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**THE**  
**ENGLISH AND EMPIRE DIGEST**  
**WITH**  
**COMPLETE AND EXHAUSTIVE**  
**ANNOTATIONS.**

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**VOLUME XIV.**



# THE ENGLISH AND EMPIRE DIGEST

WITH  
COMPLETE AND EXHAUSTIVE  
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED  
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL  
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE  
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE  
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN  
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XIV.

*CRIMINAL LAW AND PROCEDURE*

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**In this Volume English Cases reported up to 1st January, 1924, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.**



# TABLE OF CONTENTS

## AND

## TABLE OF CROSS-REFERENCES.

---

	PAGE
<i>Reports included in this Work and their Abbreviations</i> - - - -	xiii
<i>Abbreviations used in this Work</i> - - - - -	xxix
<i>Meaning of Terms used, in Classifying Annotating Cases</i> - - -	xxxiii
<i>Table of Cases</i> - - - - -	VOL. XV

### COURTS.

*See* VOLUME XVI.

### COURTS-MARTIAL.

*See* COURTS ; ROYAL FORCES.

### COVENANTS.

*See* CONTRACT ; DEEDS AND OTHER INSTRUMENTS ; LANDLORD AND TENANT ;  
SALE OF LAND.

### COVERTURE.

*See* HUSBAND AND WIFE.

### COWSHEDS AND DAIRIES.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

### CREMATION.

*See* BURIAL AND CREMATION.

### CRIMINAL INFORMATION.

*See* CRIMINAL LAW AND PROCEDURE ; CROWN PRACTICE.

<b>CRIMINAL LAW AND PROCEDURE</b> - - - - -	3—554
[For detailed Table of Contents and Table of Cross-References, see pages 3—28.]	



# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases. House of Lords, since 1890 ( <i>e.g.</i> , [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1904—1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. O.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) ( <i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
R. W. C. O.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
B. Abr.	Bacon's Abridgment	Eng.
B. Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.

Ball'd. ...	...	Ball'don's Select Cases in Chancery (Selden Society, Vol. X.) ...	Eng.
Ball & B. ...	...	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814 ...	Ir.
Bankr. & Ins. R. ...	...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 ...	Eng.
Bar. & Arn. ...	...	Barron and Arnold's Election Cases, 1 vol., 1843—1846 ...	Eng.
Bar. & Aust. ...	...	Barron and Austin's Election Cases, 1 vol., 1842 ...	Eng.
Barn. Ch. ...	...	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741 ...	Eng.
Barn. K. B. ...	...	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734 ...	Eng.
Barnes ...	...	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760 ...	Eng.
Batt. ...	...	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826 ...	Ir.
Beat. ...	...	Beatty's Reports, Chancery (Ireland), 1 vol., 1818—1830 ...	Ir.
Beav. ...	...	Beavan's Reports, Rolls Court, 86 vols., 1838—1866 ...	Eng.
Beav. & Wal. ...	...	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846 ...	Eng.
Beaw. ...	...	Beawes's Lex Mercatoria ...	Eng.
Bell, C. C. ...	...	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860 ...	Eng.
Bell, Ct. of Sess. ...	...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792 ...	Scot.
Bell, Ct. of Sess. fol. ...	...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795 ...	Scot.
Bell, Dict. Dec. ...	...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833 ...	Scot.
Bell, Sc. App. ...	...	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850 ...	Scot.
Bellewe ...	...	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol. ...	Eng.
Belt's Sup. ...	...	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756 ...	Eng.
Ben. ...	...	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579 ...	Eng.
Benl. ...	...	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627 ...	Eng.
Ber. ...	...	New Brunswick Reports (Berton) ...	Can.
Bing. ...	...	Bingham's Reports, Common Pleas, 10 vols., 1822—1834 ...	Eng.
Bing. N. O. ...	...	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840 ...	Eng.
Biss. & Sm. ...	...	Bisset and Smith's Digest ...	S. Af.
Bitt. Prac. Cas. ...	...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876 ...	Eng.
Bitt. Rep. in Ch. ...	...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884 ...	Eng.
Bl. Com. ...	...	Blackstone's Commentaries ...	Eng.
Bl. D. & Osb. ...	...	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848 ...	Ir.
Bli. ...	...	Bligh's Reports, House of Lords, 4 vols., 1819—1821 ...	Eng.
Bli. N. S. ...	...	Bligh's Reports, House of Lords, New Series 11 vols., 1827—1837 ...	Eng.
Bluett ...	...	Bluett's Isle of Man Cases ...	I. of M.
Bom. ...	...	Bombay High Court Reports ...	Ind.
Bom. A. O. ...	...	Bombay Reports, Appellate Jurisdiction ...	Ind.
Bom. Cr. Ca. ...	...	Bombay Reports, Crown Cases ...	Ind.
Bom. O. C. ...	...	Bombay Reports, Original Civil Jurisdiction ...	Ind.
Bos. & P. ...	...	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804 ...	Eng.
Bos. & P. N. R. ...	...	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807 ...	Eng.
Bott ...	...	Bott's Laws Relating to the Poor, 2 vols. ...	Eng.
Bourke ...	...	Bourke's Reports ...	Ind.
Br. & Col. Pr. Cas. ...	...	British and Colonial Prize Cases, 3 vols., 1914—1919 ...	Eng.
Bract. ...	...	Bracton De Legibus et Consuetudinibus Angliæ ...	Eng.
Bro. Abr. ...	...	Sir J. Brooke's Abridgement ...	Eng.
Bro. C. C. ...	...	W. Brown's Chancery Reports, 4 vols., 1778—1794 ...	Eng.
Bro. Ecc. Rep. ...	...	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872 ...	Eng.
Bro. N. C. ...	...	Sir R. Brooke's New Cases, 1 vol., 1515—1558 ...	Eng.
Bro. Parl. Cas. ...	...	J. Brown's Cases in Parliament, 8 vols., 1702—1800 ...	Eng.
Bro. Supp. to Mor. ...	...	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols. ...	Scot.
Bro. Synop. ...	...	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827 ...	Scot.
Brod. & Bing. ...	...	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822 ...	Eng.
Brod. & F. ...	...	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864 ...	E
Broun ...	...	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845 ...	Eng.
Brown. & Lush. ...	...	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866 ...	Eng.
Brownl. ...	...	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624 ...	Eng.
Bruce ...	...	Bruce's Decisions, Court of Session (Scotland), 1714—1715 ...	Scot.

Buch. ... ..	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879 ... ..	S. Af.
Buch. A. O. ... ..	Buchanan's Reports of Appeal Court (Cape) ... ..	S. Af.
Buchan. ... ..	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813 ... ..	Scot.
Buck ... ..	Buck's Cases in Bankruptcy, 1 vol., 1816—1820 ... ..	Eng.
Bull. N. P. ... ..	Buller's Nisi Prius (published, London, 1772) ... ..	Eng.
Bulst. ... ..	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626 ... ..	Eng.
Bunb. ... ..	Bunbury's Reports, Exchequer, fol., 1 vol., 1718—1741 ... ..	Eng.
Burr. ... ..	Burrow's Reports, King's Bench, 5 vols., 1756—1772 ... ..	Eng.
Burr. S. C. ... ..	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776 ... ..	Eng.
Burrell ... ..	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840 ... ..	Eng.
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C. & P. ... ..	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841 ... ..	Eng.
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C. L. Ch. ... ..	Common Law Chambers ... ..	Can.
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C. L. R. ... ..	Common Law Reports, 3 vols., 1853—1855 ... ..	Eng.
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C. L. R. ... ..	Cape Law Reports ... ..	S. Af.
C. L. T. ... ..	Canadian Law Times ... ..	Can.
C. L. T. Occ. N. ... ..	Canadian Law Times, Occasional Notes ... ..	Can.
C. P. ... ..	Upper Canada Common Pleas ... ..	Can.
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C. P. D. ... ..	Cape Provincial Division Reports ... ..	S. Af.
C. R. [date] A. O. ... ..	Canadian Reports, Appeal Cases ... ..	Can.
C. T. R. ... ..	Cape Times Reports of the Supreme Court of the Cape of Good Hope ... ..	S. Af.
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Cam. Prac. ... ..	Cameron's Supreme Court Practice ... ..	Can.
Camp. ... ..	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816 ... ..	Eng.
Can. Com. Cas. ... ..	Commercial Law Reports of Canada ... ..	Can.
Can. Crim. Cas. ... ..	Canadian Criminal Cases, Annotated ... ..	Can.
Can. Gaz. ... ..	Canadian Gazette ... ..	Can.
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Cas. in Ch. ... ..	Cases in Chancery, fol., 3 parts, 1660—1697 ... ..	Eng.
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Cas. temp. King ... ..	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733 ... ..	Eng.
Cas. temp. Talb. ... ..	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737 ... ..	Eng.
Cass. Dig. ... ..	Cassells' Digest ... ..	Can.
Ch. (preceded by date) ... ..	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.) ... ..	Eng.
Ch. App. ... ..	Law Reports, Chancery Appeals, 10 vols., 1865—1875 ... ..	Eng.
Ch. Cas. in Ch. ... ..	Choyce Cases in Chancery, 1557—1606 ... ..	Eng.
Ch. Ch. ... ..	Upper Canada Chancery Chambers Reports ... ..	Can.
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Co. A.	Cook's Lower Canada Admiralty Court Cases	...	...	...	Can.
Co. Ent.	Coke's Entries	...	...	...	Eng.
Co. Inst.	Coke's Institutes	...	...	...	Eng.
Co. L. J.	Colonial Law Journal	...	...	...	Eng.
Co. Litt.	Coke on Littleton (1 Inst.)	...	...	...	Eng.
Co. Rep.	Coke's Reports, 13 parts, 1572—1616	...	...	...	Eng.
Coch.	Nova Scotia Reports (Cochran)	...	...	...	Can.
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833	...	...	...	Eng.
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846	...	...	...	Eng.
Coll. Jurid.	Collectanea Juridica, 2 vols.	...	...	...	Eng.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713	...	...	...	Eng.
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885	...	...	...	Eng.
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	...	...	...	Eng.
Com. Cas.	Commercial Cases, 1895—(current)	...	...	...	Eng.
Com. Dig.	Comyns' Digest	...	...	...	Eng.
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	...	...	...	Eng.
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	...	...	...	Ir.
Cong. Dig.	Congdon's Digest	...	...	...	Can.
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	...	...	...	Ir.
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	...	...	...	Eng.
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	...	...	...	Eng.
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	...	...	...	Eng.
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	...	...	...	Eng.
Coop. temp. Brough.	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834	...	...	...	Eng.
Coop. temp. Cott.	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	...	...	...	Eng.
Cor.	Coryton's Reports	...	...	...	Ind.
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819	...	...	...	Eng.
Correspondances Jud.	Correspondances Judiciaires	...	...	...	Can.
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885	...	...	...	Scot.
Cout.	Coutlees' Unreported Cases	...	...	...	Can.
Cout. Dig.	Coutlees' Digest	...	...	...	Can.
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778	...	...	...	Eng.
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	...	...	...	Eng.
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)	...	...	...	Eng.
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797	...	...	...	Eng.
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852	...	...	...	Eng.
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	...	...	...	Eng.
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	...	...	...	Eng.
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841	...	...	...	Eng.
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1908—(current)	...	...	...	Eng.
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	...	...	...	Eng.
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	...	...	...	Ir.
Craw. & D. Abr. C.	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	...	...	...	Ir.
Cress. Insolv. Cas.	Cresswell's Insolvency Cases, 1 vol., 1827—1829	...	...	...	Eng.
Cripps' Church Cas.	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	...	...	...	Eng.
Cro. Car.	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	...	...	...	Eng.
Cro. Eliz.	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	...	...	...	Eng.
Cro. Jac.	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625	...	...	...	Eng.
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.	...	...	...	Eng.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	...	...	...	Eng.
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844	...	...	...	Eng.
D.	Duxbury's Reports of the High Court of the South African Republic	...	...	...	S. Af.
D. C. A.	Dorion's Queen's Bench Reports	...	...	...	Can.
D. L. R.	Dominion Law Reports	...	...	...	Can.
Dal.	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574	...	...	...	Eng.
Dal.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	...	...	...	Scot.
Dan. & Ll.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823	...	...	...	Eng.
	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829	...	...	...	Eng.

Dav. & Mer.	...	...	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1848—1844 ...	Eng.
Dav. Ir.	...	...	Davy's (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611 ...	Ir.
Dav. Pat. Cas.	...	...	Davies' Patent Cases, 1 vol., 1785—1816 ...	Eng.
Day	...	...	Day's Election Cases, 1 vol., 1892—1893 ...	Eng.
Dea. & Sw.	...	...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857 ...	Eng.
Deac.	...	...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840 ...	Eng.
Deac. & Ch.	...	...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835 ...	Eng.
Dears. & B.	...	...	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858 ...	Eng.
Dears. C. O.	...	...	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856 ...	Eng.
Deas & And.	...	...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832 ...	Scot.
De G.	...	...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848 ...	Eng.
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Delane	...	...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
Den.	...	...	Denison's Crown Cases Reserved, 2 vols., 1844—1852 ...	Eng.
Dick.	...	...	Dickens' Reports, Chancery, 2 vols., 1559—1798 ...	Eng.
Dig.	...	...	Justinian's Digest or Pandects ...	Eng.
Dirl.	...	...	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677 ...	Scot.
Dods.	...	...	Dodson's Reports, Admiralty, 2 vols., 1811—1822 ...	Eng.
Donnelly	...	...	Donnelly's Reports, Chancery, 1 vol., 1836—1837 ...	Eng.
Doug. El. Cas.	...	...	Douglas' Election Cases, 4 vols., 1774—1776 ...	Eng.
Doug. K. B.	...	...	Douglas' Reports, King's Bench, 4 vols., 1778—1785 ...	Eng.
Dow	...	...	Dow's Reports, House of Lords, 6 vols., 1812—1818 ...	Eng.
Dow & Cl.	...	...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832 ...	Eng.
Dow. & L.	...	...	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849 ...	Eng.
Dow. & Ry. K. B.	...	...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827 ...	Eng.
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Dr. & Wal.	...	...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841 ...	Ir.
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Dra.	...	...	Draper's King's Bench Reports ...	Can.
Drew.	...	...	Drewry's Reports, Chancery, 4 vols., 1852—1859 ...	Eng.
Drew. & Sm.	...	...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 ...	Eng.
Drinkwater	...	...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury temp. Nap.	...	...	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859 ...	Ir.
Drury temp. Sug.	...	...	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844 ...	Ir.
Dugd. Orig.	...	...	Dugdale's Origines Juridicales ...	Eng.
Dunl. (Ot. of Sess.)	...	...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862 ...	Scot.
Dunning	...	...	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Eng.
Durie	...	...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642 ...	Scot.
Dyer	...	...	Dyer's Reports, King's Bench, 3 vols., 1513—1581 ...	Eng.
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E. D. C.	...	...	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L.	...	...	South African Law Reports, Eastern Districts Local Division ...	S. Af.
E. L. R.	...	...	Eastern Law Reporter ...	Can.
E. R. (or Eng. Rep.)	...	...	English Reports ...	Eng.
E. R.	...	...	Ontario Election Reports ...	Can.
Eag. & Y.	...	...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825 ...	Eng.
East	...	...	East's Reports, King's Bench, 16 vols., 1800—1812 ...	Eng.

East, P. O.	...	East's Pleas of the Crown	...	...	Eng.
Ecc. & Ad.	...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	...	...	Eng.
Eden	...	Eden's Reports, Chancery, 2 vols., 1757—1766	...	...	Eng.
Edgar	...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	...	...	Scot.
Edw.	...	Edwards' Reports, Admiralty, 1 vol., 1808—1812	...	...	Eng.
Elchies	...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	...	...	Scot.
Emden's B. C.	...	Emden's Building Contracts, Building Leases and Building Statutes	...	...	Eng.
Eng. Pr. Cas.	...	Roscoe's English Prize Cases, 2 vols., 1745—1858	...	...	Eng.
Eq. Cas. Abr.	...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	...	...	Eng.
Eq. Rep.	...	Equity Reports, 3 vols., 1853—1855	...	...	Eng.
Esp.	...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	...	...	Eng.
Ex. D.	...	Law Reports, Exchequer Division, 5 vols., 1875—1880	...	...	Eng.
Exch.	...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	...	...	Eng.
Exch. C. R.	...	Exchequer Court Reports	...	...	Can.
F. (Ct. of Sess.)	...	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	...	...	Scot.
F.	...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	...	...	S. Af.
F. & F.	...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	...	...	Eng.
F. N. D.	...	Finnemore's Notes and Digest of Natal Cases, 1863—1867	...	...	S. Af.
Fac. Coll.	...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	...	...	Scot.
Falc.	...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	...	...	Scot.
Falc. & Fitz.	...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	...	...	Eng.
Fenton	...	Fenton, Important Judgments	...	...	N.Z.
Ferg.	...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	...	...	Scot.
Fitz. Nat. Brev.	...	Fitzherbert's Natura Brevium	...	...	Eng.
Fitz-G.	...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	...	...	Eng.
Fl. & K.	...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	...	...	Ir.
Fonbl.	...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	...	...	Eng.
For.	...	Forrest's Reports, Exchequer, 1 vol., 1800—1801	...	...	Eng.
Forb.	...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	...	...	Scot.
Fort. De Laud.	...	Fortesque, De Laudibus Legum Angliæ	...	...	Eng.
Fortes. Rep.	...	Fortescue's Reports, fol., 1 vol., 1692—1736	...	...	Eng.
Fost.	...	Foster's Crown Cases, 1 vol., 1708—1760	...	...	Eng.
Fount.	...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	...	...	Scot.
Fox & S. Ir.	...	M. C. Fox and T. B. O. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	...	...	Ir.
Fox & S. Reg.	...	J. S. Fox and O. L. Smith's Registration Cases, 1 vol., 1886—1895	...	...	Eng.
Fras.	...	Fraser (Simon), Election Cases, 2 vols., 1793	...	...	Eng.
Freem. Ch.	...	Freeman's Reports, Chancery, 1 vol., 1660—1706	...	...	Eng.
Freem. K. B.	...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	...	...	Eng.
G.	...	Gregorowski's Reports of the High Court of the Orange Free State from 1883	...	...	S. Af.
G. & R.	...	Nova Scotia Reports (Geldert & Russell)	...	...	Can.
G. I. Dig.	...	General Index Digest	...	...	Can.
Gal. & Dav.	...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	...	...	Eng.
Gale	...	Gale's Reports, Exchequer, 2 vols., 1835—1836	...	...	Eng.
Gaz. L. R.	...	New Zealand Gazette Law Reports	...	...	N.Z.
Geld. Dig.	...	Geldert's Digest	...	...	Can.
Gib. Cod.	...	Gibson's Codex Juris Ecclesiastici Anglicani	...	...	Eng.
Giff.	...	Giffard's Reports, Chancery, 5 vols., 1857—1865	...	...	Eng.
Gilb.	...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	...	...	Eng.
Gilb. C. P.	...	Gilbert's History and Practice of the Court of Common Pleas	...	...	Eng.
Gilb. Ch.	...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	...	...	Eng.
Gilm. & F	...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	...	...	Scot.
Gl. & J.	...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	...	...	Eng.
Glanv.	...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	...	...	Eng.
Glanv. El. Cas.	...	Glanville's Election Cases, 1 vol., 1623—1624	...	...	Eng.
Glascoc	...	Glascoc's Reports (Ireland), 1 vol., 1831—1832	...	...	Ir.
Godb.	...	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	...	...	Eng.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xix

Gouldsb.	...	Gouldsborough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow	...	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
Gr.	...	Upper Canada Chancery (Grant)	Can.
Griffin's Patent Cases	...	Griffin's Patent Cases, 1884—1887	Eng.
Gwill.	...	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
H.	...	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
H. & O.	...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
H. & N.	...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
H. & Tw.	...	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	Eng.
H. & W.	...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
H. B. R. (preceded by date)	...	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 ( <i>e.g.</i> , [1915] H. B. R.)	Eng.
H. C.	...	Reports of the High Court of Grigoland West	S. Af.
H. E. O.	...	Hodgin's Election Reports	Can.
H. L. Cas.	...	Clark's Reports, House of Lords, 11 vols., 1847—1866	Eng.
Hag. Adm.	...	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Hag. Con.	...	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Hag. Ecc.	...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	Eng.
Hailes	...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
Hale, C. L.	...	Hale's Common Law	Eng.
Hale, P. O.	...	Hale's Pleas of the Crown, 2 vols.	Eng.
Han.	...	New Brunswick Reports (Hannay)	Can.
Har. & Ruth.	...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	Eng.
Har. & W.	...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc.	...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard.	...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
Hare	...	Hare's Reports, Chancery, 11 vols., 1841—1853	Eng.
Hawk. P. O.	...	Hawkins's Pleas of the Crown, 2 vols.	Eng.
Hay	...	Hay's Reports	Ind.
Hay & Marr.	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Hayes	...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
Hayes & Jo.	...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
Hem. & M.	...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
Het.	...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Hob.	...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	Eng.
Hodg.	...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	Eng.
Hog.	...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	Ir.
Holt, Adm.	...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
Holt, Eq.	...	W. Holt's Equity Reports, 2 vols., 1845	Eng.
Holt, K. B.	...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Holt, N. P.	...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
Home, Ct. of Sess.	...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
Hong Kong L. R.	...	Hong Kong Reports	Hong Kong.
Hop. & Colf.	...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
Hop. & Ph.	...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
Horn & H.	...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
Hov. Supp.	...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
How. O.	...	Howard's Chancery Practice	Ir.
How. O. S.	...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	Ir.
How. E. E.	...	Howard's Equity Exchequer	Ir.
How. P. L.	...	Howard on the Popery Laws	Ir.
Hud. & B.	...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hudson's B. C.	...	Hudson on Building Contracts, 2 vols.	Eng.
Hume	...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
Bl.	...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng.
Henry	...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
Hyde	...	Hyde's Reports	Ind.

I. O. L. R.	...	Irish Common Law Reports, 17 vols., 1849—1866	...	Ir.
I. Oh. R.	...	Irish Chancery Reports, 17 vols., 1850—1867	...	Ir.
I. Eq. R.	...	Irish Equity Reports, 13 vols., 1838—1851	...	Ir.
I. L. R.	...	Irish Law Reports, 13 vols., 1838—1851	...	Ir.
I. L. R. (Vol.) All.	...	Indian Law Reports, Allahabad	...	Ind.
I. L. R. (Vol.) Bom.	...	Indian Law Reports, Bombay	...	Ind.
I. L. R. (Vol.) Calc.	...	Indian Law Reports, Calcutta	...	Ind.
I. L. R. (Vol.) Lah.	...	Indian Law Reports, Lahore	...	Ind.
I. L. R. (Vol.) Mad.	...	Indian Law Reports, Madras	...	Ind.
I. L. T.	...	Irish Law Times, 1867—(current)	...	Ir.
I. L. T. Jo.	...	Irish Law Times Journal, 1867—(current)	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 ( <i>e.g.</i> [1894] 1 I. R.)	...	Ir.
I. R. (Vol.) O. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	Ir.
I. R. Eq.	...	Irish Reports, Equity, 11 vols., 1866—1877	...	Ir.
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Ind. Jur. O. S.	...	Indian Jurist, Old Series	...	Ind.
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Ir. Jur.	...	Irish Jurist, 18 vols., 1849—1866	...	Ir.
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Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	Ir.
Irv.	...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	Scot.
J. Bridg.	...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	...	Eng.
J. D. R.	...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	...	S. Af.
J. P.	...	Justice of the Peace, 1837—(current)	...	Eng.
J. P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	Eng.
J. R.	...	Jurist Reports	...	N.Z.
J. R. N. S.	...	Jurist Reports, New Series	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	Scot.
Jac.	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	Eng.
Jac. & W.	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	Eng.
James	...	Nova Scotia Reports (James)	...	Can.
Jebb & B.	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	...	Ir.
Jebb, C. O.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	Ir.
Jenk.	...	Jenkins' Reports, 1 vol., 1220—1623	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	Ir.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	...	Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	Eng.
John. & H.	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	Eng.
Just. Inst.	...	Justinian's Institutes	...	Eng.
K.	...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	S. Af.
K. & G.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	Eng.
K. & J.	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	Eng.
K. B. (preceded by date)	...	Law Reports, King's Bench Division, since 1900 ( <i>e.g.</i> , [1901] 2 K. B.)	...	Eng.
Kames, Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	Scot.
Kay	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	...
Keb.	...	Kemble's Reports, fol., 3 vols., 1661—1677	...	...
Keen	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	...
Keil.	...	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	...	...
Kel.	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	...
Kel. W.	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	...	...
Keny.	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	...
Keny. Oh.	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	...
Kerr	...	New Brunswick Reports (Kerr)	...	...

Kilkerran	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752 ...	Scot.
Kn. & Omb.	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835 ...	Eng.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836 ...	Eng.
Knox	...	Knox's Reports ...	Aus.
Konst. & W. Rat. App.	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912 ...	Eng.
Konst. Rat. App.	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908 ...	Eng.
L. & G. temp. Plunk.	...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839 ...	Ir.
L. & G. temp. Sugd.	...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835 ...	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830 ...	Eng.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette ...	Can.
L. C. J. ...	...	Lower Canada Jurist ...	Can.
L. C. L. J.	...	Lower Canada Law Journal ...	Can.
L. C. R.	...	Lower Canada Reports ...	Can.
L. G. R.	...	Local Government Reports, 1902—(current) ...	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875 ...	Eng.
L. J. Bey.	...	Law Journal, Bankruptcy, 1832—1880 ...	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current) ...	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1831—1875 ...	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1831—(current) ...	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875 ...	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1831—1875 ...	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841 ...	Eng.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current) ...	Eng.
L. J. M. O.	...	Law Journal, Magistrates' Cases, 1831—1896 ...	Eng.
L. J. N. O.	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal) ...	Eng.
L. J. O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831 ...	Eng.
L. J. P. ...	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current) ...	Eng.
L. J. P. & M.	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875 ...	Eng.
L. J. P. C.	...	Law Journal, Privy Council, 1865—(current) ...	Eng.
L. J. P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865 ...	Eng.
L. Jo. ...	...	Law Journal Newspaper, 1866—(current) ...	Eng.
L. L. R.	...	Leader Law Reports ...	S. Af.
L. M. & P.	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851 ...	Eng.
L. N.	...	Legal News ...	Can.
L. R. A. & E.	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875 ...	Eng.
L. R. O. O. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875 ...	Eng.
L. R. O. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875 ...	Eng.
R. Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875 ...	Eng.
R. Exch.	...	Law Reports, Exchequer, 10 vols., 1865—1875 ...	Eng.
R. H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875 ...	Eng.
L. R. Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current) ...	Eng.
L. R. Ind. App. Supp.	...	Law Reports, India Appeals, Privy Council, Supplementary Volume, 1872—1873 ...	Eng.
L. R. Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893 ...	Ir.
L. R. P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875 ...	Eng.
L. R. P. C.	...	Law Reports, Privy Council, 6 vols., 1865—1875 ...	Eng.
L. R. Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875 ...	Eng.
R. Q. B.	...	Quebec Reports, Queen's Bench ...	Can.
R. Sc. & Div.	...	Law Reports, Scotch and Divorce Appeals, House of Lords, 2 vols., 1866—1875 ...	Eng.
T.	...	Law Times Reports, 1859—(current) ...	Eng.
T. Jo.	...	Law Times Newspaper, 1843—(current) ...	Eng.
T. O. S.	...	Law Times Reports, Old Series, 34 vols., 1843—1860 ...	Eng.
Th.	...	La Themis ...	Can.
	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611 ...	Eng.
	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628 ...	Eng.
aws. Reg. Cas.	...	Lawson's Registration Cases, 1895—(current) ...	Eng.
Raym.	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732 ...	Eng.
& Ca.	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865 ...	Eng.
h	...	Leach's Crown Cases, 2 vols., 1730—1814 ...	Eng.
	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758 ...	Eng.
ee temp. Hard.	...	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738 ...	Eng.
eg. Rep.	...	Legal Reporter ...	Ir.
J.—VOL. XIV.			

Legge ... ..	Legge's Reports ... ..	Aus.
Leon. ... ..	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615 ... ..	Eng.
Lev. ... ..	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696 ... ..	Eng.
Lew. O. C. ... ..	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838 ... ..	Eng.
Ley ... ..	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629 ... ..	Eng.
Lib. Ass. ... ..	Liber Assisarum, Year Books, 1—51 Edw. III. ... ..	Eng.
Lilly ... ..	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol. ... ..	Eng.
Litt. ... ..	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631 ... ..	Eng.
Lloyd, L. R. ... ..	Lloyd's List Law Reports, 1919—(current) ... ..	Eng.
Lloyd, Pr. Cas. ... ..	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918 ... ..	Eng.
Lofit ... ..	Lofit's Reports, King's Bench, foll., 1 vol., 1772—1774 ... ..	Eng.
Long. & T. ... ..	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842 ... ..	Ir.
Lords Journals ... ..	Journals of the House of Lords ... ..	Eng.
Lud. E. C. ... ..	Luder's Election Cases, 3 vols., 1784—1787 ... ..	Eng.
Lumley, P. L. O. ... ..	Lumley's Poor Law Cases, 2 vols., 1834—1842 ... ..	Eng.
Lush. ... ..	Lushington's Reports, Admiralty, 1 vol., 1859—1862 ... ..	Eng.
Lut. ... ..	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704 ... ..	Eng.
Lut. Reg. Cas. ... ..	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853 ... ..	Eng.
Lynd. ... ..	Lyndwood, Provinciale, fol., 1 vol. ... ..	Eng.
M. ... ..	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850 ... ..	S. Af.
M. & S. ... ..	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817 ... ..	Eng.
M. & W. ... ..	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847 ... ..	Eng.
M. C. R. ... ..	Montreal Condensed Reports ... ..	Can.
M. H. O. R. ... ..	Madras High Court Reports ... ..	Ind.
M. L. R. (Vol.) K. B. or Q. B. ... ..	Montreal Law Reports, King's Bench or Queen's Bench ... ..	Can.
M. L. R. (Vol.) S. C. ... ..	Montreal Law Reports, Superior Court ... ..	Can.
M. M. Cas. ... ..	Martin's Reports of Mining Cases ... ..	Can.
Mac. ... ..	Macassey's New Zealand Reports ... ..	N.Z.
Mac. & G. ... ..	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852 ... ..	Eng.
Mac. & H. ... ..	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852 ... ..	Eng.
M'Cle ... ..	M'Clelland's Reports, Exchequer, 1 vol., 1824 ... ..	Eng.
M'Cle. & Yo. ... ..	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825 ... ..	Eng.
Macfarlane ... ..	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839 ... ..	Scot.
Macl. & Rob. ... ..	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839 ... ..	Scot.
Macph. (Ct. of Sess.) ... ..	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873 ... ..	Scot.
Macq. ... ..	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865 ... ..	Scot.
Macr. ... ..	Macrory's Patent Cases, 2 parts, 1847—1856 ... ..	Ind.
Mad. ... ..	Madras High Court Reports ... ..	Ind.
Madd. ... ..	Maddock's Reports, Chancery, 6 vols., 1815—1821 ... ..	Eng.
Madd. & G. ... ..	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.) ... ..	Eng.
Madox ... ..	Madox's Formulæ Anglicanum ... ..	Eng.
Madox, Exch. ... ..	Madox's History and Antiquities of the Exchequer, 2 vols. ... ..	Eng.
Mag. ... ..	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852 ... ..	Eng.
Man. & G. ... ..	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845 ... ..	Eng.
Man & Ry. K. B. ... ..	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830 ... ..	Eng.
Man. & Ry. M. O. ... ..	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830 ... ..	Eng.
Man. L. J. ... ..	Manitoba Law Journal ... ..	Can.
Man. L. R. ... ..	Manitoba Law Reports ... ..	Can.
Man. R. temp. Wood ... ..	Manitoba Reports temp. Wood ... ..	Can.
Mans. ... ..	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914 ... ..	Eng.
Mar. L. C. ... ..	Maritime Law Reports (Crockford), 3 vols., 1860—1871 ... ..	Eng.
March ... ..	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642 ... ..	Eng.
Marr. ... ..	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779 ... ..	Eng.
Marsh. ... ..	Marshall's Reports, Common Pleas, 2 vols., 1813—1816 ... ..	Eng.
Marsh. ... ..	Marshall's Reports ... ..	Ind.
Mayn. ... ..	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326 ... ..	Eng.
Meg. ... ..	Megone's Companies Acts Cases, 2 vols., 1889—1891 ... ..	Eng.
Men. ... ..	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850 ... ..	S. Af.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xxiii

Mer. ... ..	Merivale's Reports, Chancery, 3 vols., 1815—1817 ... ..	Eng.
Milw. ... ..	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843 ... ..	Ir.
Mod. Rep. ... ..	Modern Reports, 12 vols., 1669—1755 ... ..	Eng.
Mol. ... ..	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831 ... ..	Ir.
Mont. ... ..	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832 ... ..	Eng.
Mont. & A. ... ..	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838 ... ..	Eng.
Mont. & B. ... ..	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833 ... ..	Eng.
Mont. & Ch. ... ..	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840 ... ..	Eng.
Mont. & M. ... ..	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830 ... ..	Eng.
Mont. D. & De G. ... ..	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844 ... ..	Eng.
Moo. & P. ... ..	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831 ... ..	Eng.
Moo. & S. ... ..	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834 ... ..	Eng.
Moo. Ind. App. ... ..	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872 ... ..	Eng.
Moo. P. C. C. ... ..	Moore's Privy Council Cases, 15 vols., 1836—1863 ... ..	Eng.
Moo. P. C. C. N. S. ... ..	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873 ... ..	Eng.
Mood. & M. ... ..	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830 ... ..	Eng.
Mood. & R. ... ..	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844 ... ..	Eng.
Mood. C. C. ... ..	Moody's Crown Cases Reserved, 2 vols., 1824—1844 ... ..	Eng.
Moore, C. P. ... ..	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827 ... ..	Eng.
Moore, K. B. ... ..	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620 ... ..	Eng.
Mor. Dict. ... ..	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808 ... ..	Scot.
Morr. ... ..	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893 ... ..	Eng.
Mos. ... ..	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730 ... ..	Eng.
Mun. Rep. ... ..	Municipal Reports ... ..	Can.
Murd. Epit. ... ..	Murdoch's Epitome ... ..	Can.
Murp. & H. ... ..	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837 ... ..	Scot.
Murr. ... ..	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830 ... ..	Scot.
My. & Cr. ... ..	Myrne and Craig's Reports, Chancery, 5 vols., 1835—1841 ... ..	Eng.
My. & K. ... ..	Myrne and Keen's Reports, Chancery, 3 vols., 1832—1835 ... ..	Eng.
N. A. O. ... ..	Native Appeal Cases ... ..	S. Af.
N. & S. ... ..	Nichols and Stop's Reports (Tasmania) ... ..	Tasmania.
N. B. Dig. ... ..	New Brunswick Digest (Stevens) ... ..	Can.
N. B. Eq. Rep. ... ..	New Brunswick Equity Reports ... ..	Can.
N. B. R. ... ..	New Brunswick Reports ... ..	Can.
N. B. R. (All.) ... ..	New Brunswick Reports (Allen) ... ..	Can.
N. B. R. (Ber.) ... ..	New Brunswick Reports (Berton) ... ..	Can.
N. B. R. (Carl.) ... ..	New Brunswick Reports (Carleton) ... ..	Can.
N. B. R. (Chip.) ... ..	New Brunswick Reports (Chipman) ... ..	Can.
N. B. R. (Han.) ... ..	New Brunswick Reports (Hannay) ... ..	Can.
N. B. R. (Kerr) ... ..	New Brunswick Reports (Kerr) ... ..	Can.
N. B. R. (P. & B.) ... ..	New Brunswick Reports (Pugsley and Burbidge) ... ..	Can.
N. B. R. (P. & T.) ... ..	New Brunswick Reports (Pugsley and Trueman) ... ..	Can.
N. B. R. (Pug.) ... ..	New Brunswick Reports (Pugsley) ... ..	Can.
N. B. R. (Tru.) ... ..	New Brunswick Reports (Trueman) ... ..	Can.
N. L. R. ... ..	Natal Law Reports ... ..	S. Af.
N. S. R. ... ..	Nova Scotia Reports ... ..	Can.
N. S. R. (Coch.) ... ..	Nova Scotia Reports (Cochran) ... ..	Can.
N. S. R. (G. & R.) ... ..	Nova Scotia Reports (Geldert & Russell) ... ..	Can.
N. S. R. (James) ... ..	Nova Scotia Reports (James) ... ..	Can.
N. S. R. (Old.) ... ..	Nova Scotia Reports (Oldrights) ... ..	Can.
N. S. R. (R. & C.) ... ..	Nova Scotia Reports (Russell and Chesley) ... ..	Can.
N. S. R. (R. & G.) ... ..	Nova Scotia Reports (Russell and Geldert) ... ..	Can.
N. S. R. (Thom.) ... ..	Nova Scotia Reports (Thomson) ... ..	Can.
N. S. W. Adm. or Ad. ... ..	New South Wales Reports, Admiralty ... ..	Aus.
N. S. W. B. ... ..	New South Wales Reports, Bankruptcy ... ..	Aus.
N. S. W. Bkpty. Cas. ... ..	New South Wales Bankruptcy Cases ... ..	Aus.
N. S. W. Eq. ... ..	New South Wales Reports, Equity ... ..	Aus.
N. S. W. Ind. Arbtrn. Cas. ... ..	New South Wales Industrial Arbitration Cases ... ..	Aus.
N. S. W. L. R. ... ..	New South Wales Law Reports ... ..	Aus.
N. S. W. Land App. Cts. ... ..	New South Wales Land Appeal Courts ... ..	Aus.
N. S. W. S. C. R. ... ..	New South Wales Supreme Court Reports ... ..	Aus.
N. S. W. S. C. R. N. S. ... ..	New South Wales Supreme Court Reports, New Series ... ..	Aus.
N. S. W. W. N. ... ..	New South Wales Weekly Notes ... ..	Aus.
N. W. ... ..	North-Western Provinces High Court Reports ... ..	Ind.
N. W. T. R. ... ..	North-West Territories Reports ... ..	Can.
N. Z. Jur. ... ..	New Zealand Jurist ... ..	N.Z.
N. Z. Jur. Mining Law ... ..	New Zealand Jurist Mining Law ... ..	N.Z.
N. Z. Jur. N. S. ... ..	New Zealand Jurist, New Series ... ..	N.Z.
N. Z. L. R. ... ..	New Zealand Law Reports, 1883—(current) ... ..	N.Z.
N. Z. L. R. C. A. ... ..	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887 ... ..	N.Z.
Nels. ... ..	Nelson's Reports, Chancery, 1 vol., 1625—1693 ... ..	Eng.



Nev. & M. K. B.	Neville and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. O.	Neville and Manning's Magistrates' Cases, 3 vols., 1832—1836 ...	Eng.
Nev. & P. K. B.	Neville and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. O.	Neville and Perry's Magistrates' Cases, 1 vol., 1836—1837 ...	Eng.
New Mag. Cas.	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850 ...	Eng.
New Pract. Cas.	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
New Rep.	New Reports, 6 vols., 1862—1865 ...	Eng.
New Sess. Cas.	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851 ...	Eng.
Nfld. L. R.	Newfoundland Reports ...	Nfld.
Nolan	Nolan's Magistrates' Cases, 1 vol., 1791—1793 ...	Eng.
Notes of Cases	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850 ...	Eng.
Noy	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649 ...	Eng.
O. B. & F.	Ollivier Bell and Fitzgerald's Reports ...	N.Z.
O. B. S. P.	Old Bailey Session Papers ...	Eng.
O. Bridg.	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666	Eng.
O. F. S.	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R.	Ontario Law Reports ...	Can.
O'M. & H.	O'Malley and Hardcastle's Election Cases, 1869—(current) ...	Eng.
O. P. D.	South African Law Reports, Orange Free State Provincial Division ...	S. Af.
O. R.	Ontario Reports ...	Can.
O. R.	Official Reports of the South African Republic, 1894—1899	S. Af.
O. R. O.	Reports of the High Court of the Orange River Colony ...	S. Af.
O. S.	Upper Canada Queen's Bench, Old Series ...	Can.
O. W. N.	Ontario Weekly Notes ...	Can.
O. W. R.	Ontario Weekly Reporter ...	Can.
Old.	Nova Scotia Reports (Oldrights) ...	Can.
Ont. Dig.	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
Owen	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614 ...	Eng.
P. (preceded by date)	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 ( <i>e.g.</i> , [1891] P.) ...	Eng.
P. & B.	New Brunswick Reports (Pugsley and Burbidge) ...	Can.
P. & T.	New Brunswick Law Reports (Pugsley and Trueman) ...	Can.
P. Cas.	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922 ...	Eng. & Col.
P. D.	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890 ...	Eng.
P. E. I.	Prince Edward Island Reports ...	Can.
P. R.	Ontario Practice ...	Can.
P. Wms.	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735 ...	Eng.
Palm.	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	Eng.
Park.	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717 ...	Eng.
Pat. App.	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822 ...	Scot.
Pater. App.	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake	Peake's Reports, Nisi Prius, 1 vol., 1790—1794 ...	Eng.
Peake, Add. Cas.	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812	Eng.
Peck.	Peckwell's Election Cases, 2 vols., 1803—1806 ...	Eng.
Pelham	Pelham (S. A.) Reports ...	Aus.
Per. & Dav.	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn.	Perry and Knapp's Election Cases, 1 vol., 1833 ...	Eng.
Per. O. S.	Perrault's Conseil Supérieur ...	Can.
Per. P.	Perrault's Prévosté de Quebec, 1726—1756 ...	Can.
Ph.	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas.	Phillips' Election Cases, 1 vol., 1780 ...	Eng.
Phillim.	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821	Eng.
Phillim. Eccl. Jud.	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip.	Pipson's Digest of Natal Reports, 1858—1859	S. Af.
Pig. & R.	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845	Eng.
Pitc.	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624	Scot.
Plowd.	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I. ...	Eng.
Poll.	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682	Eng.
Poph.	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627	Eng.
Pow. R. & D.	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.
Prec. Oh.	Precedents in Chancery, fol., 1 vol., 1689—1722	Eng.
Price	Price's Reports, Exchequer, 13 vols., 1814—1824	Eng.
Price	Price's Mining Commissioners' Cases ...	Can.
Pug.	New Brunswick Reports (Pugsley) ...	Can.
Py. R.	Pykes' Lower Canada Reports ...	Can.

Q. B. ... ..	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	Eng.
Q. B. (preceded by date)	Law Reports, Queen's Bench Division, 1891—1901 ( <i>e.g.</i> , [1891] 1 Q. B.)	Eng.
Q. B. D. ... ..	Law Reports, Queen's Bench Division, 25 vols., 1875—1890	Eng.
Q. J. P. ... ..	Queensland Justice of Peace Reports	Aus.
Q. L. J. ... ..	Queensland Law Journal and Reports, 11 vols., 1879—1901	Aus.
Q. L. R. ... ..	Quebec Law Reports	Can.
Q. L. R. (Beor) ...	Queensland Law Reports by Beor, 1876—1878	Aus.
Q. P. R. ... ..	Quebec Practice Reports	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current)	Can.
Q. R. (Vol.) S. O. ...	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	Can.
Q. S. O. R. ... ..	Queensland Supreme Court Reports, 5 vols., 1860—1881	Aus.
Q. S. R. ... ..	Queensland State Reports	Aus.
Q. W. N. ... ..	Weekly Notes, Queensland	Aus.
R. ... ..	The Reports, 15 vols., 1893—1895	Eng.
R. ... ..	Roscoe's Reports of the Supreme Court of the Cape of Good Hope 1861—1867, 1871—1872, 1877—1878	S. Af.
R. (Ct. of Sess.) ...	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	Scot.
R. A. O. ... ..	Ramsay, Appeal Cases	Can.
R. & C. ... ..	Nova Scotia Reports (Russell & Chesley)	Can.
R. & G. ... ..	Nova Scotia Reports (Russell and Geldert)	Can.
R. C. ... ..	La Revue Critique de Législation et de Jurisprudence de Canada	Can.
R. de J. ... ..	Revue de Jurisprudence	Can.
R. de L. ... ..	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	Can.
R. E. D. ... ..	New South Wales, Reserved and Equity Decisions	Aus.
R. E. D. ... ..	Ritchie's Equity Decisions (Russell)	Can.
R. J. R. Q. ... ..	Quebec Revised Reports	Can.
R. L. N. S. ... ..	Revue Légale, New Series, 1895—(current)	Can.
R. L. O. S. ... ..	Revue Légale, Old Series, 21 vols., 1869—1892	Can.
R. P. O. ... ..	Reports of Patent Cases, 1884—(current)	Eng.
R. R. ... ..	Revised Reports	Eng.
Rast. ... ..	Rastell's Entries	Eng.
Rayn. ... ..	Rayner's Tithe Cases, 3 vols., 1575—1782	—
Real Prop. Cas. ...	Real Property Cases, 2 vols., 1843—1847	Eng.
Rep. Ch. ... ..	Reports in Chancery, fol., 3 vols., 1615—1710	Eng.
Rep. in C. of A. ...	Reports in Courts of Appeal	N.Z.
Res. & Eq. Jud. ...	New South Wales Reserved and Equity Judgments	Aus.
Reserv. Cas. ... ..	Reserved Cases	Ir.
Rick. & M. ... ..	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	Eng.
Rick. & S. ... ..	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	Eng.
Ridg. L. & S. ... ..	Ridgeway, Lapp, and Schoales' Reports Ireland, 1 vol., 1793—1795	Ir.
Ridg. Parl. Rep. ...	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	Ir.
Ridg. temp. H. ... ..	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	Eng.
Ritch. Eq. Rep. ...	Ritchie's Equity Reports	Can.
Rob. Eccl. ... ..	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853	Eng.
Rob. L. & W. ... ..	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	Eng.
Robert. App. ... ..	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	Scot.
Robin. App. ... ..	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	Scot.
Roll. Abr. ... ..	Rolle's Abridgment of the Common Law, fol., 2 vols.	Eng.
Roll. Rep. ... ..	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625	Eng.
Rom. ... ..	Romilly's Notes of Cases in Equity, 1 part, 1772—1787	Eng.
Roscoe's B.O. ... ..	Roscoe, Digest of Building Cases	Eng.
Rose ... ..	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	Eng.
Ross, L. C. ... ..	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	Eng.
Rowe ... ..	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	Eng.
Rul. Cas. ... ..	Campbell's Ruling Cases, 25 vols.	Eng.
Russ. ... ..	Russell's Reports, Chancery, 5 vols., 1824—1829	Eng.
Russ. & M. ... ..	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833	Eng.
Russ. & Ry. ... ..	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Russ. E. R. ... ..	Russell's Election Reports	Can.
Ry. & Can. Cas. ...	Railway and Canal Cases, 7 vols., 1835—1854	Eng.
Ry. & Can. Tr. Cas. ...	Railway and Canal Traffic Cases, 1855—(current)	Eng.
Ry. & M. ... ..	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826	Eng.
Ryde & K. Rat. App. ...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904	Eng.
Ryde, Rat. App. ... ..	Ryde's Rating Appeals, 3 vols., 1871—1893	Eng.

S.	...	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	...	South African Law Journal	S. Af.
S. A. L. R.	...	South Australian Law Reports	Aus.
S. A. L. R.	...	South African Law Reports	S. Af.
S. A. R.	...	Reports of the High Court of the South African Republic, 1881—1892	S. Af.
S. A. S. R.	...	South Australian State Reports, since 1921 ( <i>e.g.</i> , [1921] S. A. S. R.)	Aus.
S. O.	...	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
S. C. (preceded by date)	...	Court of Session Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date).	...	Court of Session Cases (Scotland) (House of Lords), since 1906 ( <i>e.g.</i> , [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date).	...	Court of Justiciary Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C. (J.))	Scot.
S. C. R.	...	Canada, Supreme Court Reports	Can.
S. L. T.	...	Scots Law Times, 1893 (current)	Scot.
S. Q. R.	...	Queensland State Reports	Aus.
S. R.	...	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C.	...	Stuart's Lower Canada Reports	Can.
S. R. N. S. W.	...	New South Wales, State Reports	Aus.
S. R. Q.	...	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	...	Stuart's Vice-Admiralty Reports	Can.
Saint	...	Saint's Digest of Registration Cases, 1843—1906, 1 vol.	Eng.
Salk.	...	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	...	Saskatchewan Law Reports	Can.
Sau. & Sc.	...	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund.	...	Saunders's Reports, King's Bench, 2 vols., 1666—1672	Eng.
Saund. & A.	...	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	...	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C.	...	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848	Eng.
Saund. & M.	...	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	Eng.
Sav.	...	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591	Eng.
Say.	...	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756	Eng.
Sc. Jur.	...	Scottish Jurist, 46 vols., 1829—1873	Scot.
Sc. L. R.	...	Scottish Law Reporter, 1865—(current)	Scot.
Sc. R. R.	...	Scots Revised Reports	Scot.
Sch. & Lef.	...	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	Ir.
Scott	...	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R.	...	Scott's New Reports, Common Pleas, 8 vols., 1840—1845	Eng.
Sea. & Sm.	...	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860	Eng.
Sel. Cas. Ch.	...	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Selwyn's N.P.	...	Selwyn's Abridgement of the Law of Nisi Prius	Eng.
Sess. Cas. K. B.	...	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem.	...	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742	Eng.
Sh. (Ct. of Sess.)	...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	Scot.
Sh. & MacI.	...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	Scot.
Sh. Dig.	...	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	Scot.
Sh. Just.	...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App.	...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct.	...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch.	...	Sheppard's Touchstone of Common Assurances	Eng.
Show.	...	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas.	...	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	Eng.
Sid.	...	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.
Sim.	...	Simons' Reports, Chancery, 17 vols., 1826—1852	Eng.
Sim. & St.	...	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826	Eng.
Sim. N. S.	...	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852	Eng.
Skin.	...	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697	Eng.
Sm. & Bat.	...	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	Ir.
Sm. & G.	...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	Eng.
Smith, K. B.	...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806	Eng.
Smith, L. O.	...	Smith's Leading Cases, 2 vols.	Eng.
Smith, Reg. Cas.	...	O. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe	...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.

Fol. Jo. ... ..	Solicitors' Journal, 1856—(current) ... ..	Eng.
Spence ... ..	Spence's Equitable Jurisdiction of the Court of Chancery ... ..	Eng.
Spinks ... ..	Spinks' Prize Court Cases, 2 parts, 1854—1856 ... ..	Eng.
St. R. Qd. (preceded by date) ... ..	Queensland State Reports, since 1902 ( <i>e.g.</i> , [1902] St. R. Qd.) ... ..	Aus.
Stair Rep. ... ..	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681 ... ..	Scot.
Stark. ... ..	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823 ... ..	Eng.
State Tr. ... ..	State Trials, 34 vols., 1163—1820 ... ..	Eng.
State Tr. N. S. ... ..	State Trials, New Series, 8 vols., 1820—1858 ... ..	Eng.
Stewart ... ..	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ... ..	Can.
Stockton ... ..	Stockton's Vice-Admiralty Report and Digest ... ..	Can.
Story ... ..	Story's Commentaries on Equity Jurisprudence ... ..	Eng.
Stra. ... ..	Strange's Reports, 2 vols., 1716—1747 ... ..	Eng.
Stu. M. & P. ... ..	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ... ..	Scot.
Stuart ... ..	Sessions Cases (Stuart) ... ..	Scot.
Stuart, Adm. ... ..	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ... ..	Can.
Stuart, Adm. N. S. ... ..	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874 ... ..	Can.
Stuart, K. B. ... ..	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ... ..	Can.
Sty. ... ..	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ... ..	Eng.
Sw. ... ..	Swabey's Reports, Admiralty, 1 vol., 1855—1859 ... ..	Eng.
Sw. & Tr. ... ..	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ... ..	Eng.
Swan. ... ..	Swanston's Reports, Chancery, 3 vols., 1818—1821 ... ..	Eng.
Swin. ... ..	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ... ..	Scot.
Syme ... ..	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ... ..	Scot.
T. & M. ... ..	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851 ... ..	Eng.
T. H. ... ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ... ..	S. Af.
T. Jo. ... ..	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ... ..	Eng.
T. L. ... ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ... ..	S. Af.
T. L. R. ... ..	The Times Law Reports, 1884—(current) ... ..	Eng.
T. P. ... ..	Reports of the Supreme Court of the Transvaal, 1910—(current) ... ..	S. Af.
T. P. D. ... ..	South African Law reports, Transvaal Provincial Division ... ..	S. Af.
T. Raym. ... ..	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683 ... ..	Eng.
T. S. ... ..	Reports of the Supreme Court of the Transvaal, 1902—1909 ... ..	S. Af.
Taml. ... ..	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ... ..	Eng.
Tas. L. R. ... ..	Tasmanian Law Reports ... ..	Aus.
Taunt. ... ..	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ... ..	Eng.
Tax Cas. ... ..	Tax Cases, 1875—(current) ... ..	Eng.
Tay. ... ..	Taylor's King's Bench Reports ... ..	Can.
Temp. Wood ... ..	Manitoba Reports <i>temp.</i> Wood ... ..	Can.
Term Rep. ... ..	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ... ..	Eng.
Terr. L. R. ... ..	Territories Law Reports ... ..	Can.
Thom. ... ..	Nova Scotia Reports (Thomson) ... ..	Can.
Toth. ... ..	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ... ..	Eng.
Town. St. Tr. ... ..	Townsend, Modern State Trials ... ..	Eng.
Trem. P. O. ... ..	Tremaine Pleas of the Crown, 1 vol., 1667 ... ..	Eng.
Trist. ... ..	Tristram's Consistory Judgments, 1 vol., 1872—1890 ... ..	Eng.
Tru. ... ..	New Brunswick Reports (Trueman) ... ..	Can.
Tudor, L. C. Merc. Law. ... ..	Tudor's Leading Cases on Mercantile and Maritime Law ... ..	Eng.
Tudor, L. C. Real. Prop. ... ..	Tudor's Leading Cases on Real Property ... ..	Eng.
Turn. & R. ... ..	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ... ..	Eng.
Tyr. ... ..	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ... ..	Eng.
Tyr. & Gr. ... ..	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836 ... ..	Eng.
U. C. Jur. ... ..	Upper Canada Jurist ... ..	Can.
U. C. L. J. N. S. ... ..	Canada Law Journal, New Series, 1865—(current) ... ..	Can.
U. C. L. J. O. S. ... ..	Canada Law Journal, Old Series, 10 vols., 1855—1864 ... ..	Can.
U. C. R. ... ..	Upper Canada Reports, Queen's Bench ... ..	Can.
Udal ... ..	Fiji Law Reports (Udal) ... ..	Fiji.
V. L. R. ... ..	Victorian Law Reports ... ..	Aus.
V. R. ... ..	Victorian Reports ... ..	Aus.
V. R. (Adm.) ... ..	Victorian Reports (Admiralty) ... ..	Aus.
V. R. (Eq.) ... ..	Victorian Reports (Equity) ... ..	Aus.
V. R. (Law) ... ..	Victorian Reports (Law) ... ..	Aus.
Vaugh. ... ..	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673 ... ..	Eng.

xxviii      **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

Vent. ... ..	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691 ... ..	Eng.
Vern. ... ..	Vernon's Reports, Chancery, 2 vols., 1680—1719 ... ..	Eng.
Vern. & Scr. ... ..	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788 ... ..	Ir.
Ves. ... ..	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817 ... ..	Eng.
Ves. & B. ... ..	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814 ... ..	Eng.
Ves. Sen. ... ..	Vesey Sen.'s Reports, 2 vols., 1747—1756 ... ..	Eng.
Vin. Abr. ... ..	Viner's Abridgment of Law and Equity, fol., 22 vols. ... ..	Eng.
Vin. Supp. ... ..	Supplement to Viner's Abridgment of Law and Equity, 6 vols. ... ..	Eng.
W. ... ..	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857 ... ..	S. Af.
W. A. L. R. ... ..	West Australian Law Reports ... ..	Aus.
W. A'B. & W. ... ..	Webb, A'Beckett and Williams' Victorian Reports ... ..	Aus.
W. & W. ... ..	Wyatt and Webb ... ..	Aus.
W. C. C. ... ..	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907 ... ..	Eng.
W. H. C. ... ..	South African Law Reports, Witwatersrand High Court ... ..	S. Af.
W. Jo. ... ..	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640 ... ..	Eng.
W. L. D. ... ..	South African Law Reports, Witwatersrand Local Division ... ..	S. Af.
W. L. R. ... ..	Western Law Reporter ... ..	Can.
W. L. T. ... ..	Western Law Times ... ..	Can.
W. N. (preceded by date)	Law Reports, Weekly notes, 1866—(current) ( <i>e.g.</i> , [1866] W. N.)	Eng.
W. N. ... ..	Calcutta Weekly Notes ... ..	Ind.
W. R. ... ..	Weekly Reporter, 54 vols., 1852—1906 ... ..	Eng.
W. R. ... ..	Sutherland's Weekly Reporter ... ..	Ind.
W. R. ... ..	Weekly Reporter, reporting cases in the Cape Provincial Division ... ..	S. Af.
W. W. & A'B. ... ..	Wyatt, Webb and A'Beckett ... ..	Aus.
W. W. R. ... ..	Western Weekly Reports ... ..	Can.
Wallis ... ..	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791 ... ..	Ir.
Web. Pat. Cas. ... ..	Webster's Patent Cases, 2 vols., 1602—1855 ... ..	Eng.
Welsh, Reg. Cas. ... ..	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840 ... ..	Ir.
Went. Off. Ex. ... ..	Wentworth's Office and Duty of Executors ... ..	Eng.
West ... ..	West's Reports, House of Lords, 1 vol., 1839—1841 ... ..	Eng.
West temp. Hard. ... ..	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740 ... ..	Eng.
West. Tithe Cas. ... ..	Western's London Tithe Cases, 1 vol., 1592—1822 ... ..	Eng.
White ... ..	White's Justiciary Reports (Scotland), 3 vols., 1886—1893 ... ..	Scot.
White & Tud. L. C. ... ..	White and Tudor's Leading Cases in Equity, 2 vols. ... ..	Eng.
Wight. ... ..	Wightwick's Reports, Exchequer, 1 vol., 1810—1811 ... ..	Eng.
Will. Woll. & Dav. ... ..	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837 ... ..	Eng.
Will. Woll. & H. ... ..	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839 ... ..	Eng.
Willes ... ..	Willes' Reports, Common Pleas, 1 vol., 173 1758 ... ..	Eng.
Wilm. ... ..	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770 ... ..	Eng.
Wils. ... ..	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774 ... ..	Eng.
Wils & S. ... ..	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835 ... ..	Scot.
Wils. Ch. ... ..	J. Wilson's Reports, Chancery, 2 vols., 1818—1819 ... ..	Eng.
Wils. Ex. ... ..	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817 ... ..	Eng.
Win. ... ..	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625 ... ..	Eng.
Wm. Bl. ... ..	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779 ... ..	Eng.
Wm. Rob. ... ..	William Robinson's Reports, Admiralty, 3 vols., 1838—1850 ... ..	Eng.
Wms. Saund. ... ..	Williams' Notes to Saunders' Reports, 2 vols. ... ..	Eng.
Wol. & B. ... ..	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864 ... ..	Eng.
Wol. & D. ... ..	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858 ... ..	Eng.
Woll. ... ..	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841 ... ..	Eng.
Wood ... ..	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798 ... ..	Eng.
Y. A. D. ... ..	Young's Vice-Admiralty Reports ... ..	Can.
Y. & C. Ch. Cas. ... ..	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843 ... ..	Eng.
Y. & C. Ex. ... ..	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841 ... ..	Eng.
Y. & J. ... ..	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830 ... ..	Eng.
Y. B. ... ..	Year Books ... ..	Eng.
Yelv. ... ..	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ... ..	Eng.
You. ... ..	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ... ..	Eng.

# ABBREVIATIONS

## USED IN THIS WORK,

(For Abbreviations used in citing Reports, *see* pp. xiii.—xxviii., *ante*.)

A.-G. . .	for Attorney-General.
Act. . .	„ Actiengesellschaft.
Admlty. . .	„ Admiralty.
Affd. . .	„ Affirmed.
Affg. . .	„ Affirming.
Akt. . .	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon. . .	„ Anonymous.
Apld. . .	„ Applied.
Appct. . .	„ Applicant.
Appln. . .	„ Application.
Appln. . .	„ Application to Register a Trade Mark.
Applt. . .	„ Appellant.
Apprvd. . .	„ Approved.
Arbn. . .	„ Arbitration.
Archbp. . .	„ Archbishop.
Art. . .	„ Article.
Assce. . .	„ Assurance.
Assocn. . .	„ Association.
B. C. . .	„ Borough Council.
Bkpcy. . .	„ Bankruptcy.
Bkpt. . .	„ Bankrupt.
Bldg. Soc. . .	„ Building Society.
Bp. . .	Bishop.
C. A. . .	Court of Appeal.
O. & S. L. Ry. Co. . .	City & South London Railway Co.
O. C. A. . .	Court of Criminal Appeal.
O. C. R. . .	County Court Rules.
C. C. R. . .	Court of Crown Cases Reserved.
C. L. P. Act . .	Common Law Procedure Act.
O. L. Ry. Co. . .	Central London Railway Co.
C. O. R. . .	Crown Office Rules.
O. S. U. C. . .	Consolidated Statutes of Upper Canada.
Ca. sa. . .	<i>Capias ad satisfaciendum</i> .
Cale. Ry. Co. . .	Caledonian Railway Co.
Ch. . .	Chancery.
Ch. Div. . .	Chancery Division.
Co. . .	Company.
Co-op. Assocn. . .	Co-operative Supply Association.
Comrs. . .	Commissioners.
Consd. . .	Considered.
Corpn. . .	Corporation.
Ct. . .	Court.
Ct. of Ch. . .	Court of Chancery.
Ct. of Eq. . .	Court of Equity.
Ct. of R. . .	Court of Review.
D. C. . .	Divisional Court.
Dbtd. . .	Doubted.

Deft. .	for Defendant.
Distd. .	„ Distinguished.
Div. Ct.	„ Divisional Court.
Eccl. Comrs.	„ Ecclesiastical Commissioners.
Eccl. Ct.	„ Ecclesiastical Court.
Ex. Ch.	„ Exchequer Chamber.
<i>Ex p.</i> .	„ <i>Ex parte</i> .
Exch. .	„ Exchequer.
Exor. .	„ Executor.
Exorship.	„ Executorship.
Expld. .	„ Explained.
Extd. .	„ Extended.
Extrix.	„ Executrix.
<i>Fi. fa.</i> .	„ <i>Fieri facias</i> .
Folld. .	„ Followed.
G. & S. W. Ry. Co. . . .	„ Glasgow & South Western Railway Co.
G. C. Ry. Co. . . .	„ Great Central Railway Co.
G. E. Ry. Co. . . .	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co. . .	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co. . . .	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co. . . .	„ Great Western Railway Co.
Govt. . . .	„ Government.
Grdns. . . .	„ Guardians or Guardians of the Poor.
H. C. of A. . . .	„ High Court of Australia.
H. L. . . .	„ House of Lords.
I. R. Comrs. . . .	„ Inland Revenue Commissioners.
Insce. . . .	„ Insurance.
JJ. . . .	„ Justices.
Jud. Act . . . .	„ Judicature Act.
K. B. Div. . . .	„ King's Bench Division.
L. & B. Ry. Co. . . .	„ London & Brighton Railway Co.
L. & N. W. Ry. Co. . . .	„ London & North Western Railway Co.
L. & S. W. Ry. Co. . . .	„ London & South Western Railway Co.
L. & Y. Ry. Co. . . .	„ Lancashire & Yorkshire Railway Co.
L. B. . . .	„ Local Board.
L. B. & S. C. Ry. Co. . . .	„ London, Brighton & South Coast Railway Co.
L.C. . . .	„ Lord Chancellor.
L. C. & D. Ry. Co. . . .	„ London, Chatham & Dover Railway Co.
L. C. C. . . .	„ London County Council.
L. Elec. Ry. Co. . . .	„ London Electric Railway Co.
L. G. Board . . . .	„ Local Government Board.
L.J. . . .	„ Lord Justice.
L.JJ. . . .	„ Lords Justices.
L. T. & S. Ry. Co. . . .	„ London, Tilbury & Southend Railway Co.
M. S. Act . . . .	„ Merchant Shipping Act.
M. S. & L. Ry. Co. . . .	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags. . . .	„ Magistrates.
Mentd. . . .	„ Mentioned.
Met. Dist. Ry. Co. . . .	„ Metropolitan District Railway Co.
Met. Ry. Co. . . .	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co. . . .	„ Midland Great Western Railway Co.
Mid. Ry. Co. . . .	„ Midland Railway Co.
Mtge. . . .	„ Mortgage.
Mtgee. . . .	„ Mortgagee.
Mtgor. . . .	„ Mortgagor.
N. B. Ry. Co. . . .	„ North British Railway Co.
N. E. Ry. Co. . . .	„ North Eastern Railway Co.
N. F. . . .	„ Not Followed.
N. P. . . .	„ <i>Nisi Prius</i> .
Ord. . . .	„ Order.
Overd. . . .	„ Overruled.

# ABBREVIATIONS.

xxx1

P. C.	.	.	.	.	.	for Privy Council.
Petn.	.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	.	„ <i>Quære</i> .
R. C.	.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	.	„ Rural Sanitary Authority.
R. S. C.	.	.	.	.	.	„ Revised Statutes of Canada.
R. S. O.	.	.	.	.	.	Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	.	Referred.
Regn. of Trade Mk.	.	.	.	.	.	Registration of Trade Mark.
Regr. of Trade Mks.	.	.	.	.	.	Registrar of Trade Marks.
Resp.	.	.	.	.	.	Respondent.
Restg.	.	.	.	.	.	Restoring.
Revsd.	.	.	.	.	.	Reversed.
Revsg.	.	.	.	.	.	Reversing.
Ry. Co.	.	.	.	.	.	„ Rail. Co. or Railway Co.
S. C.	.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	.	South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	.	South Eastern Railway Co.
S. P.	.	.	.	.	.	Same Point.
S.S.	.	.	.	.	.	Steamship.
Sched.	.	.	.	.	.	Schedule.
<i>Sci. fa.</i>	.	.	.	.	.	<i>Scire facias</i> .
Sect.	.	.	.	.	.	Section.
Set. Land Act	.	.	.	.	.	Settled Land Act.
Settlmt.	.	.	.	.	.	Settlement.
Soc.	.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	.	„ Workmen's Compensation Act.





## MEANING OF TERMS

### USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate; within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.



## TABLE OF CASES.



NOTE.—A FULL TABLE OF CASES CONTAINING ALL CASES  
APPEARING IN BOTH VOLUMES XIV. AND XV. WILL BE  
FOUND AT THE COMMENCEMENT OF VOLUME XV.



# COURTS.

*See* VOLUME XVI.

## COURTS—MARTIAL.

*See* ROYAL FORCES.

## COVENANTS.

*See* CONTRACT ; DEEDS AND OTHER INSTRUMENTS ; LANDLORD AND TENANT ; SALE  
OF LAND.

## COVERTURE.

*See* HUSBAND AND WIFE.

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## COWSHEDS AND DAIRIES.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## CREMATION.

*See* BURIAL AND CREMATION.

## CRIMINAL INFORMATION.

*See* CRIMINAL LAW AND PROCEDURE.

# CRIMINAL LAW AND PROCEDURE.

	PAGE
PART I. PRINCIPLES OF CRIMINAL LIABILITY . . . . .	28
SECT. 1. THE NATURE OF CRIME IN GENERAL—DEFINITIONS . . . . .	28
SECT. 2. ELEMENTS OF CRIME . . . . .	31
SUB-SECT. 1. OVERT ACT . . . . .	31
SUB-SECT. 2. MENS REA . . . . .	31
A. In General . . . . .	31
B. In Particular Cases . . . . .	33
C. Liability of Corporations . . . . .	38
SECT. 3. LIABILITY OF MASTER FOR ACT OF SERVANT OR AGENT . . . . .	38
SUB-SECT. 1. WHERE SERVANT OR AGENT IS INNOCENT . . . . .	38
SUB-SECT. 2. WHERE ACT OF SERVANT IS AUTHORISED . . . . .	39
SUB-SECT. 3. WHERE ACT OF SERVANT IS UNAUTHORISED . . . . .	40
A. General Rule . . . . .	40
B. Servant acting Outside Scope of Authority . . . . .	43
SUB-SECT. 4. SERVANT ACTING WITHIN GENERAL SCOPE OF AUTHORITY . . . . .	43
SECT. 4. GROUNDS OF DEFENCE AND EXEMPTIONS FROM CRIMINAL LIABILITY . . . . .	47
SUB-SECT. 1. IGNORANCE OF LAW . . . . .	47
SUB-SECT. 2. IGNORANCE OR MISTAKE OF FACT . . . . .	48
SUB-SECT. 3. BONÂ FIDE CLAIM OF RIGHT . . . . .	49
SUB-SECT. 4. ACCIDENT . . . . .	51
SUB-SECT. 5. INNOCENT MOTIVE . . . . .	51
SUB-SECT. 6. SUPERIOR ORDERS . . . . .	52
SECT. 5. CRIMINAL CAPACITY . . . . .	53
SUB-SECT. 1. INFANCY . . . . .	53
A. Infants under Seven . . . . .	53
B. Infants under Fourteen . . . . .	53
(a) In General . . . . .	53
(b) Sexual and Unnatural Offences . . . . .	54
C. Infants under Twenty-one . . . . .	55
SUB-SECT. 2. INSANITY . . . . .	55
A. In General . . . . .	55
B. Partial Insanity . . . . .	56
(a) Law before M'Naghten's Case . . . . .	56
(b) M'Naghten's Case and after . . . . .	56
(c) Uncontrollable Impulse . . . . .	58
(d) Moral Insanity . . . . .	59
C. Onus of Proof . . . . .	59
D. Nature of Proof . . . . .	60
E. Method of Proof . . . . .	62
SUB-SECT. 3. DRUNKENNESS . . . . .	63
A. In General . . . . .	63
B. As affecting Capacity to form Intent . . . . .	64
C. Where Act done under Fear or Provocation . . . . .	67



# CRIMINAL LAW AND PROCEDURE.

	PAGE
SUB-SECT. 4. COERCION . . . . .	67
A. In General . . . . .	67
B. Marital Coercion . . . . .	69
(a) In General . . . . .	69
(b) Felonies . . . . .	71
i. Offences against the Person . . . . .	71
ii. Offences against Property . . . . .	71
(c) Misdemeanours . . . . .	72
(d) Proof of Marriage . . . . .	73
SUB-SECT. 5. PRIVILEGED PERSONS . . . . .	74
SECT. 6. DEGREES OF CRIMINAL LIABILITY . . . . .	74
SUB-SECT. 1. PRINCIPALS AND ACCESSORIES . . . . .	74
A. When All are Principals . . . . .	74
(a) In General . . . . .	74
(b) Partial Presence . . . . .	75
SUB-SECT. 2. PRINCIPALS IN THE FIRST DEGREE . . . . .	76
A. Liability for Acts done by Agents . . . . .	76
B. When actual Perpetrator of Act is uncertain . . . . .	78
C. When actual Perpetrator of Act is not present . . . . .	79
SUB-SECT. 3. PRINCIPALS IN THE SECOND DEGREE . . . . .	79
A. Presence . . . . .	79
(a) Actual Presence . . . . .	79
i. Assistance before Act . . . . .	79
ii. Assistance after Act . . . . .	80
(b) Constructive Presence . . . . .	81
(c) In Misdemeanours . . . . .	82
i. In General . . . . .	82
ii. Coinage Cases . . . . .	82
iii. Poaching Cases . . . . .	83
B. Common Purpose . . . . .	83
(a) Necessity for . . . . .	83
(b) Offences against the Person . . . . .	85
(c) Agreements to commit Suicide . . . . .	85
(d) Prizefights . . . . .	86
(e) Possession . . . . .	86
(f) Collateral Acts . . . . .	87
i. Consequent upon Common Design . . . . .	87
ii. Not Consequent upon Common Design . . . . .	88
iii. Committed after Completion of Common Design . . . . .	89
(g) Evidence of Common Purpose . . . . .	90
(h) Aiding and Abetting in Misdemeanours . . . . .	91
(i) Other Cases . . . . .	92
C. Where Person charged is incapable of being Principal in the First Degree . . . . .	93
D. Indictment and Trial . . . . .	94
SUB-SECT. 4. ACCESSORIES BEFORE THE FACT . . . . .	95
A. In General . . . . .	95
B. Active Encouragement essential . . . . .	96
C. In Unpremeditated Crimes . . . . .	97
D. Crime committed Different from that Commanded . . . . .	97
E. Acts done through Guilty Agent . . . . .	98
F. Indictment and Trial . . . . .	98
SUB-SECT. 5. ACCESSORIES AFTER THE FACT . . . . .	99
A. In General . . . . .	100
B. Indictment and Trial . . . . .	101
SUB-SECT. 6. ATTEMPT TO COMMIT CRIME . . . . .	101
A. In General . . . . .	101
B. What constitutes an Attempt . . . . .	102
(a) Overt Act necessary . . . . .	102
(b) Connection of Overt Act with Offence . . . . .	105
C. When Full Offence Impossible to commit . . . . .	106
D. Indictment and Trial . . . . .	107

	PAGE
SUB-SECT. 7. INCITEMENT TO COMMIT CRIME . . . . .	107
A. Nature of Offence . . . . .	107
B. Forms of Incitement . . . . .	108
C. Communication of the Incitement . . . . .	109
SUB-SECT. 8. CONSPIRACY . . . . .	110
A. Nature of Offence . . . . .	110
B. When Offence complete . . . . .	114
C. Parties to Conspiracy . . . . .	114
D. Conspiracy to violate Provisions of Statute . . . . .	115
E. Conspiracy to injure a Person . . . . .	116
F. Acts tending to Public Mischief . . . . .	116
G. In respect of Public Offices . . . . .	117
H. Acts contrary to Public Morals or Decency . . . . .	117
I. Relating to Marriage . . . . .	117
J. Relating to Trade Disputes. <i>See</i> TRADE AND TRADE UNIONS.	
K. Relating to Trade . . . . .	118
L. Seditious Conspiracy . . . . .	118
M. Treasonable Conspiracy . . . . .	118
N. Indictment and Trial . . . . .	118
O. Evidence and Proof . . . . .	120
(a) In General . . . . .	120
(b) Concert . . . . .	122
(c) Acts and Words of Co-Conspirators . . . . .	123
SUB-SECT. 9. MISPRISION . . . . .	125
PART II. ORIGINAL CRIMINAL JURISDICTION . . . . .	125
SECT. 1. COURTS OF CRIMINAL JURISDICTION . . . . .	125
SUB-SECT. 1. HIGH COURT OF PARLIAMENT . . . . .	125
A. House of Lords . . . . .	125
(a) In General . . . . .	125
(b) Trial of Peers . . . . .	125
i. When triable . . . . .	125
ii. Procedure . . . . .	125
B. House of Commons. <i>See</i> PARLIAMENT.	
SUB-SECT. 2. HIGH COURT OF JUSTICE . . . . .	126
A. King's Bench Division . . . . .	126
B. Chancery Division . . . . .	128
SUB-SECT. 3. COURTS OF ASSIZE, OYER AND TERMINER, AND GAOL DELIVERY . . . . .	129
A. In General . . . . .	129
B. Central Criminal Court . . . . .	129
SUB-SECT. 4. COURTS OF QUARTER SESSIONS . . . . .	129
SUB-SECT. 5. COURTS OF SUMMARY JURISDICTION . . . . .	130
SUB-SECT. 6. COURTS OF SPECIAL CRIMINAL JURISDICTION . . . . .	132
SECT. 2. LIMITS OF CRIMINAL JURISDICTION . . . . .	132
SUB-SECT. 1. IN GENERAL . . . . .	132
SUB-SECT. 2. OFFENCES COMMITTED OUTSIDE THE JURISDICTION . . . . .	133
A. By British Subjects . . . . .	133
B. By Aliens . . . . .	134
SUB-SECT. 3. OFFENCES PARTLY COMMITTED OUTSIDE THE JURISDICTION . . . . .	134
SUB-SECT. 4. OFFENCES COMMITTED ON SEAS AND RIVERS . . . . .	137
A. In General . . . . .	137
B. On British Ships . . . . .	138
C. On Foreign Ships . . . . .	140
D. Court of Trial . . . . .	140
SUB-SECT. 5. OFFENCES COMMITTED BY ALIENS . . . . .	141
SECT. 3. VENUE . . . . .	142
SUB-SECT. 1. AT COMMON LAW . . . . .	142
A. In General . . . . .	142
B. Where Offence consists of Series of Acts . . . . .	144

	PAGE
C. Where Offence consists of Continuing Acts . . . . .	144
(a) Involving the Posting of a Letter . . . . .	144
(b) Particular Instances . . . . .	145
SUB-SECT. 2. STATUTORY PROVISIONS . . . . .	147
A. Offences triable in any County . . . . .	147
B. Offences committed on Boundaries of Counties . . . . .	147
C. Offences committed in Counties of Cities . . . . .	148
D. Offences committed upon Journeys . . . . .	149
E. Death in One Place caused by Criminal Act in Another . . . . .	150
F. Offences triable in King's Bench Division . . . . .	150
SUB-SECT. 3. CHANGE OF VENUE . . . . .	150
SUB-SECT. 4. CHOICE OF VENUE BY CROWN . . . . .	151
PART III. LIMITATION OF TIME FOR CRIMINAL PROCEEDINGS . . . . .	151
SECT. 1. IN GENERAL . . . . .	151
SECT. 2. WHAT IS COMMENCEMENT OF PROSECUTION . . . . .	154
PART IV. BAIL . . . . .	156
SECT. 1. IN GENERAL . . . . .	156
SECT. 2. GROUNDS FOR GRANTING . . . . .	157
SECT. 3. IN TREASON . . . . .	159
SECT. 4. IN MURDER . . . . .	159
SECT. 5. IN FELONY . . . . .	161
SECT. 6. IN MISDEMEANOURS . . . . .	162
SECT. 7. FUGITIVE OFFENDERS. <i>See</i> EXTRADITION AND FUGITIVE OFFENDERS. . . . .	
SECT. 8. BY HIGH COURT . . . . .	162
SECT. 9. BY COURT OF CRIMINAL APPEAL . . . . .	163
SECT. 10. DURING REMAND . . . . .	163
SECT. 11. ON POSTPONEMENT OF TRIAL . . . . .	164
SECT. 12. PENDING APPEAL . . . . .	165
SECT. 13. APPEAL FROM REFUSAL TO GRANT . . . . .	166
SECT. 14. ON CORONER'S INQUISITION . . . . .	166
PART V. PROCEEDINGS PRELIMINARY TO INDICTMENT . . . . .	166
SECT. 1. SECURING ATTENDANCE OF ACCUSED PERSON . . . . .	166
SUB-SECT. 1. SUMMONSES AND WARRANTS . . . . .	166
A. By Whom Issued . . . . .	166
B. When Issued . . . . .	167
C. Discretion to Issue . . . . .	168
D. Who may institute Criminal Proceedings . . . . .	169
E. Consent necessary to institute Proceedings . . . . .	170
SUB-SECT. 2. ARREST . . . . .	172
A. Nature of Arrest . . . . .	172
B. Effecting Arrest . . . . .	173
C. Searching Prisoner after Arrest—Disposal of Property . . . . .	174
D. Procedure after Arrest . . . . .	175
E. Arrest without Warrant . . . . .	175
(a) In General . . . . .	175
(b) For Felony . . . . .	177
(c) For Breach of the Peace. . . . .	179
i. In General . . . . .	179
ii. What Amounts to Breach of the Peace . . . . .	180
(d) By Servant in Protection of Master's Property. . . . .	182
(e) Statutory Provisions . . . . .	183
i. In General . . . . .	183
ii. When Arrest must take place . . . . .	185
(f) Entering Premises to effect Arrest . . . . .	186

	PAGE
F. Arrest under Warrant . . . . .	186
(a) In General . . . . .	186
(b) Form and Contents of Warrant . . . . .	186
(c) Circumstances of Arrest . . . . .	187
SUB-SECT. 3. SEARCH WARRANTS . . . . .	189
SECT. 2. PRELIMINARY EXAMINATION BEFORE JUSTICES . . . . .	191
SUB-SECT. 1. THE HEARING . . . . .	191
SUB-SECT. 2. DEPOSITIONS . . . . .	192
A. In General . . . . .	192
B. The Caption . . . . .	195
C. The Signatures of the Justices . . . . .	195
D. What Depositions should include . . . . .	196
E. Deposition of Witness who is Dangerously Ill . . . . .	197
F. Right of Accused to Copies of the Depositions . . . . .	198
SUB-SECT. 3. REMAND . . . . .	198
SUB-SECT. 4. COMMITMENT FOR TRIAL OR DISCHARGE OF ACCUSED . . . . .	199
SUB-SECT. 5. RECOGNISANCES . . . . .	201
PART VI. INDICTMENTS . . . . .	202
SECT. 1. IN GENERAL . . . . .	202
SECT. 2. SUBJECT-MATTER OF INDICTMENT . . . . .	202
SUB-SECT. 1. DISOBEDIENCE TO PROVISIONS OF STATUTES . . . . .	202
A. Where no Special Remedy provided . . . . .	202
B. Where Statute provides Special Remedy . . . . .	204
(a) When Indictment lies . . . . .	204
(b) When Indictment does not lie . . . . .	205
SUB-SECT. 2. DISOBEDIENCE TO JUDICIAL ORDERS . . . . .	206
SUB-SECT. 3. MATTERS NOT INDICTABLE . . . . .	206
SECT. 3. PREFERRING AN INDICTMENT . . . . .	208
SUB-SECT. 1. IN GENERAL . . . . .	208
SUB-SECT. 2. VEXATIOUS INDICTMENTS ACT . . . . .	209
SUB-SECT. 3. ADDING COUNTS WITHOUT LEAVE OF COURT . . . . .	211
SUB-SECT. 4. EFFECT OF REPEAL OF STATUTE ON PENDING PROCEEDINGS . . . . .	213
SECT. 4. FORM OF INDICTMENTS . . . . .	213
SUB-SECT. 1. IN GENERAL . . . . .	213
SUB-SECT. 2. DESCRIPTION OF PERSONS . . . . .	216
SUB-SECT. 3. STATEMENTS AS TO AGE . . . . .	217
SUB-SECT. 4. STATEMENTS AS TO TIME . . . . .	218
SUB-SECT. 5. STATEMENTS AS TO PLACE . . . . .	219
SUB-SECT. 6. STATEMENTS AS TO VALUE . . . . .	220
SUB-SECT. 7. STATEMENTS AS TO INTENT OR KNOWLEDGE . . . . .	221
SUB-SECT. 8. DUPLICATION OF CHARGE . . . . .	221
A. When more than one Offence may be charged in the same Court . . . . .	221
(a) Same or Continuous Acts . . . . .	221
(b) Acts laid Conjunctively . . . . .	222
B. When more than one Offence may not be charged in the same Court . . . . .	222
(a) Different Acts . . . . .	222
(b) Acts charged Disjunctively . . . . .	223
SUB-SECT. 9. JOINDER OF DEFENDANTS . . . . .	224
A. Joint Offences . . . . .	224
B. Separate Offences . . . . .	225
C. When separate Trial Ordered . . . . .	225
SUB-SECT. 10. JOINDER OF OFFENCES . . . . .	226
A. In General . . . . .	226
B. Discretion of Court . . . . .	227
C. Prosecution put to Election . . . . .	228
D. Joinder of different Felonies . . . . .	229
E. Joinder of different Misdemeanours . . . . .	230
F. Joinder of Charges as Principal & Accessory . . . . .	231

	PAGE
SUB-SECT. 11. DEFECTIVE AVERMENTS . . . . .	231
SUB-SECT. 12. IMMATERIAL AVERMENTS . . . . .	232
SUB-SECT. 13. AMENDMENT . . . . .	234
SUB-SECT. 14. ORDER FOR PARTICULARS . . . . .	236
SECT. 5. FINDING OF AN INDICTMENT BY A GRAND JURY . . . . .	237
SUB-SECT. 1. IN GENERAL . . . . .	237
SUB-SECT. 2. EVIDENCE BEFORE GRAND JURY . . . . .	238
SUB-SECT. 3. FINDING THE BILL . . . . .	240
SUB-SECT. 4. AFTER BILL FOUND . . . . .	241
SUB-SECT. 5. CAPTION OF INDICTMENT . . . . .	242
SECT. 6. NOLLE PROSEQUI . . . . .	243
SECT. 7. REMOVAL OF INDICTMENT BY CERTIORARI . . . . .	244
PART VII. TRIAL OF INDICTMENTS . . . . .	245
SECT. 1. IN GENERAL . . . . .	245
SECT. 2. REMOVAL OF INDICTMENTS BY CERTIORARI . . . . .	245
SECT. 3. TRIAL AT BAR . . . . .	245
SECT. 4. PROCEEDINGS BEFORE PLEA . . . . .	245
SUB-SECT. 1. APPEARANCE . . . . .	245
A. Appearance of Prosecutor . . . . .	245
B. Appearance of Accused . . . . .	246
(a) In General . . . . .	246
(b) Representation by Counsel . . . . .	247
SUB-SECT. 2. ARRAIGNMENT . . . . .	248
A. In General . . . . .	248
B. Accused standing Mute . . . . .	249
C. Refusal to Plead . . . . .	250
D. Unfitness to Plead owing to Insanity . . . . .	250
E. Arraignment upon Charge of Previous Conviction . . . . .	251
SUB-SECT. 3. CERTIORARI TO QUASH INDICTMENT . . . . .	251
SUB-SECT. 4. MOTION TO QUASH INDICTMENT . . . . .	251
A. Time for Making . . . . .	251
B. When granted . . . . .	251
(a) In General . . . . .	251
(b) On Motion of Prosecution . . . . .	252
(c) On Motion of Accused . . . . .	253
SUB-SECT. 5. DEMURRER . . . . .	254
SECT. 5. PLEA—THE GENERAL ISSUE . . . . .	255
SUB-SECT. 1. NATURE OF PLEA . . . . .	255
SUB-SECT. 2. WITHDRAWAL OF PLEA . . . . .	256
SUB-SECT. 3. SPECIAL PLEA . . . . .	257
SECT. 6. POSTPONEMENT OF TRIAL . . . . .	258
SUB-SECT. 1. IN GENERAL . . . . .	258
SUB-SECT. 2. GROUNDS FOR POSTPONEMENT . . . . .	258
A. On application of Prosecution . . . . .	258
B. On application of Accused . . . . .	260
SUB-SECT. 3. PROCEDURE . . . . .	262
SECT. 7. THE HEARING . . . . .	262
SUB-SECT. 1. PUBLIC TRIAL . . . . .	262
SUB-SECT. 2. PRESENCE OF COMPLAINANT . . . . .	262
SUB-SECT. 3. PRESENCE OF ACCUSED . . . . .	262
SUB-SECT. 4. ORDER OF TRIAL . . . . .	263
SUB-SECT. 5. TRIAL OF FOREIGNER . . . . .	264
SUB-SECT. 6. WITNESSES . . . . .	264
A. Ordering Witnesses out of Court . . . . .	264
B. Examination, Cross-Examination & Re-Examination of Witnesses. <i>See EVIDENCE.</i>	
C. Hostile Witness . . . . .	265

	PAGE
D. Calling and Examination of Witness by Judge . . . . .	267
E. Witness Refreshing Memory . . . . .	267
F. Privilege of Witness—Incrimination of Witness. <i>See EVIDENCE.</i>	
G. Depositions and Statements . . . . .	271
H. Swearing Witness. <i>See EVIDENCE.</i>	
SUB-SECT. 7. CASE FOR THE PROSECUTION . . . . .	272
A. Status of Private Prosecutor . . . . .	272
B. Counsel for the Prosecution . . . . .	273
C. Opening Speech for the Prosecution . . . . .	273
D. Witnesses for the Prosecution . . . . .	274
(a) Witnesses on the Back of the Indictment. . . . .	274
(b) Witnesses not on the Back of the Indictment . . . . .	275
(c) Additional Evidence . . . . .	276
E. Reading Deposition of Absent Witness . . . . .	276
(a) In General . . . . .	276
(b) Discretion of Judge . . . . .	279
(c) Absence caused by Illness . . . . .	279
i. In General . . . . .	279
ii. Particular Illnesses . . . . .	280
(d) Insanity of Witness . . . . .	281
(e) Witness kept away by Accused . . . . .	281
(f) Depositions before Coroners . . . . .	282
(g) Deposition taken on a Different Charge . . . . .	282
F. Statement of the Accused at Preliminary Examination . . . . .	282
SUB-SECT. 8. THE DEFENCE . . . . .	284
A. Order . . . . .	284
B. Conduct of Defence in General . . . . .	285
C. No Evidence to go to Jury . . . . .	286
D. Accused as a Witness . . . . .	287
E. Statement by Accused . . . . .	287
F. Right of Accused to address the Jury . . . . .	288
SUB-SECT. 9. PROCEEDINGS AFTER CLOSE OF DEFENCE . . . . .	289
A. Calling further Evidence . . . . .	289
B. Summing up by Prosecution . . . . .	292
C. Summing up by Defence . . . . .	292
SUB-SECT. 10. RIGHT OF REPLY . . . . .	292
A. In General . . . . .	292
B. By Law Officers of the Crown . . . . .	294
C. Where more than one accused . . . . .	294
SUB-SECT. 11. FUNCTION OF JUDGE AND JURY. . . . .	295
SUB-SECT. 12. JUDGE'S SUMMING UP . . . . .	296
A. In General . . . . .	296
B. Necessary Contents . . . . .	298
C. Powers of Judge . . . . .	302
SUB-SECT. 13. VIEW BY JURY. . . . .	304
SUB-SECT. 14. ADJOURNMENT AND POSTPONEMENT . . . . .	304
A. In General . . . . .	304
B. Separation of Jury . . . . .	306
SUB-SECT. 15. DISCHARGE OF JURY IN THE COURSE OF A TRIAL . . . . .	306
A. In General . . . . .	306
B. Procedure on Second Trial . . . . .	309
SUB-SECT. 16. VERDICT . . . . .	310
A. In General . . . . .	310
B. Special Verdict . . . . .	313
C. Joint Indictment—Separate Verdicts . . . . .	316
D. Verdict differing from Offence charged . . . . .	317
(a) In General . . . . .	317
(b) In Particular Cases . . . . .	319
E. Special Verdict of Insanity . . . . .	324
F. Verdict of Not Guilty . . . . .	325
G. Retirement of Jury to consider Verdict . . . . .	326

	PAGE
H. Announcing the Verdict . . . . .	327
I. Reconsidering the Verdict . . . . .	327
J. Amending the Verdict . . . . .	328
K. Disagreement of Jury . . . . .	328
SUB-SECT. 17. JUDGMENT . . . . .	329
A. The Allocutus . . . . .	329
B. Respite and Arrest of Judgment . . . . .	329
(a) Respite . . . . .	329
(b) Arrest of Judgment . . . . .	330
C. Whether Presence of the Accused necessary . . . . .	331
D. Evidence to aid Determination of Sentence . . . . .	332
E. By whom Judgment pronounced . . . . .	333
F. Form and Record of Judgment . . . . .	333
G. Alteration of Judgment . . . . .	335
H. Place of Judgment . . . . .	336
PART VIII. SPECIAL PLEAS . . . . .	336
SECT. 1. PLEA OF AUTREFOIS ACQUIT AND AUTREFOIS CONVICT . . . . .	336
SUB-SECT. 1. IN GENERAL . . . . .	336
SUB-SECT. 2. PREVIOUS TRIAL OUTSIDE JURISDICTION . . . . .	338
SUB-SECT. 3. WHEN PLEA ADMITTED . . . . .	338
A. In General . . . . .	338
B. Offences against the Person . . . . .	339
C. Offences against Property . . . . .	342
D. Other Cases . . . . .	344
SUB-SECT. 4. MATTERS NOT GIVING GROUNDS FOR PLEA . . . . .	346
SECT. 2. PLEA TO THE JURISDICTION . . . . .	349
SECT. 3. PLEA OF PARDON . . . . .	349
PART IX. THE JURY. . . . .	349
PART X. INFORMATION . . . . .	349
SECT. 1. IN GENERAL . . . . .	349
SECT. 2. INFORMATION FILED BY THE ATTORNEY-GENERAL . . . . .	349
SUB-SECT. 1. IN GENERAL . . . . .	349
SUB-SECT. 2. PARTICULAR CASES . . . . .	350
SECT. 3. INFORMATION AT INSTANCE OF PRIVATE PERSON . . . . .	351
SUB-SECT. 1. IN GENERAL . . . . .	351
SUB-SECT. 2. GROUNDS FOR REFUSAL . . . . .	351
SUB-SECT. 3. FOR WHAT OFFENCES GRANTED . . . . .	352
A. Bribery and Corruption . . . . .	352
B. Offences against Administration of Justice . . . . .	352
C. Misconduct by Judicial Officers . . . . .	353
D. Misconduct by Ministerial Officers . . . . .	353
E. Libel. <i>See</i> LIBEL AND SLANDER . . . . .	
F. Breach of the Peace . . . . .	354
(a) Assault . . . . .	354
(b) Provocation to Breach of the Peace . . . . .	354
(c) Challenge to Fight . . . . .	354
(d) Going Armed . . . . .	354
(e) Riot and Incitement to Riot . . . . .	354
G. Blasphemy . . . . .	354
H. Immorality . . . . .	354
I. Abduction . . . . .	354
J. Rescue . . . . .	354
K. Impressment of Seamen . . . . .	355
L. Demanding Money with Menaces . . . . .	355
M. Attempting to obtain Execution of Will . . . . .	355
N. Cheating . . . . .	355
O. Conspiracy . . . . .	355
P. Giving Credit to Wife with a view to charge Husband . . . . .	355
SUB-SECT. 4. PROCEDURE . . . . .	355

	PAGE
PART XI. INQUISITIONS . . . . .	357
PART XII. EVIDENCE AND PROOF . . . . .	358
SECT. 1. IN GENERAL . . . . .	358
SECT. 2. IDENTIFICATION OF ACCUSED . . . . .	358
SECT. 3. AS TO CHARACTER . . . . .	361
SUB-SECT. 1. OF ACCUSED . . . . .	361
A. Good Character . . . . .	361
B. Bad Character . . . . .	363
SUB-SECT. 2. OF PERSON PROSECUTING—MOTIVE . . . . .	364
SECT. 4. RELEVANT FACTS—ADMISSIBILITY OF EVIDENCE . . . . .	366
SUB-SECT. 1. MOTIVE OR MALICE . . . . .	366
SUB-SECT. 2. ACTS OF ACCUSED . . . . .	368
A. Forming Part of same Transaction . . . . .	368
B. Not forming Part of same Transaction . . . . .	371
(a) In General . . . . .	371
(b) To show System or Design . . . . .	374
(c) To show Guilty Knowledge . . . . .	374
(d) To show Intent . . . . .	375
(e) To rebut Defence of Accident or Mistake . . . . .	376
(f) To corroborate, explain, or rebut Evidence . . . . .	376
(g) To identify Accused or Exhibit . . . . .	377
(h) Particular Offences . . . . .	377
i. Murder . . . . .	377
ii. Abortion . . . . .	379
iii. Rape, Incest and Carnal Knowledge . . . . .	380
iv. Other Offences against the Person . . . . .	381
v. Larceny and Receiving Stolen Property . . . . .	381
vi. Embezzlement . . . . .	383
vii. Robbery, Menaces and Burglary . . . . .	384
viii. False Pretences and Obtaining Credit by Fraud . . . . .	384
ix. Forgery . . . . .	387
x. Coinage Offences . . . . .	388
xi. Malicious Damage to Property . . . . .	389
xii. Other Cases . . . . .	389
C. Criminal Acts of Accused subsequent to Charge . . . . .	390
SUB-SECT. 3. ACTS OF KNOWN THIRD PERSON . . . . .	390
SUB-SECT. 4. ACTS OF UNKNOWN PERSON . . . . .	391
SUB-SECT. 5. STATEMENTS OF PERSONS OTHER THAN ACCUSED . . . . .	391
A. In General . . . . .	391
B. Statements made in Absence of Accused . . . . .	392
C. Statements made in Presence of Accused . . . . .	392
D. Statements explaining Acts . . . . .	396
E. Statements forming Part of the res gestæ . . . . .	397
F. Dying Declarations . . . . .	398
SUB-SECT. 6. COMPLAINTS . . . . .	398
A. In General . . . . .	398
B. In Sexual Offences against Females . . . . .	398
C. In Sexual Offences against Males . . . . .	401
SUB-SECT. 7. PROPERTY AND DOCUMENTS FOUND IN POSSESSION OF THE ACCUSED . . . . .	401
SECT. 5. CONFESSIONS AND STATEMENTS BY ACCUSED . . . . .	403
SUB-SECT. 1. IN GENERAL . . . . .	403
SUB-SECT. 2. STATEMENTS AT PRELIMINARY EXAMINATION BEFORE JUSTICES . . . . .	404
SUB-SECT. 3. STATEMENTS MADE IN OTHER LEGAL PROCEEDINGS . . . . .	406
SUB-SECT. 4. VOLUNTARY CONFESSIONS . . . . .	410
SUB-SECT. 5. CONFESSIONS ARISING FROM QUESTIONS BY POLICE . . . . .	414
SUB-SECT. 6. CONFESSIONS ARISING FROM INDUCEMENTS . . . . .	417
A. Matters amounting to Inducement . . . . .	417
B. Matters not amounting to Inducement . . . . .	421



	PAGE
C. By Whom Inducement made—Person in Authority . . . . .	423
(a) In General . . . . .	423
(b) Who is Person in Authority . . . . .	424
D. How long Inducement operates . . . . .	425
SUB-SECT. 7. EFFECT OF CONFESSIONS . . . . .	426
SUB-SECT. 8. FACTS DISCOVERED IN CONSEQUENCE OF INADMISSIBLE CONFESSIONS . . . . .	427
SUB-SECT. 9. PRIVILEGED COMMUNICATIONS . . . . .	427
SECT. 6. PROOF . . . . .	429
SUB-SECT. 1. IN GENERAL . . . . .	429
SUB-SECT. 2. BURDEN OF PROOF . . . . .	429
SUB-SECT. 3. SUFFICIENCY OF PROOF . . . . .	432
A. Of Corpus Delicti . . . . .	432
B. Of Intent . . . . .	435
C. Confession by Accused . . . . .	438
SUB-SECT. 4. METHOD OF PROOF . . . . .	439
A. In General . . . . .	439
B. Discovery and Inspection . . . . .	440
C. Evidence on Commission . . . . .	440
D. Depositions taken Abroad . . . . .	441
E. Identification of Accused . . . . .	441
F. Corroboration . . . . .	441
SECT. 7. BEST EVIDENCE. <i>See EVIDENCE.</i> . . . .	
SECT. 8. HEARSAY EVIDENCE . . . . .	441
SECT. 9. DYING DECLARATIONS . . . . .	443
SECT. 10. DEPOSITIONS AND STATEMENTS . . . . .	443
SECT. 11. CREDIBILITY OF WITNESSES. <i>See EVIDENCE.</i> . . . .	
SECT. 12. COMPETENT AND COMPELLABLE WITNESSES . . . . .	443
SUB-SECT. 1. IN GENERAL . . . . .	443
SUB-SECT. 2. EVIDENCE OF ACCUSED . . . . .	444
A. On own Behalf . . . . .	444
B. For Co-defendant . . . . .	444
C. Cross-Examination as to Character . . . . .	445
(a) General Rule . . . . .	445
(b) When relevant to Offence charged . . . . .	446
(c) When Accused or Witness gives Evidence of good Character . . . . .	447
(d) When Defence involves Imputations on Character or Prosecutor or Witnesses for Prosecution . . . . .	447
(e) When Evidence given against Another for same Offence . . . . .	449
SUB-SECT. 3. EVIDENCE OF WIFE OR HUSBAND OF ACCUSED . . . . .	450
A. At Common Law . . . . .	450
(a) For or against Accused . . . . .	450
(b) For or against Co-defendant . . . . .	452
B. By Statute. . . . .	453
SUB-SECT. 4. EVIDENCE OF CHILDREN . . . . .	453
A. In General. <i>See EVIDENCE.</i> . . . .	
B. Evidence not on Oath . . . . .	453
SECT. 13. EVIDENCE OF ACCOMPLICE . . . . .	456
SUB-SECT. 1. WHO IS AN ACCOMPLICE . . . . .	456
SUB-SECT. 2. COMPETENCY AS WITNESS . . . . .	457
SUB-SECT. 3. EFFECT OF GIVING EVIDENCE ON PROSECUTION FOR OTHER OFFENCES . . . . .	459
SUB-SECT. 4. CORROBORATION . . . . .	460
A. In General . . . . .	460
B. Necessity for . . . . .	460
C. Sufficiency of . . . . .	462
D. Where more than one Accused . . . . .	465
E. Direction on Corroboration . . . . .	466

	PAGE
PART XIII. PUNISHMENT AND PREVENTION OF CRIME . . . . .	467
SECT. 1. PRINCIPLES THAT DETERMINE THE AMOUNT OF PUNISHMENT . . . . .	467
SUB-SECT. 1. SENTENCE GENERALLY . . . . .	467
SUB-SECT. 2. STANDARDISATION OF SENTENCES . . . . .	469
SUB-SECT. 3. SENTENCES ON CO-PRISONERS . . . . .	470
SECT. 2. MATTERS TO BE TAKEN INTO CONSIDERATION . . . . .	470
SUB-SECT. 1. ANTECEDENTS OF PRISONER . . . . .	470
A. In General . . . . .	470
B. Previous Convictions . . . . .	471
C. Period since last Conviction . . . . .	471
SUB-SECT. 2. DETENTION IN PRISON AWAITING TRIAL . . . . .	472
SUB-SECT. 3. CONSEQUENCES OF CONVICTION . . . . .	472
SUB-SECT. 4. OTHER CHARGES PENDING . . . . .	472
SUB-SECT. 5. MITIGATING CIRCUMSTANCES . . . . .	473
A. In General . . . . .	473
B. Previous good Character—First Offences . . . . .	474
C. Age of Prisoner . . . . .	475
SUB-SECT. 6. MATTERS CALLING FOR INCREASED SENTENCE . . . . .	475
SECT. 3. KINDS OF PUNISHMENT . . . . .	476
SUB-SECT. 1. CONSECUTIVE AND CONCURRENT SENTENCES . . . . .	476
SUB-SECT. 2. IMPRISONMENT . . . . .	477
SUB-SECT. 3. PENAL SERVITUDE . . . . .	478
SUB-SECT. 4. WHIPPING . . . . .	478
SUB-SECT. 5. FINE . . . . .	479
SUB-SECT. 6. DETENTION IN BORSTAL INSTITUTIONS . . . . .	480
SUB-SECT. 7. PREVENTIVE DETENTION . . . . .	481
SUB-SECT. 8. PROBATION . . . . .	481
SECT. 4. HABITUAL CRIMINALS . . . . .	481
SUB-SECT. 1. PROCEDURE BEFORE TRIAL . . . . .	481
A. In General . . . . .	481
B. Notices to Offender and Court . . . . .	483
SUB-SECT. 2. PROCEDURE AT TRIAL . . . . .	484
SUB-SECT. 3. EVIDENCE AT TRIAL . . . . .	484
A. What Evidence may be given . . . . .	484
B. Proof of age . . . . .	485
C. Proof of previous Convictions . . . . .	485
D. Proof of Dishonest or Criminal Life . . . . .	486
(a) In General . . . . .	486
(b) Conduct during Intervals between Offences . . . . .	488
E. Previous Conviction as Habitual Criminal . . . . .	488
SUB-SECT. 4. SENTENCE . . . . .	489
SUB-SECT. 5. APPEAL . . . . .	490
SECT. 5. HABITUAL DRUNKARDS . . . . .	490
SECT. 6. YOUTHFUL OFFENDERS . . . . .	491
SECT. 7. DEPORTATION OF ALIENS . . . . .	491
SECT. 8. RECOGNISANCES TO KEEP THE PEACE—ARTICLES OF THE PEACE . . . . .	492
SECT. 9. POLICE SUPERVISION . . . . .	494
SECT. 10. EFFECT OF CONVICTION . . . . .	494
SUB-SECT. 1. IN GENERAL . . . . .	494
SUB-SECT. 2. ADMINISTRATION OF CONVICTS' PROPERTY . . . . .	495
SECT. 11. OFFENCES AFTER PREVIOUS CONVICTION . . . . .	496
SUB-SECT. 1. WHAT IS A CONVICTION . . . . .	496
SUB-SECT. 2. CHARGING PREVIOUS CONVICTION . . . . .	497
SUB-SECT. 3. PROCEDURE AT TRIAL . . . . .	497
SUB-SECT. 4. PROOF OF CONVICTION . . . . .	498
SUB-SECT. 5. PROOF OF IDENTITY . . . . .	500
SECT. 12. PARDONS AND REPRIEVES . . . . .	500
SECT. 13. VAGRANCY. <i>See</i> MAGISTRATES.	

	PAGE
PART XIV. APPEAL TO COURT OF CRIMINAL APPEAL . . . . .	500
SECT. 1. THE RIGHT OF APPEAL . . . . .	500
SUB-SECT. 1. IN GENERAL . . . . .	500
SUB-SECT. 2. AGAINST CONVICTION . . . . .	503
SUB-SECT. 3. AGAINST SENTENCE OR ORDER . . . . .	504
SECT. 2. TIME LIMIT FOR APPEAL—EXTENSION OF TIME . . . . .	504
SECT. 3. NOTICE OF APPEAL . . . . .	505
SECT. 4. PROCEDURE AT HEARING. . . . .	506
SUB-SECT. 1. IN GENERAL . . . . .	506
SUB-SECT. 2. APPEALS AGAINST SENTENCE . . . . .	507
A. In General . . . . .	507
B. Commencement of Sentence . . . . .	507
SECT. 5. SCOPE OF INQUIRY . . . . .	508
SUB-SECT. 1. MATTERS DEALT WITH AT TRIAL . . . . .	508
A. Matters left to and decided by Jury . . . . .	508
B. Defence of Insanity . . . . .	509
SUB-SECT. 2. MATTERS NOT RAISED AT TRIAL . . . . .	509
A. Specific Defence not raised . . . . .	509
B. Point of Law not taken . . . . .	510
C. Other Cases . . . . .	511
SUB-SECT. 3. EXAMINATION BY AND REPORTS TO THE COURT . . . . .	511
SECT. 6. CALLING FRESH EVIDENCE . . . . .	512
SUB-SECT. 1. PROCEDURE . . . . .	512
SUB-SECT. 2. WHEN LEAVE WILL BE GIVEN . . . . .	512
SUB-SECT. 3. WHEN LEAVE WILL BE REFUSED . . . . .	513
SUB-SECT. 4. WHAT EVIDENCE IS ADMISSIBLE . . . . .	514
SUB-SECT. 5. EFFECT OF EVIDENCE . . . . .	515
SECT. 7. DETERMINATION OF APPEALS AGAINST CONVICTION . . . . .	516
SUB-SECT. 1. IN GENERAL . . . . .	516
SUB-SECT. 2. DEFECTS IN INDICTMENT . . . . .	517
SUB-SECT. 3. NO CASE TO GO TO JURY . . . . .	517
SUB-SECT. 4. UNREASONABLE VERDICT—QUASHING CONVICTION. . . . .	519
SUB-SECT. 5. WRONGFUL ADMISSION OF EVIDENCE AT TRIAL . . . . .	521
SUB-SECT. 6. WRONGFUL EXCLUSION OF EVIDENCE AT TRIAL . . . . .	526
SUB-SECT. 7. MISDIRECTION . . . . .	526
A. Insufficient Direction . . . . .	526
(a) In General . . . . .	526
(b) As to Necessary Ingredients of Offence . . . . .	527
(c) Case for Defence not put to Jury . . . . .	528
B. Misdirection of Fact . . . . .	529
(a) In General . . . . .	529
(b) Serious Misdirection . . . . .	529
(c) Slight Misdirection . . . . .	530
C. Misdirection in Law . . . . .	530
(a) In General . . . . .	530
(b) What amounts to Misdirection . . . . .	532
i. As to Onus of Proof . . . . .	532
ii. As to Necessary Ingredients of Offence . . . . .	532
iii. On joint Indictment—Distinction between Co-Defendants . . . . .	532
iv. Direction to Jury to Convict . . . . .	533
v. Other Cases . . . . .	533
SUB-SECT. 8. ABSENCE OF OR SUFFICIENCY OF CORROBORATION . . . . .	535
A. In General . . . . .	535
B. Warning by Judge . . . . .	535
SUB-SECT. 9. MISCONSTRUCTION OF VERDICT . . . . .	537
SUB-SECT. 10. IRREGULARITY AT TRIAL . . . . .	538

	PAGE
SUB-SECT. 11. APPLICATION OF PROVISIO TO SECT. 4 (1) OF CRIMINAL APPEAL ACT, 1907, . . . . .	542
A. Defective Indictment . . . . .	542
B. Wrongful Admission or Exclusion of Evidence . . . . .	542
C. Absence of or Sufficiency of Corroboration . . . . .	542
D. Misdirection by Trial Judge . . . . .	542
E. Irregularity in Procedure at Trial . . . . .	544
F. Other Cases . . . . .	545
SECT. 8. DETERMINATION OF APPEALS AGAINST SENTENCE . . . . .	545
SUB-SECT. 1. ALTERATION OF SENTENCE . . . . .	545
A. In General . . . . .	545
B. Substitution, Variation and Correction of Sentences . . . . .	546
C. On Account of Facts not before Trial Judge . . . . .	547
D. Other Cases . . . . .	547
SUB-SECT. 2. FRIVOLOUS APPEALS AND INCREASE OF SENTENCE . . . . .	548
SECT. 9. POWER TO VARY VERDICT . . . . .	548
SECT. 10. POWER TO ORDER VENIRE DE NOVO . . . . .	549
SECT. 11. THE COURT IN RELATION TO THE HOME SECRETARY . . . . .	550
SECT. 12. PROCEDURE ON REVERSAL OF DECISION BY HOUSE OF LORDS . . . . .	550
SECT. 13. USE OF SHORTHAND NOTES OF TRIAL . . . . .	550
SECT. 14. "CRIMINAL CAUSE OR MATTER" . . . . .	551
PART XV. APPEAL TO HOUSE OF LORDS AND JUDICIAL COMMITTEE OF THE PRIVY COUNCIL . . . . .	554

**The following Parts are contained in Volume XV.**

PART XVI. COSTS, COMPENSATION, REWARDS AND RESTITUTION . . . . .	614
SECT. 1. ORDER FOR COSTS . . . . .	614
SUB-SECT. 1. BY AND AGAINST THE CROWN . . . . .	614
SUB-SECT. 2. BY STATUTE . . . . .	614
A. Before Costs in Criminal Cases Act, 1908 . . . . .	614
B. After Costs in Criminal Cases Act, 1908 . . . . .	615
SUB-SECT. 3. CRIMINAL INFORMATIONS . . . . .	615
SUB-SECT. 4. COSTS OF CERTIORARI TO REMOVE INDICTMENT FOR TRIAL . . . . .	615
SECT. 2. COMPENSATION AND REWARDS . . . . .	616
SECT. 3. RESTITUTION OF PROPERTY . . . . .	617
SUB-SECT. 1. RESTITUTION AFTER CONVICTION . . . . .	617
SUB-SECT. 2. WRITS OF RESTITUTION . . . . .	617
SUB-SECT. 3. RESTITUTION ORDERS . . . . .	617
A. By Whom and How made—Appeal . . . . .	617
B. When made . . . . .	618
C. Against Whom made . . . . .	619
D. Property subject of Order . . . . .	620
SUB-SECT. 4. GOODS PAWNED . . . . .	622
PART XVII. OFFENCES AGAINST THE SOVEREIGN . . . . .	622
SECT. 1. TREASON . . . . .	622
SUB-SECT. 1. IN GENERAL . . . . .	622
SUB-SECT. 2. OVERT ACTS . . . . .	623
A. In General . . . . .	623
B. Sufficiency of Proof . . . . .	623
C. Acts committed outside the Realm . . . . .	624
SUB-SECT. 3. COMPASSING THE DEATH OF THE KING . . . . .	624
A. By Attempts to Kill . . . . .	624
B. By Levying War . . . . .	624

	PAGE
C. By Adhering to the King's Enemies . . . . .	625
D. By Inciting Foreigners to Invasion . . . . .	625
E. By Conspiracy . . . . .	625
(a) To Kill or Depose the King . . . . .	625
(b) To Levy War . . . . .	625
F. By Speeches and Writings . . . . .	626
G. Other Cases . . . . .	627
SUB-SECT. 4. LEVYING WAR AND CONSPIRACY TO LEVY WAR . . . . .	627
SUB-SECT. 5. ADHERING TO KING'S ENEMIES . . . . .	628
SUB-SECT. 6. TRIAL . . . . .	629
A. Who may be Convicted of Treason . . . . .	629
B. Degrees of Liability . . . . .	629
C. Procedure . . . . .	630
D. Evidence . . . . .	630
SECT. 2. TREASON FELONY . . . . .	631
SECT. 3. ASSAULTS ON THE KING . . . . .	632
SECT. 4. CONTEMPTS AGAINST THE KING . . . . .	633
 PART XVIII. OFFENCES AGAINST PUBLIC TRANQUILLITY . . . . .	 633
SECT. 1. IN GENERAL . . . . .	633
SECT. 2. SEDITION . . . . .	633
SUB-SECT. 1. IN GENERAL . . . . .	633
SUB-SECT. 2. FORMS OF SEDITION . . . . .	634
SUB-SECT. 3. SEDITIOUS INTENTION . . . . .	635
A. Exciting Disaffection or Contempt against Government or Church . . . . .	635
B. Incitement to Disturbance of Public Peace and Violence . . . . .	636
C. Incitement to Insurrection . . . . .	637
D. Saving for Right of Public Discussion . . . . .	637
E. Other Cases . . . . .	637
SUB-SECT. 4. INDICTMENT OF TRIAL . . . . .	637
SUB-SECT. 5. SEDITIOUS LIBEL. <i>See</i> LIBEL AND SLANDER.	
SECT. 3. INCITING TO MUTINY . . . . .	638
SECT. 4. ADMINISTERING UNLAWFUL OATHS . . . . .	638
SECT. 5. UNLAWFUL SOCIETIES . . . . .	639
SECT. 6. GOING ARMED, PROVIDING ARMS, AND UNLAWFUL DRILLING . . . . .	639
SECT. 7. BREACH OF THE PEACE . . . . .	641
SECT. 8. UNLAWFUL ASSEMBLY . . . . .	642
SUB-SECT. 1. IN GENERAL . . . . .	642
SUB-SECT. 2. MEETINGS NOT AMOUNTING TO UNLAWFUL ASSEMBLY . . . . .	644
SUB-SECT. 3. LIABILITY FOR PARTICIPATION IN UNLAWFUL ASSEMBLY . . . . .	645
SUB-SECT. 4. DUTY TO DISPERSE . . . . .	646
SECT. 9. ROUT AND RIOT . . . . .	646
SUB-SECT. 1. ROUT . . . . .	646
SUB-SECT. 2. RIOT AT COMMON LAW . . . . .	646
SUB-SECT. 3. RIOT UNDER RIOT ACT—DISPERSAL . . . . .	648
SUB-SECT. 4. LIABILITY OF PARTICIPANTS . . . . .	648
SUB-SECT. 5. SUPPRESSION OF RIOTS . . . . .	648
SUB-SECT. 6. INDICTMENT AND TRIAL . . . . .	649
SUB-SECT. 7. COMPENSATION FOR DAMAGE BY RIOT . . . . .	650
SUB-SECT. 8. DISTINCTION BETWEEN RIOT AND OTHER OFFENCES . . . . .	650
SECT. 10. FORCIBLE ENTRY AND DETAINER . . . . .	650
SUB-SECT. 1. FORCIBLE ENTRY . . . . .	650
A. In General . . . . .	650
B. The Entry . . . . .	650
C. The Property Entered . . . . .	652
D. Title to Possession . . . . .	652
E. Right to recover Damages . . . . .	654

	PAGE
SUB-SECT. 2. FORCIBLE DETAINER . . . . .	655
SUB-SECT. 3. RESTITUTION . . . . .	655
SECT. 11. DISTURBING PUBLIC WORSHIP AND BRAWLING IN CHURCH OR CHURCHYARD . . . . .	656
SECT. 12. DISTURBING PUBLIC MEETING . . . . .	659
PART XIX. OFFENCES IN RESPECT OF PUBLIC OFFICES . . . . .	659
SECT. 1. DISCLOSURE OF OFFICIAL INFORMATION . . . . .	659
SECT. 2. EXTORTION . . . . .	660
SUB-SECT. 1. IN GENERAL . . . . .	660
SUB-SECT. 2. BY PARTICULAR OFFICERS . . . . .	661
SUB-SECT. 3. INDICTMENT AND TRIAL . . . . .	661
SECT. 3. OPPRESSION . . . . .	662
SECT. 4. BRIBERY OF PUBLIC OFFICERS . . . . .	662
SECT. 5. BREACH OF TRUST OR FRAUD BY PUBLIC OFFICER . . . . .	663
SECT. 6. SALE OF OFFICES . . . . .	664
SECT. 7. REFUSAL TO EXECUTE PUBLIC OFFICE . . . . .	665
SECT. 8. MISCONDUCT IN OFFICE . . . . .	666
SUB-SECT. 1. MISCONDUCT OF JUDICIAL OFFICERS . . . . .	666
SUB-SECT. 2. MISCONDUCT BY MINISTERIAL OFFICERS . . . . .	666
SUB-SECT. 3. MISCONDUCT BY PUBLIC OFFICERS ABROAD . . . . .	666
SECT. 9. REFUSAL OR NEGLECT OF DUTY . . . . .	667
PART XX. OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE . . . . .	668
SECT. 1. EMBRACERY . . . . .	668
SECT. 2. PERJURY . . . . .	668
SUB-SECT. 1. IN GENERAL . . . . .	668
SUB-SECT. 2. WHO IS A PERSON LAWFULLY SWORN AS A WITNESS . . . . .	668
SUB-SECT. 3. COMPETENCY TO ADMINISTER OATH . . . . .	669
SUB-SECT. 4. FALSE AFFIDAVITS . . . . .	669
SUB-SECT. 5. JUDICIAL PROCEEDING . . . . .	671
A. In General . . . . .	671
B. Jurisdiction of Court . . . . .	671
SUB-SECT. 6. MATERIALITY OF STATEMENT . . . . .	675
SUB-SECT. 7. FALSITY AND DELIBERATION . . . . .	679
SUB-SECT. 8. EVIDENCE . . . . .	679
A. In General . . . . .	679
B. Proof of Judicial Proceeding . . . . .	680
C. Proof of Sworn False Statement . . . . .	683
D. Corroboration . . . . .	685
SUB-SECT. 9. INDICTMENT . . . . .	688
SUB-SECT. 10. TRIAL DURING PENDENCY OF JUDICIAL PROCEEDINGS . . . . .	691
SUB-SECT. 11. SUBORNATION OF PERJURY . . . . .	691
SUB-SECT. 12. FALSE STATEMENTS NOT IN JUDICIAL PROCEEDINGS . . . . .	692
A. Statements on Oath . . . . .	692
B. Statements not on Oath . . . . .	692
C. Statements with reference to Marriages, Births and Deaths . . . . .	693
SECT. 3. FABRICATION OF FALSE EVIDENCE . . . . .	695
SECT. 4. INTERFERING WITH WITNESSES . . . . .	695
SECT. 5. BARRATRY . . . . .	696
SECT. 6. MAINTENANCE AND CHAMPERTY . . . . .	696
SECT. 7. INTERFERING WITH DUE COURSE OF JUSTICE . . . . .	697
SECT. 8. CONSPIRACY TO OBSTRUCT THE COURSE OF JUSTICE . . . . .	698
SECT. 9. OFFENCES BY JURORS. <i>See JURIES.</i>	
SECT. 10. CONTEMPT OF COURT . . . . .	699
SECT. 11. DISOBEDIENCE TO JUDICIAL ORDERS . . . . .	700
SECT. 12. LIBELS ON THE ADMINISTRATORS OF JUSTICE . . . . .	702
SECT. 13. ASSAULTS ON JUDICIAL OFFICERS . . . . .	703

	PAGE
<b>PART XXI. OFFENCES RELATING TO ARREST, THE PROSECUTION AND PUNISHMENT OF CRIMINALS, AND THE EXECUTION OF CIVIL PROCESS</b>	704
<b>SECT. 1. MISPRISION</b>	704
SUB-SECT. 1. MISPRISION OF TREASON	704
SUB-SECT. 2. MISPRISION OF FELONY	704
<b>SECT. 2. COMPOUNDING OFFENCES</b>	704
SUB-SECT. 1. FELONIES	704
SUB-SECT. 2. MISDEMEANOURS	705
SUB-SECT. 3. PENAL ACTIONS	705
SUB-SECT. 4. COMPROMISE OF CRIMINAL PROCEEDINGS—CIVIL LIABILITY	706
<b>SECT. 3. CORRUPT REWARDS</b>	706
<b>SECT. 4. RESISTING OR OBSTRUCTING A CONSTABLE</b>	707
<b>SECT. 5. RESISTING OR OBSTRUCTING BAILIFFS AND OTHER OFFICIALS</b>	711
<b>SECT. 6. OFFENCES RELATING TO PRISONERS</b>	712
SUB-SECT. 1. PRISON BREACH	712
SUB-SECT. 2. ESCAPE	712
SUB-SECT. 3. RESCUE	714
SUB-SECT. 4. CONVICT AT LARGE	715
<b>SECT. 7. POUND BREACH AND RESCUE OF CHATTELS TAKEN UPON DISTRESS</b>	716
<b>PART XXII. OFFENCES AFFECTING THE PROPERTY AND PREROGATIVE OF THE CROWN</b>	717
<b>SECT. 1. POSSESSION OF GOVERNMENT STORES</b>	717
<b>SECT. 2. COINAGE OFFENCES</b>	718
SUB-SECT. 1. COUNTERFEITING COIN	718
SUB-SECT. 2. COLOURING COIN	719
SUB-SECT. 3. UTTERING COUNTERFEIT COIN	719
SUB-SECT. 4. POSSESSION OF COUNTERFEIT COIN	721
SUB-SECT. 5. MAKING COINING TOOLS	722
SUB-SECT. 6. POSSESSION OF COINAGE TOOLS	722
SUB-SECT. 7. PROCURING COIN OR DIES	723
<b>SECT. 3. CONCEALING TREASURE TROVE</b>	723
<b>SECT. 4. SMUGGLING</b>	723
<b>PART XXIII. OFFENCES RELATING TO ELECTIONS. <i>See ELECTIONS.</i></b>	
<b>PART XXIV. OFFENCES ON THE HIGH SEAS</b>	724
<b>SECT. 1. PIRACY</b>	724
SUB-SECT. 1. PIRACY JURE GENTIUM	724
SUB-SECT. 2. PIRACY BY STATUTE	725
<b>SECT. 2. SLAVE TRADE—KIDNAPPING</b>	726
<b>PART XXV. OFFENCES RELATING TO FOREIGN NATIONS</b>	729
<b>SECT. 1. OFFENCES PREJUDICING RELATIONS WITH FOREIGN STATES</b>	729
<b>SECT. 2. FOREIGN ENLISTMENT</b>	729
<b>PART XXVI. OFFENCES AGAINST RELIGION</b>	733
<b>SECT. 1. BLASPHEMY</b>	733
SUB-SECT. 1. In GENERAL	733
SUB-SECT. 2. MATTERS NOT AMOUNTING TO BLASPHEMY	734
<b>SECT. 2. DISTURBANCE OF PUBLIC WORSHIP</b>	735
<b>SECT. 3. SACRILEGE</b>	735
<b>PART XXVII. OFFENCES RELATING TO MARRIAGE</b>	735
<b>SECT. 1. BIGAMY</b>	735
SUB-SECT. 1. THE FIRST MARRIAGE	735
A. Celebration of Marriage and Identity of Parties	735
B. Validity of the Marriage	735
C. Subsistence of the Marriage	735

	PAGE
SUB-SECT. 2. THE SUBSEQUENT MARRIAGE . . . . .	740
SUB-SECT. 3. GROUNDS OF DEFENCE . . . . .	741
A. Seven Years' Absence . . . . .	741
B. Belief of Death . . . . .	743
C. Belief of Invalidity of first Marriage . . . . .	743
D. Belief of Dissolution of first Marriage . . . . .	744
SUB-SECT. 4. EVIDENCE OF HUSBAND OR WIFE . . . . .	745
SECT. 2. OFFENCES RELATING TO SOLEMNISATION OF MARRIAGE . . . . .	745
SECT. 3. FALSE DECLARATIONS AND NOTICES . . . . .	745
SECT. 4. ADULTERY. <i>See</i> HUSBAND AND WIFE.	
<b>PART XXVIII. OFFENCES AGAINST DECENCY AND MORALITY . . . . .</b>	<b>745</b>
SECT. 1. INDECENT EXPOSURE . . . . .	745
SECT. 2. INDECENT EXHIBITIONS . . . . .	747
SECT. 3. INDECENT PUBLICATIONS . . . . .	748
SECT. 4. INDECENT LANGUAGE . . . . .	751
SECT. 5. UNNATURAL OFFENCES . . . . .	751
SUB-SECT. 1. SODOMY AND BESTIALITY . . . . .	751
SUB-SECT. 2. INDECENT ASSAULT ON MALE PERSON . . . . .	752
SUB-SECT. 3. GROSS INDECENCY . . . . .	753
SECT. 6. DISORDERLY HOUSES . . . . .	754
SUB-SECT. 1. BROTHEL KEEPING . . . . .	754
A. Liability at Common Law . . . . .	754
B. Liability under Statute . . . . .	755
SECT. 7. UNLICENSED PLACES OF ENTERTAINMENT . . . . .	757
SUB-SECT. 1. UNDER DISORDERLY HOUSES ACT . . . . .	757
SUB-SECT. 2. UNDER PUBLIC HEALTH ACTS . . . . .	759
SUB-SECT. 3. SUNDAY ENTERTAINMENTS . . . . .	759
SECT. 8. BETTING AND GAMING. <i>See</i> GAMING AND WAGERING.	
SECT. 9. LOTTERIES. <i>See</i> GAMING AND WAGERING.	
SECT. 10. INVITING MINORS TO BET OR BORROW MONEY . . . . .	760
SECT. 11. OFFENCES RELATING TO BURIAL AND CREMATION . . . . .	760
SECT. 12. DRUNKENNESS . . . . .	760
<b>PART XXIX. OFFENCES AFFECTING PUBLIC HEALTH, SAFETY AND CONVENIENCE . . . . .</b>	<b>761</b>
SECT. 1. UNWHOLESOME FOOD. . . . .	761
SECT. 2. OFFENCES BY INNKEEPERS . . . . .	761
<b>PART XXX. OFFENCES RELATING TO MERCHANT SHIPPING . . . . .</b>	<b>762</b>
SECT. 1. LEAVING SEAMEN BEHIND . . . . .	762
SECT. 2. PERSUADING SEAMEN TO DESERT . . . . .	762
SECT. 3. MISCONDUCT ENDANGERING SHIP . . . . .	762
SECT. 4. FAILURE TO RENDER AID AFTER COLLISION . . . . .	762
SECT. 5. SENDING UNSEAWORTHY SHIP TO SEA . . . . .	762
<b>PART XXXI. OFFENCES RELATING TO TRADE . . . . .</b>	<b>762</b>
SECT. 1. CONSPIRACY TO INJURE TRADERS . . . . .	762
SECT. 2. DECRYING OR ENHANCING PRICE OF GOODS OR SHARES . . . . .	764
SECT. 3. OFFENCES IN RELATION TO TRADE DISPUTES . . . . .	765
SUB-SECT. 1. DISPUTES BETWEEN EMPLOYERS AND WORKMEN GENERALLY. <i>See</i> TRADE AND TRADE UNIONS.	
SUB-SECT. 2. CASES PRIOR TO THE CONSPIRACY AND PROTECTION OF PROPERTY ACT, 1875 . . . . .	765
SUB-SECT. 3. OFFENCES UNDER THE CONSPIRACY AND PROTECTION OF PROPERTY ACTS . . . . .	765
A. Intimidation or Injury . . . . .	765
B. Persistently Following . . . . .	767
C. Hiding or Deprivation of Property . . . . .	767



	PAGE
D. Watching and Besetting . . . . .	767
E. Form of Indictment or Conviction . . . . .	767
F. Saving as to Sea Service . . . . .	767
SECT. 4. TRUCK ACT. <i>See</i> MASTER AND SERVANT.	
SECT. 5. FALSE TRADE MARKS AND TRADE DESCRIPTIONS. <i>See</i> TRADE MARKS AND DESIGNS.	
PART XXXII. LIBELS AND INDICTABLE SLANDERS. <i>See</i> LIBEL AND SLANDER.	
PART XXXIII. OFFENCES AGAINST THE PERSON . . . . .	769
SECT. 1. HOMICIDE . . . . .	769
SUB-SECT. 1. MURDER AND MANSLAUGHTER . . . . .	769
A. In General . . . . .	769
B. The Person Killing . . . . .	771
C. The Person Killed . . . . .	771
D. Cause of Death . . . . .	772
E. Time of Death . . . . .	776
F. Provocation . . . . .	776
(a) Effect of Provocation . . . . .	776
(b) Effect of express Malice . . . . .	778
(c) Effect of Interval of Time . . . . .	778
(d) Sufficiency of Provocation . . . . .	779
i. In General . . . . .	779
ii. Words and Gestures . . . . .	779
iii. Assault . . . . .	780
iv. Discovery of Adultery . . . . .	781
G. In Combat . . . . .	782
(a) Deliberate Contest . . . . .	782
(b) Sudden Quarrel . . . . .	783
H. In course of Resistance to legal Process . . . . .	784
(a) Lawful Arrest . . . . .	784
(b) Arrest informal or illegal . . . . .	785
I. In course of committing unlawful Act . . . . .	787
J. In course of committing wanton Act . . . . .	789
K. Killing by Request or to save Life . . . . .	790
L. Agreements to commit Suicide . . . . .	790
M. By improper Performance of lawful Act . . . . .	791
(a) In exercise of Authority . . . . .	791
(b) Correction of Children . . . . .	791
N. By neglect of Duty . . . . .	792
(a) Neglect of Children . . . . .	792
(b) Neglect of aged and helpless Persons . . . . .	794
(c) In course of Employment . . . . .	796
i. In General . . . . .	796
ii. Railways . . . . .	797
iii. Ships . . . . .	797
iv. Mines and Machinery . . . . .	798
O. By Negligence . . . . .	798
(a) Use of Firearms . . . . .	798
(b) Driving and Riding . . . . .	798
(c) Navigation . . . . .	800
(d) In course of Business . . . . .	800
(e) Custody of Animals . . . . .	800
(f) Medical Treatment . . . . .	800
(g) Contributory Negligence . . . . .	802
P. Indictment and Trial . . . . .	802
Q. Evidence . . . . .	803
(a) In General . . . . .	803
(b) Dying Declarations . . . . .	804
i. Form and Contents . . . . .	804
ii. Admissibility in General . . . . .	805
iii. Belief in impending Death . . . . .	807
iv. Proof of Belief in impending Death . . . . .	810

	PAGE
SUB-SECT. 2. JUSTIFIABLE HOMICIDE . . . . .	812
SUB-SECT. 3. EXCUSABLE HOMICIDE . . . . .	813
SECT. 2. SUICIDE—MAIMING . . . . .	814
SECT. 3. CONSPIRACY TO MURDER . . . . .	814
SECT. 4. INCITEMENT TO MURDER . . . . .	814
SECT. 5. THREATENING TO MURDER . . . . .	815
SECT. 6. FELONIOUS ASSAULTS . . . . .	815
SUB-SECT. 1. FORM OF ASSAULT . . . . .	815
A. Wounding . . . . .	815
B. Shooting . . . . .	816
C. Grievous Bodily Harm . . . . .	818
D. Actual Bodily Harm . . . . .	819
SUB-SECT. 2. THE INTENT . . . . .	819
A. Intent to Murder . . . . .	819
B. Intent to Maim, Disfigure, Disable, or do Grievous Bodily Harm . . . . .	820
C. Intent to resist Lawful Arrest . . . . .	822
SECT. 7. ASSAULT . . . . .	823
SUB-SECT. 1. WHAT IS AN ASSAULT . . . . .	823
SUB-SECT. 2. GROUNDS OF DEFENCE . . . . .	825
A. Consent . . . . .	825
B. Accident . . . . .	826
C. Lawful Correction . . . . .	826
(a) The Right to Correct . . . . .	826
(b) The Method of Correction . . . . .	828
D. Self-Defence . . . . .	828
E. Defence of Another . . . . .	829
F. Defence of Property . . . . .	829
G. Lawful Arrest, Detention or Removal . . . . .	831
H. Resistance to unlawful Process . . . . .	832
SUB-SECT. 3. FALSE IMPRISONMENT . . . . .	833
SUB-SECT. 4. EFFECT OF CIVIL ACTION PENDING FOR ASSAULT . . . . .	834
SUB-SECT. 5. ASSAULTS ON JUDICIAL OFFICIALS . . . . .	834
SUB-SECT. 6. INDECENT ASSAULT . . . . .	834
SECT. 8. BATTERY . . . . .	834
SECT. 9. UNLAWFUL WOUNDING AND INFLECTING GRIEVOUS BODILY HARM . . . . .	834
SECT. 10. ADMINISTERING POISON . . . . .	835
SUB-SECT. 1. THE ADMINISTRATION . . . . .	835
SUB-SECT. 2. THE INTENT . . . . .	836
SECT. 11. PROCURING ABORTION . . . . .	836
SUB-SECT. 1. SUPPLYING NOXIOUS THING . . . . .	836
SUB-SECT. 2. ADMINISTERING NOXIOUS THING . . . . .	837
SUB-SECT. 3. USING INSTRUMENTS . . . . .	838
SECT. 12. CONCEALMENT OF BIRTH . . . . .	839
SUB-SECT. 1. THE BODY . . . . .	839
SUB-SECT. 2. DEATH AND DISPOSITION . . . . .	839
SUB-SECT. 3. THE CONCEALMENT . . . . .	841
SECT. 13. OFFENCES AGAINST WOMEN AND GIRLS . . . . .	842
SUB-SECT. 1. RAPE . . . . .	842
A. Nature of Offence . . . . .	842
B. By Whom committed . . . . .	843
C. Method of Commission . . . . .	843
D. Consent . . . . .	843
E. Corroboration . . . . .	846
SUB-SECT. 2. DEFILEMENT OF GIRLS . . . . .	846
SUB-SECT. 3. DEFILEMENT OF IDIOTS AND IMBECILES . . . . .	849

	PAGE
SUB-SECT. 4. OWNER OR OCCUPIER OF PREMISES PERMITTING DEFILEMENT . . . . .	849
SUB-SECT. 5. PROCURATION . . . . .	849
A. Offences under Criminal Law Amendment Acts . . . . .	849
B. Detention of Women for Immoral Purposes . . . . .	850
C. Seduction of Children . . . . .	851
SUB-SECT. 6. LIVING ON IMMORAL EARNINGS . . . . .	851
SUB-SECT. 7. INCEST . . . . .	852
SUB-SECT. 8. INDECENT ASSAULT . . . . .	853
SECT. 14. CRUELTY TO CHILDREN . . . . .	854
SUB-SECT. 1. NEGLECT TO PROVIDE FOR CHILDREN . . . . .	854
A. At Common Law . . . . .	854
B. By Statute . . . . .	855
SUB-SECT. 2. ABANDONMENT OR EXPOSURE OF CHILD . . . . .	856
SUB-SECT. 3. TRIAL . . . . .	857
SECT. 15. ABDUCTION . . . . .	857
SUB-SECT. 1. AT COMMON LAW . . . . .	857
SUB-SECT. 2. ABDUCTION OF HEIRESS . . . . .	857
SUB-SECT. 3. GIRLS UNDER 18 . . . . .	858
SUB-SECT. 4. GIRLS UNDER 16 . . . . .	858
SUB-SECT. 5. CHILDREN UNDER 14 . . . . .	861
SECT. 16. INJURY BY EXPLOSIVES OR DESTRUCTIVE SUBSTANCE . . . . .	862
SECT. 17. SETTING MAN-TRAPS AND SPRING-GUNS . . . . .	862
SECT. 18. FURIOUS OR WANTON DRIVING OR RIDING . . . . .	863
SECT. 19. ENDANGERING SAFETY OF RAILWAY PASSENGERS . . . . .	865
SECT. 20. SLAVE-TRADE—KIDNAPPING . . . . .	865
SECT. 21. NEGLECT . . . . .	865
PART XXXIV. OFFENCES AGAINST PROPERTY . . . . .	865
SECT. 1. LARCENY . . . . .	865
SUB-SECT. 1. TAKING BY FRAUD . . . . .	865
A. Possession only parted with . . . . .	865
(a) Obtaining by a Trick . . . . .	865
i. In General . . . . .	865
ii. By Personation . . . . .	866
iii. Obtaining Delivery of Goods . . . . .	867
iv. Money Changing . . . . .	869
v. Other Cases . . . . .	870
(b) Obtaining from a Person with limited Authority . . . . .	871
B. Possession and Property parted with . . . . .	873
SUB-SECT. 2. TAKING BY INTIMIDATION . . . . .	875
SUB-SECT. 3. TAKING UNDER MISTAKE . . . . .	876
SUB-SECT. 4. TAKING BY FINDING . . . . .	877
A. The Intent. . . . .	877
B. Belief of Ability to discover Owner . . . . .	880
SUB-SECT. 5. THE CARRYING AWAY . . . . .	881
SUB-SECT. 6. BY CONSENT OF OWNER . . . . .	883
SUB-SECT. 7. THE INTENT . . . . .	884
A. Formation of Intent . . . . .	884
B. Nature of Intent. . . . .	885
C. Claim of Right . . . . .	888
SUB-SECT. 8. LARCENY BY PERSONS HAVING PHYSICAL POSSESSION ONLY . . . . .	890
A. By Servants . . . . .	890
B. By Persons with bare Custody . . . . .	893
SUB-SECT. 9. LARCENY BY A BAILEE . . . . .	894
A. Who may be a Bailee . . . . .	894
B. Nature of Offence . . . . .	895
(a) In General . . . . .	895
(b) Forms of Bailment . . . . .	896

	PAGE
SUB-SECT. 10. LARCENY IN A DWELLING-HOUSE . . . . .	899
SUB-SECT. 11. LARCENY FROM THE PERSON . . . . .	899
SUB-SECT. 12. LARCENY FROM SHIPS, DOCKS, ETC. . . . .	899
SUB-SECT. 13. LARCENY BY TENANTS OR LODGERS . . . . .	900
SUB-SECT. 14. LARCENY OF OWN GOODS. . . . .	900
A. By Owner . . . . .	900
B. By Part-Owner . . . . .	901
SUB-SECT. 15. HUSBAND AND WIFE . . . . .	902
A. Taking by one of Goods of the other . . . . .	902
B. Taking of Husband's Goods by another. . . . .	903
SUB-SECT. 16. SUBJECTS OF LARCENY . . . . .	904
A. In General . . . . .	904
B. Things forming Part of Realty . . . . .	905
C. Animals . . . . .	905
SUB-SECT. 17. LARCENY OF PARTICULAR PROPERTY . . . . .	906
A. Cattle, etc. . . . .	906
B. Documents of Title to Lands and other Legal Documents . . . . .	907
C. Valuable Securities . . . . .	908
D. Fixtures . . . . .	910
E. Trees and Plants. . . . .	910
F. Goods in Process of Manufacture . . . . .	911
G. Postal Packets, etc. . . . .	911
H. Gas, Water and Electricity . . . . .	911
SUB-SECT. 18. OWNERSHIP . . . . .	911
A. In General . . . . .	911
B. Possession . . . . .	912
C. Persons having Control or Special Property . . . . .	913
D. Where Owner is Dead . . . . .	915
E. Married Women . . . . .	915
F. Children . . . . .	915
G. Corporations and Societies . . . . .	916
H. County, Parish and Church Property . . . . .	917
SUB-SECT. 19. INDICTMENT . . . . .	918
SUB-SECT. 20. EVIDENCE AND PROOF . . . . .	918
SECT. 2. EMBEZZLEMENT . . . . .	921
SUB-SECT. 1. WHO IS A CLERK OR SERVANT . . . . .	921
A. In General . . . . .	921
B. Nature of Employment . . . . .	921
(a) Persons under Orders or Control of Master . . . . .	921
(b) Persons not under Orders or Control of Master . . . . .	923
C. Persons employed in Public Offices . . . . .	925
D. Officers of Companies and Societies . . . . .	926
E. Proof of Employment . . . . .	928
SUB-SECT. 2. THE RECEIPT OF PROPERTY . . . . .	928
SUB-SECT. 3. THE MISAPPROPRIATION . . . . .	930
SUB-SECT. 4. ILLEGAL OR IRREGULARLY CONSTITUTED SOCIETIES . . . . .	932
SUB-SECT. 5. EMBEZZLEMENT BY PUBLIC SERVANTS, ETC. . . . .	932
SUB-SECT. 6. EVIDENCE . . . . .	932
SUB-SECT. 7. INDICTMENT AND TRIAL . . . . .	935
SECT. 3. FRAUDULENT CONVERSION . . . . .	935
SUB-SECT. 1. OF PROPERTY ENTRUSTED . . . . .	935
SUB-SECT. 2. OF PROPERTY RECEIVED . . . . .	937
SUB-SECT. 3. CONVERSION BY TRUSTEES . . . . .	937
SUB-SECT. 4. EVIDENCE . . . . .	938
SECT. 4. FRAUDS BY OFFICERS OF PUBLIC COMPANIES . . . . .	939
SECT. 5. FALSIFICATION OF ACCOUNTS . . . . .	940

	PAGE
SECT. 6. ROBBERY . . . . .	941
SUB-SECT. 1. THE TAKING . . . . .	941
SUB-SECT. 2. THE METHOD OF TAKING . . . . .	942
A. In General . . . . .	942
B. By Force . . . . .	942
C. By Putting in Fear . . . . .	942
SUB-SECT. 3. INDICTMENT AND TRIAL . . . . .	944
SECT. 7. ASSAULT WITH INTENT TO ROB . . . . .	944
SECT. 8. EXTORTION BY THREATS . . . . .	944
SUB-SECT. 1. AT COMMON LAW . . . . .	944
SUB-SECT. 2. UTTERING A LETTER OR WRITING . . . . .	945
SUB-SECT. 3. DEMANDING WITH MENACES . . . . .	945
A. The Demand . . . . .	945
B. The Menaces . . . . .	946
C. Reasonable or Probable Cause . . . . .	947
D. Intent to Steal . . . . .	947
SUB-SECT. 4. THREATENING TO ACCUSE OF CRIME . . . . .	948
A. The Threats to Accuse . . . . .	948
B. The Crime . . . . .	948
C. The Intent . . . . .	949
SUB-SECT. 5. THREATS TO PUBLISH LIBELS . . . . .	949
SECT. 9. BURGLARY . . . . .	949
SUB-SECT. 1. BREAKING AND ENTERING . . . . .	949
A. In General . . . . .	949
B. Breaking . . . . .	950
(a) Actual Breaking . . . . .	950
(b) Constructive Breaking . . . . .	952
(c) Breaking out . . . . .	952
C. Entering . . . . .	953
D. Evidence . . . . .	953
SUB-SECT. 2. DWELLING-HOUSE . . . . .	953
A. The Building . . . . .	953
B. Occupation . . . . .	955
C. Ownership . . . . .	955
SUB-SECT. 3. THE INTENT . . . . .	957
SECT. 10. HOUSEBREAKING . . . . .	958
SUB-SECT. 1. BREAKING AND ENTERING . . . . .	958
SUB-SECT. 2. THE BUILDING . . . . .	958
SUB-SECT. 3. THE FELONY . . . . .	958
SECT. 11. LARCENY IN A DWELLING-HOUSE . . . . .	959
SECT. 12. SACRILEGE . . . . .	959
SECT. 13. FOUND BY NIGHT ARMED OR IN POSSESSION OF HOUSEBREAKING IMPLEMENTS . . . . .	960
SECT. 14. RECEIVING PROPERTY . . . . .	960
SUB-SECT. 1. WHAT IS RECEIVING . . . . .	960
SUB-SECT. 2. RECEIVING STOLEN PROPERTY . . . . .	962
SUB-SECT. 3. POSSESSION . . . . .	965
A. Proof of Possession . . . . .	965
B. What amounts to Possession . . . . .	966
SUB-SECT. 4. GUILTY KNOWLEDGE . . . . .	969
A. In General . . . . .	969
B. Evidence and Proof . . . . .	970
SUB-SECT. 5. RECENT POSSESSION . . . . .	971
SUB-SECT. 6. EXPLANATION BY ACCUSED . . . . .	972
SUB-SECT. 7. HUSBAND AND WIFE . . . . .	973
A. Receiving by Husband and Wife . . . . .	973
B. Adulterer receiving Goods taken by Wife . . . . .	974
SUB-SECT. 8. EVIDENCE AND PROOF . . . . .	975
SUB-SECT. 9 INDICTMENT AND TRIAL . . . . .	975

	PAGE
SECT. 15. COMMON LAW CHEATS . . . . .	977
SUB-SECT. 1. OBTAINING PROPERTY BY FRAUD . . . . .	977
SUB-SECT. 2. OTHER CHEATS . . . . .	980
SECT. 16. OBTAINING BY FALSE PRETENCES . . . . .	980
SUB-SECT. 1. IN GENERAL . . . . .	981
SUB-SECT. 2. THE OBTAINING. . . . .	981
A. The Thing obtained . . . . .	982
B. By Whom . . . . .	983
C. From Whom . . . . .	984
D. As Result of False Pretences . . . . .	987
E. Arising from Contract . . . . .	988
F. Execution of Valuable Security . . . . .	988
G. Acting under false Process or Authority of Court . . . . .	989
SUB-SECT. 3. THE FALSE PRETENCE . . . . .	989
A. Nature of Pretence . . . . .	992
B. Form of Pretence . . . . .	993
C. Remoteness . . . . .	994
D. Particular Kinds of Pretences . . . . .	994
(a) As to Quality or Value . . . . .	996
(b) In relation to Cheques, Banknotes, etc. . . . .	999
(c) As to Quantity or Weight . . . . .	999
(d) As to Business . . . . .	1000
(e) As to Authority or Ownership . . . . .	1002
(f) As to Identity or Description . . . . .	1002
(g) False Accounts . . . . .	1003
(h) Other Cases. . . . .	1004
E. Continuing Pretences . . . . .	1004
SUB-SECT. 4. INTENT TO DEFRAUD . . . . .	1006
SUB-SECT. 5. KNOWLEDGE OF FALSITY . . . . .	1006
SUB-SECT. 6. EVIDENCE AND PROOF . . . . .	1006
A. In General . . . . .	1007
B. Proof of Falsity . . . . .	1008
SUB-SECT. 7. INDICTMENT . . . . .	1009
SECT. 17. ATTEMPTS TO OBTAIN BY FALSE PRETENCES . . . . .	1010
SECT. 18. CHEATING AT PLAY . . . . .	1011
SECT. 19. PRACTICE OF WITCHCRAFT, PALMISTRY, ETC. . . . .	1011
SECT. 20. OBTAINING CREDIT BY FRAUD . . . . .	1012
SECT. 21. FRAUDULENT CONVEYANCES . . . . .	1012
SUB-SECT. 1. UNDER 13 ELIZ. C. 5 . . . . .	1012
SUB-SECT. 2. UNDER DEBTORS ACT . . . . .	1013
SECT. 22. DESTRUCTION, CONCEALMENT, ETC., OF DOCUMENTS . . . . .	1013
SECT. 23. PERSONATION . . . . .	1013
SUB-SECT. 1. AT COMMON LAW . . . . .	1013
SUB-SECT. 2. OF SEAMEN AND SOLDIERS. . . . .	1014
SUB-SECT. 3. OF OWNERS OF STOCK . . . . .	1014
SECT. 24. CORRUPTION OF AND BY AGENTS—BRIBERY . . . . .	1015
SECT. 25. CONSPIRACY TO DEFRAUD . . . . .	1015
SUB-SECT. 1. NATURE OF OFFENCE. . . . .	1018
SUB-SECT. 2. EVIDENCE AND PROOF . . . . .	1019
SUB-SECT. 3. INDICTMENT . . . . .	1020
SECT. 26. MALICIOUS DAMAGE TO PROPERTY . . . . .	1020
SUB-SECT. 1. MALICE . . . . .	1020
A. Definition . . . . .	1020
B. What constitutes Malice . . . . .	1020
C. Against Whom or What Malice is directed . . . . .	1021

	PAGE
SUB-SECT. 2. INTENT TO INJURE OR DEFRAUD. . . . .	1022
A. In General . . . . .	1022
B. Evidence and Proof of Intent . . . . .	1022
SUB-SECT. 3. CLAIM OF RIGHT . . . . .	1023
SUB-SECT. 4. PROPERTY IN POSSESSION OF ACCUSED . . . . .	1026
SUB-SECT. 5. ARSON . . . . .	1026
A. At Common Law . . . . .	1026
B. Setting on Fire . . . . .	1026
C. Setting Fire to Dwelling House any Person being therein . . . . .	1027
D. Setting Fire to Houses and Buildings . . . . .	1027
(a) House, Dwelling-House, Building . . . . .	1027
(b) Outhouse, Barn, Shed, Stable . . . . .	1028
(c) Warehouse . . . . .	1029
(d) Building used in carrying on Trade . . . . .	1029
(e) Intent to injure or defraud . . . . .	1029
E. Setting Fire to Goods and endangering Building . . . . .	1029
F. Setting Fire to Crops, etc. . . . .	1030
G. Setting Fire to Stacks of Corn, etc. . . . .	1030
H. Setting Fire to Ship or Vessel . . . . .	1030
I. Setting Fire to Government Dockyards, Ships, etc.. . . . .	1031
SUB-SECT. 6. DAMAGE TO BUILDINGS BY EXPLOSIVES . . . . .	1031
SUB-SECT. 7. RIOTOUS DEMOLITION . . . . .	1031
SUB-SECT. 8. DEMOLITION OR DAMAGE BY TENANTS . . . . .	1033
SUB-SECT. 9. DAMAGING GOODS IN COURSE OF MANUFACTURE, ETC. . . . .	1033
SUB-SECT. 10. DAMAGING MACHINERY . . . . .	1033
SUB-SECT. 11. DESTROYING TREES, ETC. . . . .	1034
SUB-SECT. 12. DAMAGE TO MINES, ETC. . . . .	1034
SUB-SECT. 13. DAMAGE TO WATERWAYS, PONDS, ETC. . . . .	1035
SUB-SECT. 14. DAMAGE TO RAILWAYS . . . . .	1035
SUB-SECT. 15. DAMAGE TO TELEGRAPHS . . . . .	1036
SUB-SECT. 16. DAMAGE TO SHIPPING . . . . .	1037
SUB-SECT. 17. INJURY TO ANIMALS. . . . .	1037
SUB-SECT. 18. THREATS TO BURN OR DESTROY . . . . .	1038
SUB-SECT. 19. OTHER DAMAGE TO OR ON REAL AND PERSONAL PROPERTY . . . . .	1038
A. In General . . . . .	1038
B. Fair and Reasonable Supposition of Right . . . . .	1039
C. Amount exceeding £5 . . . . .	1040
D. Amount not exceeding £5 . . . . .	1040
E. Damage to Grass . . . . .	1040
F. Damage to Milk . . . . .	1041
SUB-SECT. 20. PROCEEDINGS UNDER MALICIOUS DAMAGE ACTS . . . . .	1041
PART XXXV. FORGERY . . . . .	1041
SECT. 1. DEFINITION . . . . .	1041
SECT. 2. MAKING OR ALTERING DOCUMENT . . . . .	1043
SUB-SECT. 1. IN GENERAL . . . . .	1043
SUB-SECT. 2. DATE. . . . .	1043
SUB-SECT. 3. AMOUNT . . . . .	1044
SECT. 3. SIGNATURE . . . . .	1045
SUB-SECT. 1. IN GENERAL . . . . .	1045
SUB-SECT. 2. IN NAME OF EXISTING PERSON . . . . .	1045
SUB-SECT. 3. IN NAME OF FICTITIOUS PERSON . . . . .	1046
SUB-SECT. 4. IN ASSUMED NAME . . . . .	1047
SUB-SECT. 5. AUTHORITY TO SIGN . . . . .	1048
SECT. 4. INCOMPLETE, INVALID OR VOID DOCUMENTS . . . . .	1049
SUB-SECT. 1. INCOMPLETE DOCUMENTS . . . . .	1049
SUB-SECT. 2. INVALID OR VOID DOCUMENTS . . . . .	1050
SUB-SECT. 3. RESEMBLANCE TO GENUINE DOCUMENT . . . . .	1051

	PAGE
SECT. 5. INTENT TO DEFRAUD . . . . .	1052
SUB-SECT. 1. IN GENERAL . . . . .	1052
SUB-SECT. 2. EVIDENCE AND PROOF . . . . .	1053
SECT. 6. THE DOCUMENT FORGED. . . . .	1055
SUB-SECT. 1. WHAT IS A DOCUMENT . . . . .	1055
SUB-SECT. 2. WILL . . . . .	1056
SUB-SECT. 3. DEED OR BOND. . . . .	1056
SUB-SECT. 4. BANK NOTE . . . . .	1057
SUB-SECT. 5. VALUABLE SECURITY . . . . .	1057
A. Scrip, Debenture. . . . .	1057
B. Bill of Exchange. . . . .	1057
C. Promissory Note. I.O.U. . . . .	1058
D. Warrant for Payment of Money . . . . .	1058
E. Order for Payment of Money—Request. . . . .	1059
F. Undertaking—Guarantee . . . . .	1060
G. Receipt—Accountable Receipt . . . . .	1061
H. Foreign Negotiable Instruments . . . . .	1063
I. Other Cases . . . . .	1063
SUB-SECT. 6. DOCUMENT OF TITLE TO GOODS . . . . .	1063
SUB-SECT. 7. RECORDS AND PROCESSES OF COURT . . . . .	1064
SUB-SECT. 8. REGISTER OF BIRTHS, MARRIAGES AND DEATHS . . . . .	1065
SUB-SECT. 9. REVENUE PAPER—STAMPS . . . . .	1065
SUB-SECT. 10. DOCUMENT UNDER MERCHANT SHIPPING ACTS . . . . .	1065
SUB-SECT. 11. CERTIFICATES OF CHARACTER . . . . .	1066
SUB-SECT. 12. FALSIFICATION OF ACCOUNTS . . . . .	1066
SUB-SECT. 13. TELEGRAM . . . . .	1066
SUB-SECT. 14. OTHER CASES . . . . .	1066
SECT. 7. FORGERY OF SEALS AND DIES. . . . .	1067
SUB-SECT. 1. SEALS . . . . .	1067
SUB-SECT. 2. DIES FOR STAMPING PLATE, ETC. . . . .	1067
SECT. 8. UTTERING . . . . .	1067
SUB-SECT. 1. IN GENERAL . . . . .	1067
SUB-SECT. 2. EVIDENCE OF GUILTY KNOWLEDGE . . . . .	1069
SUB-SECT. 3. INTENT TO DEFRAUD . . . . .	1070
SECT. 9. POSSESSION OF FORGED DOCUMENT, SEALS, DIES, ETC. . . . .	1071
SUB-SECT. 1. BANK NOTES . . . . .	1071
SUB-SECT. 2. ENGRAVED PLATES, ETC. . . . .	1072
SECT. 10. DEMANDING PROPERTY ON FORGED INSTRUMENT . . . . .	1072
SECT. 11. ACKNOWLEDGMENT OF BAIL, RECOGNISANCES, ETC.. . . .	1073
SECT. 12. INDICTMENT AND EVIDENCE . . . . .	1073
SUB-SECT. 1. INDICTMENT . . . . .	1073
SUB-SECT. 2. PRODUCTION OF FORGED DOCUMENT . . . . .	1073
SUB-SECT. 3. HANDWRITING. <i>See</i> EVIDENCE. . . . .	
SUB-SECT. 4. PRINCIPAL AND ACCESSORIES . . . . .	1073
SECT. 13. PUNISHMENT. . . . .	1074

PART XXXVI. DECEIT BY FORTUNE TELLING, WITCHCRAFT, SLEIGHT OF HAND, ETC. . . . .	1074
---	------

PART XXXVII. OFFENCES RELATING TO ROYAL FORCES . . . . .	1076
--	------



<i>Adulteration</i> . . . . .	<i>See</i> AGRICULTURE ; FOOD AND DRUGS.	<i>Libel, Criminal.</i> . . . .	<i>See</i> LIBEL AND SLANDER.
<i>Companies, Offences relating to</i> . . . . .	.. COMPANIES.	<i>Licensing Offences</i> . . . .	.. INTOXICATING LIQUORS.
<i>Convicts</i> . . . . .	.. PRISONS.	<i>Nuisances</i> . . . . .	.. NUISANCE ; PUBLIC HEALTH, AND LOCAL ADMINISTRATION.
<i>Coroners' Courts</i> . . . .	.. CORONERS.	<i>Offences against the Royal Marriages Acts</i> . . . . .	.. CONSTITUTIONAL LAW.
<i>Criminal Lunatics</i> . . . .	.. LUNATICS AND PERSONS OF UNSOUND MIND.	<i>Offences Triable Summarily</i> . . . . .	.. MAGISTRATES ; AND <i>titles passim.</i>
<i>Cruelty to Animals</i> . . . .	.. ANIMALS.	<i>Petty Sessions</i> . . . . .	.. MAGISTRATES.
<i>Ecclesiastical Offences</i> . . . .	.. ECCLESIASTICAL LAW.	<i>Poaching</i> . . . . .	.. ANIMALS ; GAME.
<i>Election Offences</i> . . . .	.. ELECTIONS.	<i>Prisons</i> . . . . .	.. PRISONS.
<i>Extradition</i> . . . . .	.. EXTRADITION AND FUGITIVE OFFENDERS.	<i>Quarter Sessions</i> . . . .	.. COURTS ; MAGISTRATES.
<i>Game Laws</i> . . . . .	.. GAME.	<i>Sheriffs</i> . . . . .	.. SHERIFFS AND BAILIFFS.
<i>Habeas Corpus</i> . . . . .	.. CROWN PRACTICE.	<i>Slander, Criminal</i> . . . .	.. LIBEL AND SLANDER.
<i>Highway Offences</i> . . . .	.. HIGHWAYS, STREETS AND BRIDGES ; STREETS AND AERIAL TRAFFIC.	<i>Summary Jurisdiction, Courts of</i> . . . . .	.. MAGISTRATES.
<i>Inebriate Reformatories</i> . . . . .	.. PRISONS.	<i>Vagrancy</i> . . . . .	.. MAGISTRATES ; POOR LAW.
<i>Jurors</i> . . . . .	.. JURIES.	<i>Wild Birds</i> . . . . .	.. ANIMALS.
<i>Justices of the Peace</i> . . . .	.. COURTS ; MAGISTRATES.		

## Part I.—Principles of Criminal Liability.

### SECT. 1.—THE NATURE OF CRIME IN GENERAL—DEFINITIONS.

1. *Crime.*—The word "crime" is a general term, & the subdivision of it is into felonies & misdemeanours (BAGLEY, J.).

The word "crime" has the same force as "offence." The proper definition of the word "crime" is an offence for which the law awards punishment. Such crimes are subdivided into three classes, treasons, felonies & misdemeanours (LITTLEDALE, J.).—MANN v. OWEN (1829), 9 B. & C. 595 ; 4 Man. & Ry. K. B. 449 ; 109 E. R. 222 ; *sub nom.* MAN v. OWEN, 7 L. J. O. S. K. B. 255.

2. ————(1) The proper meaning of "crime" is an indictable offence (MARTIN, B.).

(2) What then is a civil proceeding as contradistinguished from a criminal proceeding? The true test is this, if the subject-matter be of a personal character, that is, if either money or goods are sought to be recovered by means of the proceeding, that is a civil proceeding ; but, if the proceeding is one which may affect debt. at once, by the imprisonment of his body, in the event of a verdict of guilty, so that he is liable as a public offender, that is a criminal proceeding (PLATT, B.).—A.-G. v. RADLOFF (1854), 10 Exch. 84 ; 23 L. J. Ex. 240 ; 23 L. T. O. S. 191 ; 18 Jur. 555 ; 2 W. R. 566 ; 2 C. L. R. 1116 ; 156 E. R. 366.

*Annotations.*—*Reid.* Parker v. Green (1862), 2 B. & S. 299 ; A.-G. v. Bradlaugh (1885), 14 Q. B. D. 667 ; Conybeare v. London School Board (1890), 7 T. L. R. 4. *Mentd.* A.-G. v. Sillem, Alexandra Case (1864), 33 L. J. Ex. 92 ; R. v. Hausmann (1909), 73 J. P. 516.

3. ————An illegal act which is a wrong against the public welfare seems to have the

necessary elements of a crime (LORD ESHER, M.R.).—MOGUL S.S. Co. v. MCGREGOR, GOW & Co. (1889), 23 Q. B. D. 598 ; 58 L. J. Q. B. 465 ; 61 L. T. 820 ; 53 J. P. 709 ; 37 W. R. 756 ; 5 T. L. R. 658 ; 6 Asp. M. L. C. 455, C. A. ; *affd.*, [1892] A. C. 25, H. L.

*Annotations.*—*Mentd.* *Re* Apollinaris Co.'s Trade Marks, "Apollinaris," "Friedrichshall" & "Hunyadi Janos" (1890), 63 L. T. 162 ; *R. v.* Whitechurch (1890), 24 Q. B. D. 420 ; Connor v. Kent, Gibson v. Lawson, Curran v. Treleaven, [1891] 2 Q. B. 545 ; Jenkinson v. Nield (1892), 8 T. L. R. 540 ; Maxim-Nordenfellt Guns & Ammunition Co. v. Nordenfellt (1893), 41 W. R. 604 ; Temperton v. Russell, [1893] 1 Q. B. 715 ; Wright v. Hennessey (1894), 11 T. L. R. 14 ; Trollope v. London Building Trades Federation (1895), 11 T. L. R. 228 ; Lyons v. Wilkins, [1896] 1 Ch. 811 ; Newton v. Amalgamated Musicians' Union (1896), 40 Sol. Jo. 716 ; Ajello v. Worsley, [1898] 1 Ch. 274 ; Allen v. Flood, [1898] A. C. 1 ; Huttley v. Simmons, [1898] 1 Q. B. 181 ; Boots v. Grundy (1900), 82 L. T. 769 ; Elliman v. Carrington (1901), 84 L. T. 858 ; Quinn v. Leathem, [1901] A. C. 495 ; Gliban v. National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600 ; South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. 239 ; Denaby & Cadeby Main Collieries v. Yorkshire Miners' Assocn., [1906] A. C. 384 ; Conway v. Wade, [1908] 2 K. B. 844 ; Hyams v. Stuart King, [1908] 2 K. B. 696 ; National Phonograph Co. v. Edison Bell Consolidated Phonograph Co., [1908] 1 Ch. 335 ; United Shoe Machinery Co. of Canada v. Brunet, [1909] A. C. 330 ; North Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439 ; A.-G. of Commonwealth of Australia v. Adelaide S.S. Co., [1913] A. C. 781 ; *Re* Bowman, Secular Soc. v. Bowman, [1915] 2 Ch. 447 ; Larkin v. Long, [1915] A. C. 814 ; Evans v. Heathcote, [1918] 1 K. B. 418 ; Montefiore v. Menday Motor Components Co., [1918] 2 K. B. 241 ; Thomas v. Moore, [1918] 1 K. B. 555 ; Pratt v. British Medical Assocn., [1919] 1 K. B. 244 ; Valentine v. Hyde, [1919] 2 Ch. 129 ; Davies v. Thomas, [1920] 2 Ch. 189 ; *Re* Wallace, Champion v. Wallace, [1920] 2 Ch. 274 ; Rawlings v. General Trading Co., [1921] 1 K. B. 635 ; Ware & De v. Shipping Federation (1923), 39 T. L. R. 710 ; Sorrell v. Smith, [1923] 2 Ch. 32.

### PART I. SECT. 1.

1 i. *Crime.*—Every crime is wicked & felonious.—H.M. ADVOCATE v. EDMISTON (1866), 5 Irv. 219.—SCOT.

a. *Applicability of common law of England.—In criminal matters.—To Canada.*—The criminal common law of England is still in force in Canada, except in so far as repealed, either

expressly or by implication.—BROUSSEAU v. R. (1917), 56 S. C. R. 22 ; 39 D. L. R. 114 ; 29 Can. Crim. Cas. 207.—CAN.

b. ————*To Manitoba.—When restricted.*—The common criminal law of England of July 15, 1870, is the law of Manitoba saved as altered, varied, modified, or affected by the

Code, or it is preserved under the Code, except in so far as it is thereby expressly or by implication repealed ; & it is operative even in case provided for by the Code unless there is such repugnancy as to cause the Code to prevail.—R. v. ELNICK, R. v. CLEMENTS, R. v. BURDIE (1920), 2 W. W. R. 606 ; 53 D. L. R. 298 ; 30 Man. L. R. 415.—CAN.

## 4. — Application to summary proceedings.]

—A member of an English school board was imprisoned in Ireland by a ct. of summary jurisdiction under Criminal Law & Procedure (Ireland) Act, 1887 (c. 20), for unlawfully taking part in a criminal conspiracy to interfere with the administration of the law in a proclaimed district in Ireland:—*Held*: the member had been "punished with imprisonment for a crime" within the meaning of Elementary Education Act, 1870 (c. 75), Part I., Sched. II., r. 14.

Conspiracy is a crime in Ireland as in England. It is an offence against the Crown for which an indictment lies at common law. The circumstance that the Crown did not proceed against pltf. for conspiracy by indictment, but preferred the charge upon which he was convicted before a ct. of summary jurisdiction in Ireland, cannot alter the nature of the charge (DAY, J.).—*CONYBEARE v. LONDON SCHOOL BOARD*, [1891] 1 Q. B. 118; 60 L. J. Q. B. 44; 63 L. T. 651; 55 J. P. 151; 39 W. R. 288; 7 T. L. R. 4; 17 Cox, C. C. 191, D. C.

5. — Not acts legalised by statute.]—*CONNOR v. KENT*, *GIBSON v. LAWSON*, *CURRAN v. TRELEAVEN*, No. 808, *post*.

6. Criminal offence.—Avoiding payment of fare.—*Railway Clauses Consolidation Act, 1845* (c. 20), s. 103.]—An offence under sect. 103 of the above Act for travelling in a railway carriage without having paid the fare, is a criminal offence, & the penalty recoverable under the sect. is not a "civil debt" within the terms of Summary Jurisdiction Act, 1879 (c. 49), s. 6, nor do the provisions of sect. 35 of that Act apply in such a case.—*R. v. PAGET* (1881), 8 Q. B. D. 151; 51 L. J. M. C. 9; 45 L. T. 794; 46 J. P. 151; 30 W. R. 336, D. C.

*Annotations*:—*Reid*. *Kennard v. Simmons* (1884), 48 J. P. 225; *Ex p. Newson* (1911), 104 L. T. 892; & *Moss* (1896), 74 L. T. 551; *R. v. Burrows, etc.*, JJ., *Ex p. Wilson* (1897), 77 L. T. 338.

7. — Tramways Act, 1870 (c. 78), s. 51.]

—Sect. 56 of the above Act all tolls, penalties, & charges under the Act might be recovered & enforced under 11 & 12 Vict. c. 43, & any Act amending the same:—*Held*: proceedings taken under sect. 51 of the above Act against a person for avoiding payment of fare were proceedings in respect of a criminal offence, & an action for malicious prosecution would lie against the persons taking them.

The offence amounts to a misdemeanour, & if the peculiar mode of dealing with it had not been enacted by the same statute which creates the offence, it would be punishable, upon an indictment, as a misdemeanour, & subject the offender to fine or imprisonment. It is perfectly clear to my mind that this is a criminal offence (LORD ESHER, M.R.).—*RAYSON v. SOUTH LONDON TRAMWAYS CO.*, [1893] 2 Q. B. 304; 62 L. J. Q. B. 593; 69 L. T. 491; 58 J. P. 20; 42 W. R. 21; 9 T. L. R. 579; 37 Sol. Jo. 630; 4 R. 522, C. A.

*Annotations*:—*Reid*. *Re Solicitor, Ex p. Incorporated Law Soc.* (1893), 69 L. T. 522; *Wiffen v. Bailey & Romford*

c. Criminal proceedings.]—When a statute authorises the imprisonment of an offender against its provisions, whether it be as the primary punishment for the offence or as punishment in the last resort, the proceedings against him must be regarded as criminal.—*R. v. WHITE*, 2 SIDNEY (1860), 1 Q. S. R. 9.—

d. —.]—Insolvents were found guilty, under Indian Insolvency Act, s. 50, of wilfully preventing or purposely withholding the production of

papers relating to their affairs, & sentenced to three months' imprisonment:—*Held*: the proceedings, so far as they resulted in imprisonment, amounted to a criminal case.—*Re VALLABHDAS JAIRAM* (1903), 1 L. R. 27 Bom. 394.—*IND.*

e. —.]—Accused was convicted of having in his possession without lawful authority opium without first obtaining a licence, & was condemned to pay a fine of \$200 & costs & in default of payment to imprisonment. In default

U. C., [1915] 1 K. B. 800. *Mentd.* *Knight v. North Metropolitan Tram. Co.* (1898), 14 T. L. R. 286.

8. — Disobedience to bye-law.]—The Ct. of Appeal has no jurisdiction to hear an appeal from a decision of the High Ct. of Justice upon a case stated by justices as to an information for contravening the bye-laws of a school constituted under Elementary Education Act, 1874 (c. 75), for the information relates to a criminal matter within the meaning of Jud. Act, 1873 (c. 66), s. 47.

It is clear that the matter complained of is in truth a criminal offence, for it is disobedience to bye-laws, which are enforceable as part of the law of the land, & a person guilty of disobedience to them is liable to a penalty. This is sufficient to constitute a criminal matter; & we have no jurisdiction to hear this appeal (BRAMWELL, L.J.).—*MELLOR v. DENHAM* (1880), 5 Q. B. D. 467; 49 L. J. M. C. 89; 42 L. T. 493; 44 J. P. 472, C. A.

*Annotations*:—*Apld.* *R. v. Whitchurch* (1881), 7 Q. B. D. 534. *Consd.* *A.-G. v. Bradlaugh* (1885), 14 Q. B. D. 667; *Seaman v. Burley*, [1896] 2 Q. B. 344; *Southport Corpn. v. Birkdale U. D. C.* (1897), 76 L. T. 318. *Reid.* *R. v. Paget* (1881), 8 Q. B. D. 151; *Saunders v. Richardson* (1881), 45 J. P. 782; *R. v. Tyler & International Commercial Co.*, [1891] 2 Q. B. 588; *Southwark & Vauxhall Water Co. v. Hampton U. C.*, [1899] 1 Q. B. 273; *Devonport Corpn. v. Tozer* (1903), 67 J. P. 269; *R. v. Manchester Local Profiteering Committee, Ex p. L. & Y. Ry.* (1920), 89 L. J. K. B. 1089. *Mentd.* *R. v. Lewis & Moss* (1896), 74 L. T. 551; *Derby Corpn. v. Derbyshire County Council*, [1897] A. C. 550.

9. Criminal proceeding.—Distinguished from civil proceedings.]—*A.-G. v. RADLOFF*, No. 2, *ante*.

10. —.]—An order was made by justices directing deft. to fill up an ashpit so as to be no longer a nuisance. The Q. B. Div. made absolute a rule for a *certiorari* to quash the order, on the ground that it was not warranted by sects. 94 & 96 of the above Act:—*Held*: the order of the justices was made "in a criminal cause or matter" within the meaning of Jud. Act, 1873 (c. 66), s. 47, & an appeal from the judgment of the Q. B. Div. could not be entertained.

Why is not this proceeding under the above Act a "criminal cause or matter within the meaning of Jud. Act, 1873 (c. 66), s. 47? It is certainly not a civil proceeding, & it may perhaps be said that every proceeding is either civil or criminal. Therefore, independently of authority, I am disposed to hold that this is a "criminal cause or matter" (BRAMWELL, L.J.).—*R. v. WHITCHURCH* (1881), 7 Q. B. D. 534; *sub nom.* *Re NOTTINGHAM JJ.*, *Ex p. WHITCHURCH*, 50 L. J. M. C. 99; *sub nom.* *Ex p. WHITCHURCH*, 45 L. T. 379; 46 J. P. 134; 29 W. R. 922; *sub nom.* *Re WHITCHURCH*, *Ex p. NOTTINGHAM JJ.*, 45 J. P. 617, C. A.; *affg.* *S. C. sub nom.* *Ex p. WHITCHURCH*, 6 Q. B. D. 545, D.

*Annotations*:—*Distd.* *A.-G. v. Bradlaugh* (1885), 14 Q. B. D. 667. *Consd.* *R. v. Central Criminal Court JJ.* (1886), 18 Q. B. D. 314; *Ex p. Schofield*, [1891] 2 Q. B. 428. *Re Derbyshire County Council & Derby Corpn.*, [1896] 2 Q. B. 53; *Seaman v. Burley*, [1896] 2 Q. B. 344. *Reid.* *Loughborough Highway Board v. Curzon* (1886), 2 T. L. R. 678; *R. v. Tyler & International Commercial Co.*, [1891] 2 Q. B. 588; *Derby Corpn. v. Derbyshire County Council*, [1892] A. C. 550; *Southport Corpn. v. Birkdale U. D. C.* (1897),

of payment he was imprisoned. Upon termination of the imprisonment he was kept in custody for deportation. A writ of *habeas corpus* was ordered & accused discharged from custody:—*Held*: the proceedings were criminal proceedings, & therefore the provincial Act giving an appeal from an order of discharge in *habeas corpus* was not applicable.—*Re MAH SHIN SHONG*, *Re SING YIM HONG*, [1923] 1 W. W. R. 1365; [1923] 4 D. L. R. 844; 39 Can. Crim. Cas. 401; 32 B. C. R. 176. —*CAN.*

**Sect. 1.—The nature of crime in general—Definitions.****Sect. 2: Sub-sects. 1 & 2, A.]**

76 L. T. 318; *Wiffen v. Bailey & Romford U. C.*, [1915] 1 K. B. 600; *R. v. Manchester Local Profiteering Committee, Ex p. L. & Y. Ry.* (1920), 89 L. J. K. B. 1089. **Mentd.** *Ex p. Saunders* (1883), 11 Q. B. D. 191; *R. v. Llewellyn* (1884), 13 Q. B. D. 681; *R. v. Kent JJ.* (1885), 1 T. L. R. 539; *Whitaker v. Derby Urban S. A.* (1885), 55 L. J. M. C. 8.

**11. — Penal actions.]—**Penal actions were never yet put under the head of criminal law or crimes. No case has been cited where it has been held that a penal action is a criminal cause, & perhaps the point was never before doubted (*LORD MANSFIELD, C.J.*).—*ATCHESON v. EVERITT* (1776), 1 Cowp. 382; 98 E. R. 1142.

**Annotations:—***Mentd. Re Banister* (1847), 9 L. T. O. S. 412; *Noble v. Ahler* (1886), 11 P. D. 158.

**12. — ]—**(1) Where a trader harbours & conceals smuggled goods, he is liable in penalties for the illegal act of a servant, done in the conduct of the business, with a view to protect the smuggled goods, though the master be absent at the time, & the act be done by the servant upon the exigency of the occasion when the goods are discovered.

(2) An information for the recovery of penalties is not a criminal, but a penal proceeding, in the nature of a civil action.—*A.-G. v. SIDDON* (1830), 1 Cr. & J. 220; 2 Man. & Ry. M. C. 533; 1 Tyr. 41; 9 L. J. O. S. Ex. 7; 148 E. R. 1400.

**Annotations:—***As to (1) Consd. Lyons v. Martin* (1838), 7 L. J. Q. B. 214; *Newman v. Jones* (1886), 17 Q. B. D. 132. **Refd.** *A.-G. v. Riddell* (1832), 2 Tyr. 523; *Coleman v. Riches* (1855), 16 C. B. 104; *Harrison v. Leaper* (1862), 26 J. P. 373; *Searle v. Reynolds* (1866), 7 B. & S. 704; *Inland Revenue v. Cardiff Conservative Club Co.* (1894), 58 J. P. 120. *As to (2) Refd. A.-G. v. Riddell* (1832), 2 Tyr. 523; *Dewhurst v. Pearson* (1833), 1 Cr. & M. 365.

**13. — — Penalty for taking bribes.]—**A warrant for the apprehension of a party "for certain misdemeanours, whereof he is impeached, & also for certain penalties & forfeitures sued for in the Queen's Ct." by the A.-G., pursuant to 33 Geo. 3, c. 52, s. 62, is criminal process, against which a party is not privileged *redeundo* after discharge by *habeas corpus* from illegal custody.—*Re DOUGLAS* (1842), 3 Q. B. 825; 3 Gal. & Dav. 509; 12 L. J. Q. B. 49; 114 E. R. 724; *sub nom. R. v. DOUGLAS*, 7 Jur. 39.

**14. — — Penalty under Parliamentary Oaths Act, 1866 (c. 19).]**—An information by the A.-G. to recover penalties incurred under the above Act is not a "criminal cause or matter" within the meaning of Jud. Act, 1873 (c. 66), s. 47, so as to preclude deft. from appealing against the judgment of the High Ct. at bar.—*A.-G. v. BRADLAUGH* (1885), 14 Q. B. D. 667; 54 L. J. Q. B. 205; 52 L. T. 589; 49 J. P. 500; 33 W. R. 673, C. A.; *previous proceedings* (1884), 1 Cab. & El. 440.

**Annotations:—***Refd. R. v. Hausmann* (1909), 73 J. P. 516; *Re Clifford & O'Sullivan*, [1921] 2 A. C. 570.

**15. — — On Revenue side of King's Bench Division—Customs Consolidation Act, 1876 (c. 36), s. 186.]—**An information by the A.-G. on the Revenue side of the K. B. Div. under sect. 186 of the above Act is not a criminal information within the meaning of Criminal Appeal Act, 1907 (c. 23), s. 20 (2), & no appeal lies to the Ct. of Criminal Appeal from a conviction on such an information.—*R. v. HAUSMANN* (1909), 73 J. P. 516; 26 T. L. R. 3; 3 Cr. App. Rep. 3, C. C. A.

**16. — — Penalty under Distress (Costs) Act, 1817 (c. 93).]**—An order made by justices, under sect. 2 of the above Act, for the payment of

the levying of a distress, is enforceable by imprisonment in default of sufficient distress, such sum being a penalty & not a civil debt.—*R. v. DALY, Ex p.*

*NEWSON* (1911), 104 L. T. 892; 75 J. P. 333; 22 Cox, C. C. 461, D. C.

**17. — — Permitting persons of bad character to assemble on licensed premises.]—**An information under 9 Geo. 4, c. 61, for permitting persons of bad character to assemble on licensed premises is a criminal proceeding.—*PARKER v. GREEN* (1862), 2 B. & S. 299; 31 L. J. M. C. 133; 6 L. T. 46; 26 J. P. 247; 8 Jur. N. S. 409; 10 W. R. 316; 9 Cox, C. C. 169; 121 E. R. 1084.

**18. — — Non-repair of highways.]—**An indictment for non-repair of a highway is a criminal proceeding.—*R. v. HAWKHURST (INHABITANTS)* (1862), 1 New Rep. 88; 27 J. P. 262; 11 W. R. 116.

**Annotation:—***Mentd. R. v. Burney* (1875), 31 L. T. 828.

**— Attachment for contempt.]—***See, further, CONTEMPT OF COURT, ATTACHMENT & COMMITTAL, Vol. XVI., pp. 7-10, 16 et seq.*

**19. — — Summary proceedings for enforcement of debts.]—**Summary proceedings for enforcing what is merely a debt must be in the nature of civil, & not criminal, process (*MELLOR, J.*).—*R. v. MASTER* (1869), L. R. 4 Q. B. 285; 10 B. & S. 42; 38 L. J. M. C. 73; *sub nom. R. v. MARTIN, ETC., GLOUCESTERSHIRE JJ., Re JAMES*, 19 L. T. 733; *sub nom. R. v. GLOUCESTERSHIRE JJ.*, 33 J. P. 436; 17 W. R. 442.

**Annotations:—***Consd. Seaman v. Burley*, [1896] 2 Q. B. 344. **Refd.** *R. v. Kerswill*, [1895] 1 Q. B. 1. **Mentd.** *Marginson v. Tildsley* (1903), 67 J. P. 226.

**20. Statutory offences—General rule.]—**A person committed to prison under Solrs. Act, 1843 (c. 73), s. 32, for acting as a solr. though not duly qualified, is a "criminal prisoner" within Prison Act, 1865 (c. 126), s. 4. Such a person is not entitled to be treated as a first-class misdemeanant by Prison Act, 1877 (c. 21), s. 41.

It must always be a question of the construction of the particular statute whether an act is prohibited in the sense that it is rendered criminal, or whether the statute merely affixes certain consequences more or less unpleasant to the doing of the act. If the act is prohibited in the former sense, it may be made the subject of an indictment for misdemeanour, or the statute may provide for summary proceedings either cumulatively or exclusively of the remedy by indictment (*BOWEN, L.J.*).—*OSBORNE v. MILMAN* (1887), 18 Q. B. D. 471; 56 L. J. Q. B. 263; 56 L. T. 808; 51 J. P. 437; 35 W. R. 397; 3 T. L. R. 452, C. A.

**Annotations:—***Refd. Re Grayston, Re Wall* (1888), 4 T. L. R. 772; *R. v. Nat Bell Liquors*, [1922] 2 A. C. 128.

**21. — — ]—**There are statutes which do not create an imperative & positive duty to the public, but which only impose, as the result of non-compliance with the directions of the statute, a pecuniary loss on the individual who does not so comply. In such a case it is not the intention of the legislature to make the disobedience of the law a misdemeanour; it is only the intention to provide that if the person does not comply with the directions of the statute he must submit to the penalty. In each case it is a question of the construction of the Act to see if that is what is meant (*BOWEN, L.J.*).—*R. v. TYLER & INTERNATIONAL COMMERCIAL CO.*, [1891] 2 Q. B. 588; 61 L. J. M. C. 38; 65 L. T. 662; 56 J. P. 118; 7 T. L. R. 720, C. A.

**Annotations:—***Refd. Rayson v. South London Tram. Co.* (1893), 69 L. T. 491; *Southport Corp'n. v. Birkdale U. D. C.* (1897), 76 L. T. 318; *Park v. Royalties Syndicate*, [1912] 1 K. B. 330; *Mousell v. L. & N. W. Ry.*, [1917] 2 K. B.

*Griffiths v. Studebakers* (1923), 87 J. P. 199.

**22. — — "Offender."]**—The word "offender" [in Dramatic Copyright Act, 1833 (c. 15), s. 2] is

only used here as a convenient expression, & is in no way meant to designate a criminal (DAY, J.).—**ADAMS v. BATLEY, COLE v. FRANCIS** (1887), 18 Q. B. D. 625; 56 L. J. Q. B. 393; 56 L. T. 770; 35 W. R. 537; 3 T. L. R. 511, C. A.

**Annotations**:—**Consd. Saunders v. Wiel**, [1892] 2 Q. B. 321; **Derbyshire County Council v. Derby Corp.** (1896), 74 L. T. 747. **Mentd. Jones v. Jones** (1889), 22 Q. B. D. 425; **Hobbs v. Hudson** (1890), 54 J. P. 360; **Reeve v. Gibson**, [1891] 1 Q. B. 652; **Thomson v. Clannorris**, [1900] 1 Ch. 718.

**23. ———.]**—The use of the word "offence" like the use of the word "offender" is not in itself conclusive as to the penal nature of Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 58 (**LORD ESHER, M.R.**).—**SAUNDERS v. WIEL**, Q.

40 W. R. 594; 8 T. L. R. 650; 36 Sol. Jo. 591; 4 R. 1, C. A.

**Annotations**:—**Consd. Re Derbyshire County Council & Derby Corp.**, [1896] 2 Q. B. 53. **Mentd. Thomson v. Clannorris**, [1900] 1 Ch. 718.

**24. ——— "Offence."]**—**SAUNDERS v. WIEL**, No. 23, ante.

**25. ———.]**—*Prima facie*, the words of Rivers Pollution Prevention Act, 1876 (c. 75), s. 3, would create a misdemeanour, the word "offence" being used. But it has been held in **Adams v. Batley**, No. 22, ante, & **Saunders v. Wiel**, No. 23, ante, that the use of the word "offence" is not conclusive upon that point. We must see what are the consequences which will follow, & if we find that what is described as an "offence" is followed, not by punishment, but by a remedy equivalent to that for a civil wrong, then the matter is not a criminal one (**COLLINS, J.**).—**Re DERBYSHIRE COUNTY COUNCIL & DERBY CORPN.**, [1896] 2 Q. B. 53; *sub nom. DERBYSHIRE COUNTY COUNCIL v. DERBY CORPN.*, 65 L. J. Q. B. 488; 60 J. P. 474; 44 W. R. 543, D. C.; *affd. sub nom. Re DERBYSHIRE COUNTY COUNCIL & DERBY CORPN.*, [1896] 2 Q. B. 297, C. A.; *sub nom. DERBY CORPN. v. DERBYSHIRE COUNTY COUNCIL*, [1897] A. C. 550, H. L.

**Annotation**:—**Mentd. R. v. Manchester Profiteering Committee, Ex p. L. & Y. Ry.** (1920), 89 L. J. K. B. 1089.

**26. Disobedience to order of sessions.]**—The fact that an indictment will lie for a disobedience of an order of sessions is no reason that the disobedience should be an offence of a criminal nature. The offence here is that pltf. being of ability would not support his impotent relative, that is a duty the neglect of which, though only morally wrong before the statute [43 Eliz. c. 2, s. 7] is made a crime by the statute. It seems to me, therefore, that the commitment is not in the nature of civil but of criminal process to punish the pltf. for not performing the duty imposed on him by statute (**BLACKBURN, J.**).—**BANCROFT v. MITCHELL** (1867), L. R. 2 Q. B. 549; 8 B. & S. 558; 36 L. J. Q. B. 257; 12 T. L. R. 550; 21 T. L. R. 550.

#### PART I. SECT. 2, SUB-SECT. 1.

**What is.]**—An indictment must be written & signed by the neutral to write & sign goods could be through the neutral: the posting of the letter was overt act sufficient to take the

S. C. (J.) 40.—

corruptly solicit

from M., an appt. for a certificate for a public-house licence, a bribe of £500 "as a consideration for your corruptly voting for, & endeavouring to procure the granting of" a certificate for a public-house licence, "and you did thus attempt to obtain £500 from M. in breach of your duty as a magistrate".—**Held**: the indictment was irrelevant, in respect that it alleged nothing more than expression of willingness to commit a crime.—**H.M. ADVOCATE v. DICK** (1901), 3 F. (Ct. of Sess) 59; 38 Sc. L. R. 580.—**SCOT.**

#### SECT. 2, SUB-SECT. 2.—A.

31 i. *Implied in offence.*—The ex-

**285. Mentd. R. v. Ireland** (1868), 37 L. J. Q. B. 73; **Myers v. Veitch** (1869), 20 L. T. 847.

**27. Criminal prisoner—Vaccination Act, 1867 (c. 84), s. 31.]**—A person who is committed to prison in default of distress for non-payment of a sum of money adjudged to be paid by a ct. of summary jurisdiction on an information under sect. 31 of the above Act, is a "criminal prisoner" within the meaning of Prisons Act, 1865 (c. 126), s. 4, & must be treated as such while in prison.—**KENNARD v. SIMMONS** (1884), 50 L. T. 28; 48 J. P. 551; 15 Cox, C. C. 397.

**Annotation**:—**Mentd. R. v. Burrows, etc. JJ., Ex p. Wilson** (1897), 77 L. T. 338.

**28. ——— Solicitors Act, 1843 (c. 73), s. 32.]**—**OSBORNE v. MILMAN**, No. 20, ante.

**Annotations**:—**See Part XIV., Sect. 14, post; CONTEMPT OF COURT, ATTACHMENT & COMMITTAL**, Vol. XVI., p. 81, Nos. 990-996.

### SECT. 2.—ELEMENTS OF CRIME.

#### SUB-SECT. 1.—OVERT ACT.

**29. What is.]**—**R. v. ROBERTS**, No. 747, post.

**30. Necessity for.]**—**R. v. EAGLETON**, No. 750, post.

**Attempt to commit crime.]**—*See* Sub-sect. 6, post.

**Overt act in conspiracy.]**—*See* Nos. 820, 830, post, & Sect. 6, sub-sect. 8, M., post.

**Overt act in treason.]**—*See* Part XVII., Sect. 1, sub-sect. 2, post.

#### SUB-SECT. 2.—MENS REA.

##### A. In General.

**31. Implied in offence.]**—(1) Intoxicating liquor was knowingly sold to a child under fourteen in a bottle, neither corked nor sealed, by a servant of a licensed person contrary to the express orders & without the knowledge of his master, who was himself in charge of the premises at the time of the sale:—**Held**: the licence-holder could not be convicted under Intoxicating Liquors (Sale to Children) Act, 1901 (c. 27), s. 2, of "knowingly allowing" a person to sell intoxicating liquor to a child under fourteen in a vessel neither corked nor sealed.

(2) Under ordinary circumstances an offence implies a *mens rea* (**LORD ALVERSTONE, C.J.**).—**EMARY v. NOLLOTH**, [1903] 2 K. B. 264; 72 L. J. K. B. 620; 89 L. T. 100; 67 J. P. 354; 52 W. R. 107; 19 T. L. R. 530; 47 Sol. Jo. 567; 20 Cox, C. C. 507, D. C.

**Annotations**:—*As to* (1) **Folld. Allchorn v. Hopkins** (1905), 69 J. P. 355; **McKenna v. Harding** (1905), 69 J. P. 354. **Held. Boyle v. Smith**, [1906] 1 K. B. 432; **Strutt v. Clift**, [1911] 1 K. B. 1; **Williams v. Pearce** (1916), 85 L. J. K. B. 959.

pression *mens rea* is descriptive of the state of mind which in the case of most offences must accompany the doing of the prohibited act in order to render it an offence. Such mental element varies with different offences, & in the case of each offence is only to be discovered by detailed examination of the elements of the offence.—**MORFATT v. HASSETT**, [1907] V. L. R. 515.—**AUS.**

**31 ii. ———.]**—There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence.—**BALDWIN v. SNOOK**, [1913] 3 W. R. 314; 40 D. L. R. 333.—**CAN.**

*Sect. 2.—Elements of crime: Sub-sect. 2, A. & B.]*

**32. Essential ingredient of crime.]**—Deft., who was the owner & occupier of certain premises in the metropolis used for the purpose of manufacture, was summoned under Smoke Nuisance (Metropolis) Act, 1853 (c. 128), ss. 1 & 2, for negligently using a furnace in such premises so that the smoke arising therefrom was not effectually consumed. The furnace in question was constructed so as to consume its own smoke if carefully used, & the emission of smoke complained of was caused by the carelessness of the stoker employed by deft. to attend to the furnace. Deft. was not personally guilty of any negligence in connection with the matters:—*Held*: deft. was not criminally responsible for the negligence of his servant, & could not be convicted of the offence.

It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge—but as a general rule there must be something of that kind which is designated by the expression *mens rea*. Moreover, it is a principle of our criminal law that the condition of mind of the servant is not to be imputed to the master. This principle of the common law applies also to statutory offences with this difference, that it is in the power of the legislature, if it so pleases, to enact, & in some cases it has so enacted, that a man may be convicted & punished for an offence although there was no blameworthy condition of mind about him; but inasmuch as to do so is contrary to the general principle of the law, it lies on those who assert that the legislature has so enacted to make it out convincingly by the language of the statute (CAVE, J.).—CHISHOLM v. DOULTON (1889), 22 Q. B. D. 736; 58 L. J. M. C. 133; 60 L. T. 966; 53 J. P. 550; 37 W. R. 749; 5 T. L. R. 437; 16 Cox, C. C. 675, D. C.

*Annotations*:—*Distd.* Armitage v. Nicholson (1913), 108 L. T. 993. *Refd.* Niven v. Greaves (1890), 54 J. P. 548.

**33. — May be dispensed with by statute.]**—Prisoner was indicted, under 9 Will. 3, c. 41, s. 2, for having been found in possession of naval stores marked with the broad arrow. The jury returned a verdict that prisoner was found in possession of copper marked with the broad arrow; that they had not sufficient evidence before them to show that prisoner knew that the copper was so marked; but that he had reasonable means of knowing that it was so marked:—*Held*: upon these findings

**33 i. Essential ingredient of crime—May be dispensed with by statute.]**—The question whether or not the common law doctrine of *mens rea* is excluded by a particular statute is to be determined by considering the scope & subject of the statute & the various circumstances which would make the application of the doctrine reasonable or unreasonable, as well as the language of the statute.—R. v. ERSON, [1914] V. L. R. 144.—**AUS.**

**33 ii. —**—The common law doctrine that to constitute crime there must be a guilty mind applies also to offences created by statute, unless it can be deduced from the statute itself that the intention of the legislature was to exclude the application of that doctrine. The true rule for the determination of the question whether or not the application of the common law doctrine is excluded by the statute under consideration in each case is to consider the scope & object

of the statute, & the various circumstances which make the application of the doctrine reasonable or unreasonable, as well as the language of the particular statute under consideration. There are three classes of cases under the statute law: (1) those in which, following the common law rule, a guilty mind must either be necessarily inferred from the nature of the act done or must be established by independent evidence; (2) those in which either from the language or scope & object of the enactment to be construed, it is made plain that the Legislature intended to prohibit the act absolutely, & the question of the existence of a guilty mind is only relevant for the purpose of determining the quantum of punishment following the offence; (3) those in which, although from the omission from the statute of the word “knowingly” or “wilfully” it is not necessary to aver in the indictment that the offence

prisoner could not be convicted of the offence charged.

*Mens rea* is an essential ingredient in every offence. It may be dispensed with by statute; but the terms which should induce the ct. to infer that it is dispensed with must be very strong (COCKBURN, C.J.).—R. v. SLEEP (1861), Le. & Ca. 44; 30 L. J. M. C. 170; 4 L. T. 525; 25 J. P. 532; 7 Jur. N. S. 979; 9 W. R. 709; 8 Cox, C. C. 472, C. C. R.

*Annotations*:—*Refd.* R. v. Prince (1875), L. R. 2 C. C. R. 154; R. v. Tolson (1889), 23 Q. B. D. 168; Blaker v. Tillstone (1894), 63 L. J. M. C. 72.

**34. —**—J.—DICKENSON v. FLETCHER, No. 107, *post*.

**35. —**—J.—PEARKS, GUNSTON & TEE, LTD. v. WARD, HENNER v. SOUTHERN COUNTIES DAIRIES CO., No. 102, *post*.

**36. —**—J.—(1) Appls. were the owners & occupiers of, but did not reside on, a farm, which was managed for them by a bailiff under the superintendence of a steward who resided some considerable distance away. Part of the business of the farm was the conveyance of milk to a railway station, & for this purpose the appls. had at the farm a four-wheel van which was usually driven to & from the station by a milkman. The van had appls.’ names painted on the side, & it was constructed or adapted for use for the conveyance of milk churns in the course of appls.’ business as dairy farmers. On one occasion without the knowledge of appls. or the steward, & for his own purposes, the bailiff used the milk van, after carrying milk to the station, for bringing back his wife & others from a place of entertainment. In respect of this user appls. were convicted of keeping & using the milk van without having a licence therefor:—*Held*: the milk van was kept by appls., & they were responsible for its user by the bailiff on the day in question, & as such user was not for the conveyance of goods or burden in the course of trade or husbandry within Customs & Inland Revenue Act, 1888 (c. 8), s. 4 (3), the conviction was right.

(2) Under ordinary circumstances *mens rea* must be shown unless by express enactment the doctrine is excluded.—STRUTT v. CLIFT, [1911] 1 K. B. 1; 80 L. J. K. B. 114; 103 L. T. 722; 74 J. P. 471; 27 T. L. R. 14; 8 L. G. R. 989, D. C.

*Annotation*:—As to (1) *Distd.* Phelon & Moore v. Keel, [1914] 3 K. B. 165.

**37. —**—J.—I view with some trepidation any tendency to diminish the importance of the rule as to *mens rea* which has prevailed in respect of criminal charges. There are cases no doubt where a statute makes it plain that an

charged was knowingly” or “wilfully” committed, or to prove a guilty mind, & the commission of the act in itself *prima facie* imports an offence, yet the person charged may still discharge himself by proving to the satisfaction of the tribunal which tries him that in fact he had not a guilty mind.—R. v. EWART (1905), 25 N. Z. L. R. 709.—**N.Z.**

**33 iii. —**—Where a statute with a penalty for non-performance imposes a duty upon a person & such person fails to perform such duty through his own negligence our law does not permit such person to set up a defence based on the absence of *mens rea*. Where there is an absolute prohibition in a statute, a man who can show that he has broken it through no fault of his own might well be heard, but not one who admits that through his own fault he has contravened it.—R. v. VIEDGE (1917), E. D. L. 160.—**S. AF.**

offence is created without a criminal intention on the part of the person who is charged, but those cases, where the ct. is dealing with a question of crime, are to my mind in themselves anomalous, & I should hesitate to increase their number without being satisfied upon argument that this is one of them (ATKIN, L.J.).—*Re MAHMOUD & ISPAHANI*, [1921] 2 K. B. 716; 125 L. T. 161; *sub nom.* MAHMOUD v. ISPAHANI, 90 L. J. K. B. 821; 37 T. L. R. 489; 26 Com. Cas. 215, C. A.

**38. Necessity for proof of—Statutory requirement.**—In cases where a statute requires a motive to be proved as an essential element of a crime, the prosecution must fail if such motive is not proved. The absence of *mens rea* really consists in an honest & reasonable belief entertained by the accused of the existence of facts, which, if true, would make the act charged against him innocent.—*BANK OF NEW SOUTH WALES v. PIPER*, [1897] A. C. 383; 66 L. J. P. C. 73; 76 L. T. 572; 61 J. P. 660; 13 T. L. R. 413, P. C.

*Annotations*:—*Reid*. Blain v. King, [1918] 2 K. B. 30; R. v. Wheat, R. v. Stocks, [1921] 2 K. B. 119.

**39. What amounts to absence of mens rea.**—*BANK OF NEW SOUTH WALES v. PIPER*, No. 38, *ante*.

**40. Effect of absence of.**—To obtain a conviction under Merchandise Marks Act, 1887 (c. 28), the case must be one in which *mens rea* in fact exists; but although the burden of proof is shifted & the prosecution have not to prove *mens rea*, yet if deft. can prove absence of *mens rea* he is to be acquitted. *Mens rea* must be applied to the particular offence & there may be an innocence of intention to infringe the Act, although there may be suspicion of the genuineness of the trade mark.—*CHRISTIE, MANSON & WOODS v. COOPER*, [1900] 2 Q. B. 522; 69 L. J. Q. B. 708; 83 L. T. 54; 64 J. P. 692; 49 W. R. 46; 16 T. L. R. 442.

*Annotations*:—*Consd.* R. v. Phillips (J.), R. v. Phillips (P.), R. v. Phillips (D.) (1909), 73 J. P. 458. *Reid*. Stone v. Burn, [1911] 1 K. B. 927.

**I. Necessity for proof of.**—*Re RANCHHODDAS* (1896), 1 L. L. R. 22 Bom. 317.—**IND.**

**g.**—Accused sold, but was allowed by the vendee to remain in possession of, a heifer. Thereafter he handed the heifer to one of his creditors as security for payment of a promissory note. The heifer was subsequently sold by the pledgee under a power of sale given in the note:—*Held*: accused was wrongly convicted of theft of the property of the first vendee, as there was an entire absence of *mens rea* on the part of accused.—*R. v. KOTI* (1908), E. D. C. 234.—**S. AF.**

**38 i.**—*Statutory requirement.*—It is an elementary principle of our common law that no person can be of a criminal

proof of *mens rea*. There is a presumption that *mens rea*, knowledge of the facts that make the

has found it necessary in the public interests to pass enactments which certain prohibited acts are constituted into crimes even in the absence of the knowledge & intention necessary to constitute *mens rea*.—*R. v. WERNER*, [1917] E. D. L. 71.—**AF.**

**h.**—Act peremptorily forbidden in the interest of public morality & convenience.—Where the law in the interest of public morality or convenience peremptorily prohibits any act, innocence of intention or belief is no defence.—*R. v. PING YUEN*, [1921] W. W. R. 505.—**CAN.**

**k.**—Act penalised for public J.—VOL. XIV.

benefit.—It is unnecessary to prove *mens rea* when for the public benefit a penalty is prescribed for the doing or omission of an act.—*R. v. GOLDBERG*, [1919] O. P. D. 55.—**S. AF.**

**l.**—*When presumed.*—An indictment in certain counts charged the destruction of the vessel with intent thereby to prejudice the underwriters, & in others simply charged the crime without alleging the intent, & prisoner was found guilty on all the counts:—*Held*: it was not necessary to show the prisoner's knowledge of the insurance, as he must be presumed to have intended the necessary consequence of his act, which was to prejudice the underwriters.—*R. v. TOWER* (1880), 20 N. B. R. 168.—**CAN.**

or twenty years of age was found to have administered dhatura to three members of her family:—*Held*: she must be presumed to have known that the administration of dhatura was likely to cause death, although she might not have administered it with

**n.**—Prisoner was convicted of publishing in the Kerry Sentinel of which he was proprietor

evidence of intent.

In every class of crime other than libel prior to 6 & 7 Vict., the thing dealt with is not the intent presumed in law but personal intent actually existing in fact in the mind of deft., & that is a question for the jury.—

## B. In Particular Cases.

**Cruelty to animals—Guilty knowledge.**—See ANIMALS, Vol. II., pp. 284–286, Nos. 565–579.

**41. Sale of adulterated or altered food—Sale of Food & Drugs Act, 1875 (c. 63), s. 6.**—In a prosecution under sect. 6 of the above Act for "selling to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, & quality demanded by such purchaser," it is not necessary to prove guilty knowledge on the part of the seller.—*BETTS v. ARMSTEAD* (1888), 20 Q. B. D. 771; 57 L. J. M. C. 100; 58 L. T. 811; 52 J. P. 471; 36 W. R. 720; 16 Cox, C. C. 418, D. C.

*Annotations*:—*Fold*. Pain v. Boughtwood (1890), 24 Q. B. D. 353. *Reid*. Brown v. Foot (1892), 61 L. J. M. C. 110; Pearks, Gunston & Tee v. Ward, Hennen v. Southern Counties Dairies Co., [1902] 2 K. B. 1; Smithies v. Bridge (1902), 71 L. J. K. B. 555.

**42.**—A vendor of milk under a contract consigned milk to a railway co. for carriage to P. station, where it was to be delivered to purchasers. On arrival at that station the milk was found to be adulterated by the addition of 9 per cent. of water. The adulteration took place without the knowledge of the vendor during the railway transit:—*Held*: the vendor was liable to be convicted, under sect. 6 of the above Act for selling, to the prejudice of the purchaser, milk which was not of the nature, substance & quality demanded, but the vendor's personal innocence of the adulteration was a fact to be taken into account in mitigation of punishment.—*PARKER v. ALDER*, [1899] 1 Q. B. 20; 68 L. J. Q. B. 7; 79 L. T. 381; 62 J. P. 772; 47 W. R. 142; 43 Sol. Jo. 15; 19 Cox, C. C. 191, D. C.

*Annotations*:—*Fold*. Andrews v. Luckin (1917), 87 L. J. K. B. 507. *Consd.* Buckingham v. Duck (1918), 120 L. T. 84. *Reid*. Oatley v. Lemon (1905), 92 L. T. 200; Warrington v. Windhill Industrial Co-op. Soc. (1918), 88 L. J. K. B. 280.

**43.**—Where a farmer, under a contract of sale of pure milk, delivered at a railway station genuine milk for dispatch by rail to the

R. v. HARRINGTON (1888), Crimes Ireland Act, Cases 12.—**IR.**

**o.**—As soon as an act is proved to be a crime there is sufficient evidence of wicked & felonious intent.—*H.M. ADVOCATE v. EDMISTON* (1866), 5 Irv. 219.—**SCOT.**

**p.** *What amounts to absence of mens rea—Provocation.*—The provocation contemplated by Penal Code, s. 300, should be of a character to deprive the offender of his self-control. In determining whether it was so, it is admissible to take into account the condition of mind in which the offender was at the time of the provocation.—*R. v. KHOGAYI* (1879), 1 L. R. 2 Mad. 122.—**IND.**

**q.** *Corporation—Knowledge of*

—*R. v. PANTON, Ex p. FARMER* DUCE CO., LTD. (1888), 14 V.

RIPPLINGER (1908), 9 W. L. 14 Can. Crim. Cas. 111.—**CAN.**

**PART I. SECT. 2, SUB-SECT. 2.—B.**

**r.** *Sale of adulterated or altered food—In general.*—In proceedings under Adulteration Acts the absence

, 25 N. Z. L.

**s.**—*Obstruction of Sale of Food & Drugs Act, 1899 (c. 51), s. 16.*—Where an inspector of food & drugs required a sample of whisky from a particular bottle, & the husband of the publican, who the justices



*Sect. 2.—Elements of crime: Sub-sect. 2, B.]*

purchaser, & the milk was found by an inspector of nuisances, on reaching the arrival station, to be deficient in milk fat & other solids, & there was no evidence before the justices that it was not tampered with on the journey:—*Held*: the mere fact that the milk was genuine at the time when it was handed over to the railway co. did not relieve the farmer from liability for selling milk not of the nature, substance & quality demanded by the purchaser under sect. 6 of the above Act & 42 & 43 Vict., c. 30, s. 3.—*ANDREWS v. LUCKIN* (1917), 87 L. J. K. B. 507; 117 L. T. 726; 82 J. P. 31; 34 T. L. R. 33; 26 Cox, C. C. 124; 16 L. G. R. 199, D. C.

44. — *Sale of Food & Drugs Act, 1875* (c. 63), s. 9.]—A person selling an altered article can be convicted under sect. 9 of the above Act although at the time he sold it he did not know of the alteration.—*PAIN v. BOUGHTWOOD* (1890), 24 Q. B. D. 353; 59 L. J. M. C. 45; 62 L. T. 284; 54 J. P. 469; 38 W. R. 428; 6 T. L. R. 167; 16 Cox, C. C. 747, D. C.

*Annotations*:—*Folld.* Dyke v. Gower, [1892] 1 Q. B. 220; Morris v. Corbett (1892), 56 J. P. 649. *Refd.* Brown v. Foot (1892), 61 L. J. M. C. 110; Hunt v. Richardson, [1916] 2 K. B. 446.

45. — — —.]—In a prosecution under sect. 9 of the above Act, it is sufficient to prove that an article of food has been altered by the abstraction of some part of it, & sold in its altered state without notice, & it is not necessary to prove that it was so altered by the seller with intent to sell it in its altered state without notice.—*DYKE v. GOWER*, [1892] 1 Q. B. 220; 61 L. J. M. C. 70; 65 L. T. 760; 56 J. P. 168; 17 Cox, C. C. 421, D. C.

*Annotations*:—*Folld.* Morris v. Corbett (1892), 56 J. P. 649. *Refd.* Spiers & Pond v. Bennett, [1896] 2 Q. B. 65.

46. — — —.]—The servant of C., a dairyman, being short in his supply of milk, bought two gallons from another dairyman & mixed it with his own & sold the same to customers. C. being summoned under sect. 9 of the above Act:—*Held*: though neither C. nor C.'s servant knew or had reason to suspect the milk was adulterated, this was no defence.—*MORRIS v. CORBETT* (1892), 56 J. P. 649, D. C.

47. — — —.]—In order to prove an offence of selling an article of food altered by the abstraction therefrom of any part of it so as to affect injuriously its quality, substance or nature, without making disclosure of the alteration, contrary to sect. 9 of the above Act, it is not necessary for the prosecution to prove *mens rea* on the part of the seller.—*SPIERS & POND v. BENNETT*, [1896] 2 Q. B. 65; 65 L. J. M. C. 144; 74 L. T.

found was at the time acting as her manager, while pretending to uncork it, deliberately, as the justices found, broke the bottle; but the justices did not find that he did so at the request or with the authority or connivance of his wife, nor was there any evidence to that effect:—*Held*: a conviction against the wife for wilful obstruction of the inspector could not be sustained under sect. 16 of above Act, & the offence created by that sect. is one of intentional misconduct involving personal *mens rea*.—*TAYLOR v. NIXON*, [1910] 2 I. R. 94; 44 I. L. T. 81.—*IR.*

t. *Sale by weight — Bread.*]—Where a bye-law imposed a penalty for selling loaves of light weight:—*Held*: no evidence of *mens rea* was necessary to conviction, the word "wilfully" not being used in the statute or bye-law.—*R. v. CHISHOLM*

(1907), 9 O. W. R. 914; 14 O. L. R. 178.—*CAN.*

a. — — —.]—An assize bye-law made it an offence for a person to offer or expose for sale or cause to be sold or delivered to a purchaser certain articles below a fixed standard weight:—*Held*: *mens rea* was not required to constitute the offence.—*GINSBERG v. BENONI MUNICIPALITY* (1916), T. P. D. 284.—*S. AF.*

b. *Sale of food contrary to regulations—Live Stock (Sales) Order, 1918.*]—In a prosecution of a farmer for selling a heifer in calf for slaughter contrary to Live Stock (Sales) Order, 1918:—*Held*: the fact that the seller did not know the heifer was in calf was no defence to the charge.—*ANDERSON v. ROSE*, [1919] S. C. (J.) 20.—*SCOT.*

c. — — —.]—A butcher slaughtered a cow which after grading had

697; 60 J. P. 487; 44 W. R. 510; 12 T. L. R. 380; 40 Sol. Jo. 479; 18 Cox, C. C. 332, D. C.

*Annotation*:—*Mentd.* Pearks, Gunston & Tee v. Houghton, [1902] 1 K. B. 889.

48. *Adulteration of bread—Common law.*]—A baker who sells bread containing alum in a shape which renders it noxious is guilty of an indictable offence, if he ordered the alum to be introduced into the bread, although he gave directions for mixing it up in a manner which would have rendered it harmless.—*R. v. DIXON* (1814), 4 Camp. 12; 3 M. & S. 11; 105 E. R. 516, N. P.

*Annotations*:—*Apld.* A.-G. v. Siddon (1830), 1 Cr. & J. 220; R. v. Hicklin (1868), L. R. 3 Q. B. 360. *Refd.* R. v. Wolverhampton Recorder, Scott v. Wolverhampton J.J. (1868), 18 L. T. 395; R. v. Brallford, [1905] 2 K. B. 730. *Mentd.* R. v. Aspinall (1876), 2 Q. B. D. 48.

49. — *Bread Act, 1886* (c. 37), s. 8.]—A person cannot be convicted, under sect. 8 of the above Act, for using prohibited mixtures or ingredients in the making of bread for sale, unless there be knowledge, either in himself or in the person employed by him, of the presence of the mixture or ingredient.—*CORE v. JAMES* (1871), L. R. 7 Q. B. 135; 41 L. J. M. C. 19; 25 L. T. 593; 36 J. P. 519.

*Annotations*:—*Distd.* Betts v. Armstead (1888), 52 J. P. 471. *Consd.* Pain v. Boughtwood (1890), 24 Q. B. D. 353. *Apld.* Brown v. Foot (1892), 61 L. J. M. C. 110. *Refd.* Nichols v. Hall (1873), L. R. 8 C. P. 322; Hotchin v. Hindmarsh, [1891] 2 Q. B. 181.

50. *Possession of adulterated tobacco by dealer—Tobacco Act, 1842* (c. 93), s. 3.]—Under sect. 3 of the above Act a dealer in & retailer of tobacco is liable to the penalty of £200 for having in his possession adulterated tobacco, although he has bought it as genuine & has no knowledge or reason to think that it is not so.—*R. v. WOOD-*

2 New Sess. Cas. 346; 16 L. J. M. C. 122; 10 J. P. 791; 153 E. R. 907.

*Annotations*:—*Consd.* Re Mahmoud & Ispahani, [1921] 2 K. B. 716. *Refd.* R. v. Sleep (1861), Le & Ca. 44; Sherras v. De Rutzen, [1895] 1 Q. B. 918.

51. *Sale of food contrary to regulations—Milk (Prices) Order, 1917.*]—A carrier employed by applt. to supply his customers with milk served a customer with what purported to be two separate pints of milk, but which in fact were both short measure. The customer paid the carrier 8d., which was the maximum price for a quart of milk under the above Order. Owing, however, to the measure being short, the price paid for the actual milk served was at the rates of 10½d. per quart & 8½d. per quart. Applt. had warned the carrier against giving short measure. Informations were preferred against applt. for selling the milk at prices exceeding the maximum, & he was convicted:—*Held*: the conviction must be affirmed, since (1) applt. was liable for the act

been allocated to him by an official of the Food Control Department. When slaughtered the cow was found to be in calf, & the butcher was charged with a contravention of the Live Stock (Sales) Order, 1919, s. 1. The sheriff convicted the accused, finding in fact that when the cow was graded the grader did not consider the cow to be in calf, nor did the allocator when the cow was allocated, that before the cow was slaughtered the allocator discovered the cow to be in calf, but did not inform the accused, & that when the cow was sent to be slaughtered the accused did not know that the allocator had discovered it to be in calf. The accused appealed:—*Held*: even if justifiable ignorance was a good defence to the charge, the sheriff's findings in fact did not disclose justifiable ignorance.—*BRATTE v. WAUGH* (1920), 57 Sc. L. R. 471.—*SCOT.*

of his servant which was performed within the scope of his authority, even though against applt.'s express instructions; (2) *mens rea* was not a necessary ingredient of the offence charged against applt.—**BUCKINGHAM v. DUCK** (1918), 88 L. J. K. B. 375; 120 L. T. 84; 83 J. P. 20; 26 Cox, C. C. 349; 17 L. G. R. 19, D. C.

*Annotations*:—*As to* (2) *Consd.* **Pearks' Dairies v. Tottenham Food Control Committee** (1918), 88 L. J. K. B. 623. *Generally, Mentd.* **Warburton v. Stamp** (1919), 88 L. J. K. B. 1170.

**52. — Margarine (Maximum Prices) Order, 1917.**—Appls.' assistant, in violation of their instructions, but by an innocent mistake, sold margarine to a customer giving only 14½ oz. by weight instead of 16 oz. Appls. were convicted by justices of contravening the above Order by selling margarine at a price exceeding the maximum price on the grounds (1) that the assistant was acting within the scope of her authority, (2) that short weight was equivalent to an increased price, (3) that *mens rea* on the part of appls. was not an essential element of the offence:—*Held*: the conviction was right.—**PEARKS' DAIRIES, LTD. v. TOTTENHAM FOOD CONTROL COMMITTEE** (1918), 88 L. J. K. B. 623; 120 L. T. 95; 83 J. P. 36; 35 T. L. R. 114; 26 Cox, C. C. 356; 17 L. G. R. 33, D. C.

*Annotation*:—*Mentd.* **Warburton v. Stamp** (1919), 88 L. J. K. B. 1170.

**53. False warranty—Sale of Food & Drugs Act, 1875 (c. 63), s. 27.**—A person giving a false warranty in writing to a purchaser in respect of an article of food or a drug sold by him is not liable to a penalty under sect. 27 of the above Act, if at the time of giving the warranty he did not know, & had no reason to believe, that the warranty was false.—**DERBYSHIRE v. HOULISTON** (1897), 61 J. P. 374; 45 W. R. 527; 13 T. L. R. 377; 41 Sol. Jo. 491, D. C.

—*See, further, FOOD & DRUGS.*

**54. False description in invoice—Fertilisers & Feeding Stuffs Act, 1893 (c. 56), s. 3 (1) (b).**—Applt. was the manager in London of a co. trading in chemical fertilisers. The co. entered into a contract with the S. co. for the sale of T. phosphate powder, & an invoice was sent describing the goods as containing 38 to 45 per cent. of total phosphates. Applt. was prosecuted by the county council for an offence under sect. 3 (1) (b) of the above Act:—*Held*: applt. was guilty of causing or permitting the invoice to be false in a material particular, though there was no evidence that he saw the particular invoice sent out, or otherwise knew the contents to be false.—**KORTEN v. WEST SUSSEX COUNTY COUNCIL** (1903), 72 L. J. K. B. 514; 88 L. T. 466; 67 J. P. 167; 19 T. L. R. 354; 20 Cox, C. C. 402; 1 L. G. R. 445, D. C.

*Annotations*:—*Follid.* **Laird v. Dobell**, [1906] 1 K. B. 131. *Consd.* **Needham v. Worcestershire County Council** (1909), 100 L. T. 901.

**55. —.**—*Mens rea* is not a constituent element of the offence created by sect. 3 (1) (b) of the above Act.—**LAIRD v. DOBELL**, [1906] 1 K. B. 131; 75 L. J. K. B. 163; 93 L. T. 842; 70 J. P. 62; 54 W. R. 506; 21 Cox, C. C. 66; 4 L. G. R. 232, D. C.

*Annotation*:—*Consd.* **Needham v. Worcestershire County Council** (1909), 100 L. T. 901.

**56. — Fertilisers & Feeding Stuffs Act, 1906 (c. 27), s. 6.**—Where a person, who sells any article for use as food for cattle or poultry, gives an invoice with the article sold which is inaccurate as to the percentage of oil & albuminoids, he does not commit an offence against sect. 6 (1) (a) of

the above Act, & the offence committed, if any, would be under sect. 6 (1) (b) for causing or permitting any invoice or statement of the articles sold by him to be false in a material particular to the prejudice of the purchaser.—**NEEDHAM & CO. v. WORCESTERSHIRE COUNTY COUNCIL** (1909), 100 L. T. 901; 73 J. P. 293; 25 T. L. R. 471; 7 L. G. R. 595, D. C.

*Annotation*:—*Distd.* **Kyle v. Jewers** (1914), 84 L. J. K. B. 255.

**57. Possession of unjust measure—Weights & Measures Act, 1878 (c. 49), s. 25.**—Appls. were convicted of having in their possession for use for trade a false or unjust measure contrary to sect. 25 of the above Act. A servant of appls. had been sent out with a tank waggon containing oil, & had in his possession two five-gallon measures for the purpose of measuring oil sold & delivered to appls.' customers from the tank waggon. One of such measures was correct, but the other, which also belonged to appls., was found to contain a quantity of soap which rendered it false & unjust to the extent of three & a half pints. The measures supplied to appls.' servant were correct, but other measures set aside for repair were accessible to him. The oil in each waggon was checked morning & evening, & the servant did not bring back more oil than his deliveries during the day accounted for. Appls. were not cognisant of their servant's conduct, nor did they give their sanction & approval to the use by him of the unjust measure:—*Held*: the conviction must be quashed, since, although *mens rea* on the part of the employers was not an element in the offence, the physical possession of the unjust measure by appls.' servant was not in the circumstances the possession of appls.—**ANGLO-AMERICAN OIL CO., LTD. v. MANNING**, [1908] 1 K. B. 536; 77 L. J. K. B. 205; 98 L. T. 570; 72 J. P. 35; 24 T. L. R. 215; 6 L. G. R. 299, D. C.

*Annotation*:—*Refid.* **Buckingham v. Duck** (1918), 120 L. T. 84.

**58. Delivering short weight—Weights & Measures Act, 1889 (c. 21), s. 29.**—Where a vehicle carrying coal for a delivery to a purchaser from a coal merchant is stopped, & the sacks it contains are weighed, under sect. 29 of the above Act, the person in charge of the vehicle is not guilty of an offence under that sect., though the sacks of the coal are proved to be of less weight than that represented by labels on the sacks & delivery notes sent out with the sacks, if he himself is unaware of, & has nothing to do with, the deficiency in weight.—**PAUL v. HARGREAVES**, [1908] 2 K. B. 289; 77 L. J. K. B. 535; 98 L. T. 751; 72 J. P. 231; 24 T. L. R. 501; 21 Cox, C. C. 584; 6 L. G. R. 530, D. C.

—*See, further, WEIGHTS & MEASURES.*

**59. Notification of contagious disease—Contagious Diseases (Animals) Act, 1869 (c. 70), s. 75.**—An order of the Privy Council made under sect. 75 of the above Act, directed that any person in possession or charge of an animal being affected, should with all practicable speed give notice to a police constable:—*Held*: it must be proved that the person in possession or charge, & summoned for the violation of the order, had knowledge of the animal being affected, to justify conviction.—**NICHOLS v. HALL** (1873), L. R. 8 C. P. 322; 42 L. J. M. C. 105; 28 L. T. 473; 37 J. P. 424; 21 W. R. 579.

*Annotations*:—*Refid.* **Diokenson v. Fletcher** (1873), L. R. 9 C. P. 1; **Sherras v. De Rutzen**, [1895] 1 Q. B. 918.



*Sect. 2.—Elements of crime: Sub-sect. 2, B.]*

**60. Exposure for sale of diseased meat—Common law.]**—A meat salesman can be indicted & convicted at common law, for knowingly sending or

(1802), 3 F. & F. 106, C. C. R.

**61. ———.]**—A carrier & jobbing butcher can be indicted & convicted at common law for knowingly bringing to market meat unfit for human food.—*R. v. JARVIS* (1802), 3 F. & F. 108.

**62. ———.]**—A person is not indictable for sending to a meat salesman meat he knows to be unfit for human food, if he does not know & intend that it is to be sold as human food.—*R. v. CRAWLEY* (1802), 3 F. & F. 109.

**63. ——— Public Health Act, 1875 (c. 55), s. 117.]**—Deft. having in his possession diseased meat exposed for sale can be convicted under sect. 117 of the above Act without proof of actual personal knowledge that the meat was so diseased.—*BLAKER v. TILLSTONE*, [1894] 1 Q. B. 345; 63 L. J. M. C. 72; 70 L. T. 31; 58 J. P. 184; 42 W. R. 253; 10 T. L. R. 178; 38 Sol. Jo. 185; 10 R. 94, D. C. *Annotations:—Consd.* *Hobbs v. Winchester Corpn.*, [1910] 2 K. B. 471. *Refd.* *Firth v. McPhail*, [1905] 2 K. B. 300.

**64. ———.]**—Where meat intended for human consumption is exposed for sale & is condemned as unsound, the person in whose possession or on whose premises the meat is found is liable to conviction under sect. 117 of the above Act whether he is or is not aware of the

*Hobbs v. Winchester Corpn.*, [1910] 2 K. B. 471; 79 L. J. K. B. 1123; 102 L. T. 841; 74 J. P. 413; 26 T. L. R. 557; 8 L. L. R. 1072, C. A.

*Annotation:—Refd.* *Bothamley v. Jolly*, [1915] 3 K. B. 425.

**d. Exposure for sale of diseased meat.]**—Knowledge that an animal is diseased is necessary to constitute an offence against Health Act, 1898 (S.A.), s. 109.—*MASTER BUTCHERS, LTD. v. LAUGHTON & COOMBS, LTD.* (1915), 19 C. L. R. 349.—**AUS.**

**e. Customs—False entry.]**—Defts. relying upon a statement of the Minister of Customs reported in Commonwealth Hansard & the newspapers that the goods in question were free, instructed their clerk to pass an entry in the following terms: "39 bales of paper for wrapping fruit—Free." The clerk had no knowledge of the size of the paper but was informed by a customs official that being free it was 10 by 10, & by the latter's direction he inserted those figures. The paper was not in fact 10 by 10, & defts. were charged under Commonwealth Customs Act, 1901, s. 234 (d), with having made an entry which was false in that particular, but magistrates dismissed the charge:—*Held*: a guilty intent is not necessary to constitute an offence under the above sect.—*DAWSON v. JACK* (1902), 28 V. L. R. 634.—**AUS.**

**f. ———.]**—Proof of the existence of *mens rea* is not essential to the establishment of an offence under the Commonwealth Customs Act, 1901, s. 234 (e).—*STEPHENS v. REID (R.) & Co.* (1902), 28 V. L. R. 82.—**AUS.**

**g. ——— Declaration.]**—*Mens rea* is not necessary to constitute an offence under s. 243, the object of that sect. being to throw upon the person making the declaration the obligation of making a declaration which is true in fact, & to penalise the person who makes a declaration which is untrue in fact for the mistake he has made.—

**65. Sale of articles bearing forged trade mark—Merchandise Marks Act, 1887 (c. 28).]**—*CHRISTIE, MANSON & WOODS v. COOPER*, No. 40, *ante*.  
———.]—*See, further*, **TRADE MARKS, NAMES & DESIGNS**

by carrier—6

**c. 16, s. 2.]**—In an information on sect. 2 of the

aver that deft. is not a person qualified to kill game, nor that he had the game in his possession knowingly.—*R. v. MARSH* (1824), 2 B. & C. 717; 4 Dow. & Ry. K. B. 260; 2 Dow. & Ry. M. C. 182; 107 E. R. 550.

*Annotations:—Consd.* *R. v. Prince* (1875), L. R. 2 C. C. R. 154. *Refd.* *Fletcher v. Calthrop* (1845), 6 Q. B. 880; *Newman v. Jones* (1886), 17 Q. B. D. 132; *Sherras v. De Rutzen*, [1895] 1 Q. B. 918. *Mentd.* *Konyon v. Hart* (1865), 34 L. J. M. C. 87; *Cotterill v. Lempriere* (1890), 24 Q. B. D. 634.

**67. Possession of naval stores—9 & 10 Will. 3, c. 41, s. 2.]**—On an indictment charging deft., under sect. 2 of the above Act, with being in possession of naval stores marked with the broad arrow, it is necessary to show not only that deft. was possessed of the articles, but also that he knew they were marked with the broad arrow.—*R. v. COHEN* (1858), 8 Cox, C. C. 41.

*Annotations:—Fold.* *R. v. Sleep* (1861), 8 Cox, C. C. 472. *Refd.* *R. v. Prince* (1875), L. R. 2 C. C. R. 154; *R. v. Tolson* (1889), 23 Q. B. D. 168.

**68. ———.]**—*R. v. SLEEP*, No. 33, *ante*.

*railway Act.]*—where G. & S. received from N. cases which contained oil of vitriol, & N. had

were of an entirely different description, & G. & S. had no knowledge of what the contents really were, & sent them innocently by the railway:—*Held*: they were not liable to be convicted under 5 & 6 Will. 4, c. cvii., s. 108, guilty knowledge

*CHAMBERLAIN v. FENN* (1906), 26 N. Z. L. R. 152.—**N.Z.**

**h. Factory & Workshop Acts—Employment at less than minimum wage.]**—*Held*: knowledge or wilfulness is not necessary to constitute an offence under Factories & Shops Act, 1915, s. 226 (1) (a) & it is not a defence to a prosecution for employing a person at less than minimum wage under that act that deft. reasonably believed in a state of facts which if true would have disproved the charge.—*DUNCAN v. ELLIS* (1916), 21 C. L. R. 379.—**AUS.**

**k. Game—Poaching.]**—A. demised to a coursing club the exclusive right of hunting, coursing, & killing hares on his lands. Subsequently A. gave permission to H. & M. who were ignorant of the demise to hunt over the lands. H. & M. did hunt & look for game:—*Held*: an offence was committed, even if they believed that they had authority to hunt or look for game on A.'s land.—*COLLINS v. MURPHY & HORGAN* (1912), 46 I. L. T. 240.—**IR.**

**l. Public Health.]**—In order to support a conviction under the clause in the Victoria Consolidated Health Bye-law, 1886, providing: "No person shall let, occupy, or suffer to be occupied as a dwelling or lodging, any room (a) which does not contain at least 384 cubic feet of space for each person occupying the same," it is necessary that there should be some evidence of guilty knowledge, actual or constructive, on the part of the person charged.—*Re WING KEE* (1893), 2 B. C. R. 321.—**CAN.**

**m. Tramway—Travelling without payment of fare.]**—Under clause 17 of the regulations to the Tramways Act,

1890, Sch. II., an intention to defraud is not a necessary ingredient of the offence of avoiding payment of a fare within the meaning of the clause.—*COCHRANE v. TUTTILL*, [1908] V. L. R. 549.—**AUS.**

**n. Sale of articles bearing forged trade mark.]**—Deft. was indicted & convicted under Criminal Code, s. 400 (b), for having unlawfully filled bottles with an article of food for the purpose of sale or traffic therein, such bottles having stamped upon them the trade mark of an incorporated co.—The evidence showed that the bottles in question were filled by deft.'s servant without deft.'s knowledge. The jury returned a verdict of "guilty without knowledge":—*Held*: the clear object of the statute being to protect manufacturers & others in the use of their registered trade marks, knowledge on the part of deft. was not of the essence of the offence & that the trial judge was right in treating the verdict rendered as one of guilty.—*R. v. NEWCOMBE* (1918), 52 N. S. R. 85; 40 D. L. R. 85; 29 Can. Crim. Cas. 249.—**CAN.**

**o. ———.]**—To sustain a conviction for applying a false trade description to an article sold, in terms of Act 12, 1888, s. 1, ss. 1 (d), a *mens rea* on the part of M. must be established, when it was open to him under sect. 1 of the Act to prove that he acted without any intent to defraud.—*R. v. MARGET*, [1914] C. P. D. 953.—**S. AF.**

**p. Possession of articles bearing false marks.]**—The mere having in possession for sale packages of fruit fraudulently packed within Fruit Marks Act, 1901, c. 27 (D.), s. 7, is an offence, thereunder, though no one

being necessary before the offence could be committed.—*HEARNE v. GARTON* (1859), 2 E. & E. 66; 28 L. J. M. C. 216; 33 L. T. O. S. 256; 23 J. P. 693; 5 Jur. N. S. 648; 7 W. R. 566; 121 E. R. 26.

*Annotations*:—*Appld.* *R. v. Sleep* (1861), 8 Cox, C. C. 472. *Consd.* *R. v. Prince* (1875), L. R. 2 C. C. R. 154. *Refd.* *Legg v. Pardoe* (1860), 9 C. B. N. S. 239; *R. v. Tolson* (1889), 23 Q. B. D. 168. *Mentd.* *R. v. Stephens* (1866), 12 Jur. N. S. 961; *Blower v. G. W. Ry.* (1872), L. R. 7 C. P. 655; *R. v. Paget* (1881), 8 Q. B. D. 151; *Toronto Ry. v. Toronto City*, [1920] A. C. 446.

**70. Reception of lunatics in unlicensed house—8 & 9 Vict., c. 100, s. 44.**—Deft. was convicted, under sect. 44 of the above Act, of receiving two or more lunatics into her house, not being a registered asylum or hospital, or a house duly licensed under the Act, or under any previous Act, but it was specially found by the jury who convicted, that though the persons so received were lunatic, deft. honestly & on reasonable grounds believed that they were not lunatic:—*Held*: such belief was immaterial, & the conviction was right.—*R. v. Bishop* (1880), 5 Q. B. D. 259; 49 L. J. M. C. 45; 42 L. T. 240; 44 J. P. 330; 28 W. R. 475; 14 Cox, C. C. 404, C. C. R.

*Annotations*:—*Refd.* *Cundy v. Le Cocq* (1884), 13 Q. B. D. 207; *R. v. Tolson* (1889), 23 Q. B. D. 168; *Sherras v. De Rutzen*, [1895] 1 Q. B. 918; *Hobbs v. Winchestr Corp.*, [1910] 2 K. B. 471. *Mentd.* *Burrows v. Rhodes*, [1899] 1 Q. B. 816.

**71. Larceny.**—Where during a voyage a seaman saves up a portion of his rations supplied in accordance with M. S. Acts Amendment Act, 1906 (c. 48), s. 25, & at the end of the voyage takes home the unconsumed rations, he cannot be convicted of larceny unless the prosecution prove that there was *mens rea* on his part. The fact that the shipowners, to the knowledge of the seaman, disapproved of the practice of taking away unconsumed rations at the end of the voyage, does not justify a finding of *mens rea* against the seaman. It must be proved that he knew that he was taking away the property of another.—*MOGAN v. CALDWELL* (1919), 88 L. J. K. B. 1141; 83 J. P. 213; 35 T. L. R. 381; 17 L. G. R. 330; *sub nom.* *MORGAN v. CALDWELL*, 121 L. T. 148; 14 Asp. M. L. C. 437; 26 Cox, C. C. 425, D. C.

**72. Shooting pigeon—Larceny Act, 1861 (c. 96),**

is imposed on thereby nor any fraud intended.—*Jt. v. JAMES* (1903), 1 O. W. R. 520; 22 C. L. T. 369; 4 O. L. R. 537.—*CAN.*

**q. General dealer—Entry of false name.**—A licensed general dealer is, under General Dealers (Ireland) Act, 1903 (c. 44), s. 2, bound to enter the true name & place of abode of the person from whom he purchases an article, otherwise he is guilty of an offence under sect. 2 of above Act, & it is no answer that he entered the name & place of abode given by the seller & had no reason to believe they were not the true name & abode.—*TOPPIN v. MARCUS*, [1908] 2 I. R. 423.—*IR.*

**r. Extra-judicial oath.**—The administration of an extra-judicial oath is an indictable offence under sect. 20 of the Oaths Act (1900, No. 20). It is not necessary to allege or prove *mens rea* in deft.—*R. v. MARTIN* (1904), 4 S. R. N. S. W. 720; 21 N. S. W. W. N. 233.—*AUS.*

**s. Maternity allowance—Claim for.**—*Mens rea* is an essential ingredient of an offence created by s. 10 of the Maternity Allowance Act, 1912.—*R. v. ERSON* (1914), 17 C. L. R. 506.—*AUS.*

**t. of water.**—Applt. was convicted of contravening a municipal regulation in that upon a certain day

he allowed the waste or misuse of the municipal water supply upon a certain erf belonging to him. It appeared that water was found running on a certain night from a tap upon the applt.'s erf, which was unoccupied at the time:—*Held*: the applt. had no knowledge that the water was running to waste, he did not "allow" the waste of water, & the conviction should be quashed.—*R. v. FARR* (1914), C. P. D. 36.—*S. AF.*

**a. Provision for safety in mines.**—Where workmen had been allowed to remain in a place in a mine where air for a considerable period during the course of 1½ months had contained dust & smoke:—*Held*: the mine overseer had been rightly convicted of a contravention of Mines, Works & Machinery Regs. 61, even though he had no actual knowledge as to the presence of the dust & smoke.—*R. v. BENNETT* (1916), T. P. D. 355.—*S. AF.*

**b. Sunday trading.**—D., the proprietor of a tea shop, was charged before a police magistrate with a breach of the Sunday Observance Act, 1908. It appeared that on a Sunday, during his absence from the State, his assistant sold cigarettes contrary to his express instructions. The magistrate, on the ground that deft. had no guilty knowledge of the transaction:—*Held*: guilty knowledge was necessary to constitute an offence against the

s. 23.]—To a charge under sect. 23 of the above Act, the belief of deft. that a pigeon shot by him was a wild one which he might lawfully kill affords no defence.—*HORTON v. GWYNNE*, [1921] 2 K. B. 661; 90 L. J. K. B. 1151; 125 L. T. 309; 85 J. P. 210; 26 Cox, C. C. 744; 19 L. G. R. 351, D. C.

**73. Provisions for safety in coal mines—23 & 24 Vict. c. 151, s. 10.**—*DICKENSON v. FLETCHER*, No. 107, *post*.

**74. Fabricating a voting paper—21 & 22 Vict. c. 98, s. 13 (5).**—At an election of a member of a local board of health, a voting paper was delivered at the house of R., a voter. The wife of the voter, having her husband's authority, put a cross at the bottom of the paper, & resp. then put the voter's initials in the margin opposite the name of the candidate for which the vote was intended, & resp. signed his name as witness to the mark of the voter. An information having been laid against resp. under sect. 13 (5) of the above Act, for "fabricating" the voting paper, the justices dismissed the summons, finding, on the above facts, that resp. *bona fide* believed, as the fact was, that the wife had authority to put her husband's name to the paper, & that resp. had no criminal or unlawful intention in putting his name as witnessing the mark of the voter:—*Held*: the justices were right, for *mens rea* was necessary to constitute the offence.—*ABERDARE LOCAL BOARD v. HAMMETT* (1875), L. R. 10 Q. B. 162; 44 L. J. M. C. 49; 32 L. T. 20; 39 J. P. 598; 23 W. R. 617.

**75. User of unlicensed vehicle—Customs & Inland Revenue Act, 1888 (c. 8), s. 4 (3).**—*STRUTT v. CLIFT*, No. 36, *ante*.

**76. Exportation of prohibited goods—Customs Consolidation Act, 1876 (c. 36), s. 186.**—A summons against resp. under sect. 186 of the above Act, for knowingly harbouring prohibited goods on a steamer of which he was chief steward, was dismissed by a magistrate on the ground that the offence charged involved an intention to contravene the prohibition, & that resp. had no such intention:—*Held*: the magistrate's decision was right, & must be affirmed.—*FRAILEY v. CHARLTON*, [1920] 1 K. B. 147; 88 L. J. K. B. 1285; 121

relevant sect. of the above Act.—*BANE v. DAVIS* (1921), 17 Tas. L. R. 52.—*AUS.*

**c. Agricultural seeds—Entry of false name.**—The owner of the shop in which the sample is taken is guilty of an offence under Weeds & Agricultural Seeds (Ireland) Act, 1909 (c. 31), s. 5 (1) & (2), if a false name & address is wilfully given by the manager of the business, although without the authority or consent of the principal. The word "wilfully" in the sub-sect. means "intentionally, & not by mistake

TECHNICAL INSTRUCTION DEPARTMENT  
*v. BURKE*, [1915] 2 I. R. 128.—*IR.*

**d. Excise—Excise Act (1901), s. 120.**—*WALKER v. CHAPMAN*, [1904] S. R. Q. 330.—*AUS.*

**e. Sealing laws.**—It is not necessary to prove *mens rea* against accused under the Sealing laws, 55 Vict. c. 2, s. 2.—*McCOWEN v. BOWRING BROTHERS* (1896), 7 Nfld. L. R. 872.—*NFLD.*

**f. Licensed premises—Charge of "knowingly" committing offence.**—Where the holder of a liquor licence is charged with knowingly committing a statutory offence, some evidence of guilty knowledge must be brought home to him or his agent, in the absence of some provision in the statute to the contrary.—*KAPLAN v. R.*, [1912] E. D. L. 78.—*S. AF.*

*Sect. 2.—Elements of crime: Sub-sect. 2, B. & C. Sect. 3: Sub-sects. 1 & 2.]*

L. T. 577; 83 J. P. 249; 26 Cox, C. C. 500, D. C.

*See, further, REVENUE.*

**77. Suffering gambling on licensed premises—Licensing Act, 1872 (c. 94), s. 17.]**—In order to support a conviction under sect. 17 of the above Act, it is necessary to give some evidence of actual or constructive knowledge on the part of the person charged that gaming was carried on on his premises.—*BOSLEY v. DAVIES* (1875), 1 Q. B. D. 84; 45 L. J. M. C. 27; 33 L. T. 528; 40 J. P. 550; 24 W. R. 140.

*Annotations:—Consd. Bond v. Evans* (1888), 21 Q. B. D. 249. *Refd. Redgate v. Haynes* (1878), 45 L. J. M. C. 65.

**78. Sale of intoxicating liquor to drunken person—Licensing Act, 1872 (c. 94), s. 13.]**—A publican sold intoxicating liquor to a drunken person who had given no indication of intoxication, & without being aware that the person so served was drunk:—*Held*: the prohibition of sect. 13 of the above Act was absolute, & knowledge of the condition of the person served with liquor was not necessary to constitute the offence.—*CUNDY v. LE COCQ* (1884), 13 Q. B. D. 207; 53 L. J. M. C. 125; 51 L. T. 265; 48 J. P. 599; 32 W. R. 769, D. C.

*Annotations:—Consd. Bond v. Evans* (1888), 21 Q. B. D. 249. *Apld. Hobbs v. Winchester Corp.*, [1910] 2 K. B. 471. *Refd. Newman v. Jones* (1886), 17 Q. B. D. 132; *Somerset v. Wade*, [1894] 1 Q. B. 574; *Burrows v. Rhodes*, [1899] 1 Q. B. 816; *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 339. *Mentd. Chisholm v. Doulton* (1889), 58 L. J. M. C. 133.

**79. Permitting drunkenness on licensed premises—Licensing Act, 1872 (c. 94), s. 13.]**—A licensed person cannot be convicted, under sect. 13 of the above Act, of permitting drunkenness to take place on his premises, where the evidence shows that a person who was on the premises was in fact drunk, but the licensed person did not know that such person was drunk.—*SOMERSET v. WADE*, [1894] 1 Q. B. 574; 63 L. J. M. C. 126; 70 L. T. 452; 58 J. P. 231; 42 W. R. 399; 10 T. L. R. 313; 10 R. 105, D. C.

**80. Supplying liquor to constable on duty—Licensing Act, 1872 (c. 94), s. 16 (2).]**—Sect. 16 of the above Act, which prohibits a licensed victualler from supplying liquor to a police constable while on duty, does not apply where the licensed victualler *bond fide* believes that the police constable is off duty.—*SHERRAS v. DE RUTZEN*, [1895] 1 Q. B. 918; 64 L. J. M. C. 218; 72 L. T. 839; 59 J. P. 440; 43 W. R. 526; 11 T. L. R.

**g. — Allowing prohibited games.]**—Failure to take reasonable steps to prevent billiards being played, which amounts to mere negligence or carelessness, will not support a conviction on a charge against an innkeeper under Licensing Act, 1881, s. 155, unless such negligence or carelessness is in itself evidence of connivance.—*BAILEY v. PRATT* (1902), 20 N. Z. L. R. 758.—**N.Z.**

**h. Supplying intoxicating liquor to drunken person.]**—A licensee may be convicted under Licensing Act, 1890, s. 124, of supplying liquor to a person intoxicated, although the liquor was actually supplied by a barman without the knowledge, & contrary to the orders of the licensee, who had taken all reasonable precautions to prevent such occurrence.—*DAVIS v. YOUNG*, [1910] V. L. R. 369.—**AUS.**

**k. —.]**—The Licensing Act, 1881, s. 146, makes it an offence for an innkeeper to sell liquor to any person already in a state of intoxication. An innkeeper sold liquor to a

369; 39 Sol. Jo. 451; 18 Cox, C. C. 157; 15 R. 388, D. C.

*Annotations:—Consd. R. v. Leinster* (1923), 87 J. P. 191. *Refd. Bank of New South Wales v. Piper*, [1897] A. C. 383; *Derbyshire v. Houlston*, [1897] 1 Q. B. 772; *Korten v. West Sussex County Council* (1903), 72 L. J. K. B. 514; *Hobbs v. Winchester Corp.*, [1910] 2 K. B. 471; *Griffiths v. Studebakers* (1923), 87 J. P. 189.

**81. Sale of intoxicating liquor to children in unsealed vessel—Intoxicating Liquors (Sale to Children) Act, 1901 (c. 27), s. 2.]**—Where the holder of a licence to sell intoxicating liquors sells, or delivers for sale at the residence or working place of the purchaser, any such liquor to a child under the age of fourteen years for consumption by any person on or off the premises in a vessel not corked & sealed as required by the above Act, he is guilty of an offence under sect. 2 of that Act, notwithstanding that at the time he sold & delivered such liquor he honestly believed that the vessel was properly corked & sealed in accordance with the requirements of the Act.—*BROOKS v. MASON*, [1902] 2 K. B. 743; 72 L. J. K. B. 19; 88 L. T. 24; 67 J. P. 47; 51 W. R. 224; 19 T. L. R. 4; 47 Sol. Jo. 13; 20 Cox, C. C. 464, D. C.

*Annotations:—Refd. Emary v. Nolloth*, [1903] 2 K. B. 264. *Mentd. Jones v. Shervington*, [1908] 2 K. B. 539.

**82. —.]**—A barman *bond fide* believing a boy's statement that he was fourteen, served him with liquor in a can. The licence-holder was not present at the time of the sale & had no knowledge thereof:—*Held*: as the barman had not knowingly sold the beer to a person under the age of 14, applt. could not be convicted, under the circumstances, of an offence under sect. 2 of the above Act.—*GROOM v. GRIMES* (1903), 89 L. T. 129; 67 J. P. 345; 47 Sol. Jo. 567; 20 Cox, C. C. 515, D. C.

*See, further, INTOXICATING LIQUORS.*

### C. Liability of Corporations.

*See CORPORATIONS, Vol. XIII., pp. 408–411.*

## SECT. 3.—LIABILITY OF MASTER FOR ACT OF SERVANT OR AGENT.

### SUB-SECT. 1.—WHERE SERVANT OR AGENT IS INNOCENT.

*See Sect. 6, sub-sect. 2, A, post.*

drunken person in whom there was no observable signs of drunkenness, without being aware that the person so served was already drunk:—*Held*: the prohibition was absolute, & that knowledge of the condition of the person served with liquor was not necessary to constitute the offence.—*McVEIGH v. ECCLES* (1899), 18 N. Z. L. R. 44.—**N.Z.**

**l. Supplying intoxicating liquor to an Indian.]**—Deft., a wholesale liquor dealer in E., supplied an intoxicant to an Indian:—*Held*: the appearance of these men was sufficient to arouse suspicions & put deft. on his guard, & even if deft. acted innocently by Indian Act, s. 135, he was not excused.—*R. v. PICKARD* (1908), 7 W. L. R. 797; 14 Can. Crim. Cas. 33.—**CAN.**

**m. Unauthorised possession of liquor.]**—*R. v. O'KELL* (1887), 1 Terr. L. R. 79.—**CAN.**

**n. Unauthorised sale of liquor.]**—Deft. was the owner of an unlicensed

public house or hotel, which he had leased to his son; deft. lived in the hotel as a boarder:—*Held*: the word "permit" in Liquor License Act, s. 50, indicates authorisation, either expressly or tacitly, proceeding from the occupant personally, & involves a *mens rea*; & there being no evidence that deft. knew or in any way authorised or connived at the drinking on the premises for "permitting" which he was convicted, even if he were an occupant, the conviction could not be sustained.—*R. v. IRISH* (1909), 15 O. L. R. 351; 13 O. W. R. 769.—**CAN.**

**o. Possession of still.]**—A person is not guilty of having in his possession a still under Inland Revenue Act, s. 180 (e), if, though the still be on his premises, he has no knowledge of its existence.—*R. v. CAPAN* (1920), 2 W. W. R. 135; 51 D. L. R. 672; 32 Can. Crim. Cas. 267; 30 Man. L. R. 316.—**CAN.**

**p. Possession of narcotic drugs—Mens rea essential.]**—*R. v. WONG CHUN QUONG* (1923), 32 B. C. R. 108.—**CAN.**

## SUB-SECT. 2.—WHERE ACT OF SERVANT IS AUTHORISED.

**83. Distinguished from civil liability.]**—Where a man makes a request to another to publish defamatory matter, of which for the purpose he gives him a statement, whether in full or in outline, & the agent publishes the matter, adhering to the sense & substance of it, although the language be to some extent his own, the man making the request is liable to an action as the publisher.

There is this distinction to be made between civil & criminal proceedings. In the former, a principal is only liable for acts done by his agent within the scope of his authority; but in the latter the principal who instructs an agent to do something illegal, which may be injurious to another, cannot qualify the wrong (BYLES, J.).—*PARKES v. PRESCOTT* (1869), L. R. 4 Exch. 169; 38 L. J. Ex. 105; 20 L. T. 537; 17 W. R. 773, Ex. Ch.

*Annotation*:—*Mentd. R. v. De Marny* (1906), 71 J. P. 14.

**84. Master responsible.]**—*WALTHAM v. MULGAR* (1805), Moore, K. B. 776; 72 E. R. 899.

**85. —.]**—If A. & B. are the owners of adjoining mines, & A., asserting that a certain airway belongs to him, directs his workmen to stop it up, & they, acting *bonâ fide*, & believing that A. has a right to give such an order, do so, they are not guilty of felony within 7 & 8 Geo. 4, c. 30, s. 6, for stopping up the airway of a mine, even though A. knew that he had no right to the airway, but if either of the workmen knew that the stopping of the airway was a malicious act of his master, such workman would be guilty of the felony.—*R. v. JONES* (1837), 8 C. & P. 131.

*Annotations*:—*Reid. R. v. Day* (1844), 8 J. P. 186. *Mentd. R. v. Martin* (1849), 2 Car. & Kir. 950; *Chapman v. Milvain* (1850), 5 Exch. 61.

**86. —.]**—Where a chimney of a manufactory sends forth smoke so as to be a nuisance within 29 & 30 Vict. c. 90, s. 19, & the justices are satisfied that the fire was lit by order of the master, it is the master, & not the particular servant who happened to light the fire, who is liable to be summoned for the nuisance.—*BARNES v. AKROYD* (1872), L. R. 7 Q. B. 474; 41 L. J. M. C. 110; 26 L. T. 692; 37 J. P. 116.

*Annotation*:—*Reid. Sherras v. De Rutzen*, [1895] 1 Q. B. 918.

**87. —.]**—Applt. was a guardian of the poor for the N. Union. He carried on business as a cabinet maker & upholsterer in partnership with his son. The relieving officer purchased at applt.'s shop, from the son & partner of the applt., an iron bedstead, which was, by the direction of the relieving officer, delivered at the house of an outdoor pauper in the union. Applt. was not present when the bedstead was ordered, nor when it was paid for, nor when it was delivered, & the

price was paid to his son alone. The bedstead was only lent to the pauper, & remained the property of the guardians:—*Held*: applt. was liable to the penalty imposed by Poor Law Amendment Act, 1834 (c. 76), s. 77, without proof of any guilty knowledge on his part, the bedstead having been supplied by his partner with knowledge of the circumstances, in the ordinary course of the partnership business.—*DAVIES v. HARVEY* (1874), L. R. 9 Q. B. 433; 43 L. J. M. C. 121; 30 L. T. 629; 38 J. P. 661; 22 W. R. 733.

*Annotations*:—*Consd. Newman v. Jones* (1886), 17 Q. B. D. 132. *Reid. Sherras v. De Rutzen*, [1895] 1 Q. B. 918; *Collman v. Mills* (1896), 75 L. T. 590; *Griffiths v. Studebakers* (1923) 87 J. P. 199.

**88. —.]**—Applt. was convicted under Sunday Observance Act, 1877 (c. 7), of exercising certain worldly labour, business & work, the same not being a work of necessity or charity. The evidence showed that on a certain Sunday, applt.'s shop was open from 1.20 to 10 p.m., & various persons entered & purchased different articles from the man in charge, who was selling on behalf of applt., but applt. was not himself present. No evidence was given for applt., & he was not personally present at the hearing:—*Held*: there was no ground for interfering with the conviction.—*CONNOR v. QUEST* (1906), 96 L. T. 28; 71 J. P. 62, D. C.

**89. —.]**—*R. v. KEY* (1908), 52 Sol. Jo. 784; 1 Cr. App. Rep. 135, C. C. A.

**90. — Libel—Publication by bookseller.]**—*R. v. DODD* (1724), Sess. Cas. K. B. 135; 93 E. R. 136.

**91. — — —.]**—*R. v. CUTHELL* (1799), *Erskine's Speeches*, Vol. 5, 231.

**92. — — — Publication by newspaper.]**—*PARKES v. PRESCOTT*, No. 83, *ante*.

**93. — — —.]**—*R. v. HOLBROOK*, No. 100, *post*.

*See LIBEL ACT*, 1843 (c. 96), s. 7; *LIBEL & SLANDER*.

**94. — Possession of agent may be possession of master.]**—In order to convict a person charged under Coinage Offences Act, 1832 (c. 34), s. 8, with having in his possession more than three pieces of counterfeit coin, with intent to utter them, it is not necessary that the possession should be individual possession but it is enough if the coin be in the possession of the person charged or his immediate agent, as sect. 21 of the statute provides for such a case.

Where two persons were taken into custody together, one of them having on him sixteen pieces of counterfeit coin & the other only two pieces:—*Held*: the person who had only the two pieces might in point of law be convicted as well as the person who had the sixteen.—*R. v. WILLIAMS* (1842), Car. & M. 259.

**Servant acting under claim of right.]**—*See* No. 11,507, *post*.

## PART I. SECT. 3, SUB-SECT. 2.

**q. Whether master responsible.]**—L. was supercargo of a ship conveying natives of T. & P. & other islands in the South Seas to be employed as labourers in F. A quarrel arose on board between the T. & P. natives, & a serious disturbance occurred, the P. natives shooting with bows & arrows at the T. natives & the crew. Muskets were given to the crew in the presence of L., who said to A., "Shoot if you can get a good shot at them," or "Fire down on them & take good aim." About twenty minutes afterwards & when the disturbance had to a great extent ceased, three of the crew who had previously received muskets, neither of them being A., shot the P.

natives dead. L. was tried for murder & found guilty of manslaughter:—*Held*: it was for the jury to decide on the nature of the orders given & to consider whether during the interval between their delivery & the discharge of the last shot, circumstances had so changed or so long a time elapsed, as

orders had been virtually though not expressly withdrawn; their verdict ought not to be disturbed.—*R. v. LEVINGER* (1869), 6 W. W. & A'B. 147. —*AUS*.

**r. —.]**—An ensign in a regiment, without sufficient cause, instructed a sentry to fire among the prisoners, & on one being killed:—*Held*: guilty of culpable homicide.—

*R. v. MAXWELL* (1807), *Buchan. p. II. 3.*—*SCOT*.

**s. — On proof of illegal omission.]**—To make a master criminally responsible for an offence committed by his servants, it must be shown that there has been some act or illegal omission on

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some prior instigation or conspiracy.—*R. v. SHAMSUNDER* (1873), 1 N. W. 310. —*IND*.

**t. — & servant or agent.]**—Where one person employs another to do a criminal act on his behalf, & the other deliberately & knowingly does that act, both are criminally liable.—*IL v. SCHAPIRO* (1904), T. S. 355.—*S. AF*.

*Sect. 3.—Liability of master for act of servant or agent: Sub-sect. 3, A.]*

SUB-SECT. 3.—WHERE ACT OF SERVANT IS UN-AUTHORISED.

*A. General Rule.*

**95. Whether master liable.]**—WALTHAM *v.* MULGAR (1605), Moore, K. B. 776; 72 E. R. 899.

**96. — Though act done in his presence.]**—In criminal cases the principal is not answerable for the act of his deputy. The accidental presence of the principal does not revoke the power of the deputy.—*R. v. HUGGINS* (1730), 2 Stra. 883; 17 State Tr. 309; 2 Ld. Raym. 1574; 1 Barn. K. B. 396; Fitz-G. 177; 93 E. R. 915.

*Annotations:—*Consd. *Jones v. Nicholls* (1829), 3 Moo. & P. 12. *Refd.* *R. v. Francis* (1735), Cunn. 165. *Mentd.* *Scott v. Shepperd* (1773), 3 Wils. 403; *R. v. Lea, Parry, Rea, Jones & Wright* (1837), 2 Mood. C. C. 9; *Campbell v. R.* (1846), 11 Q. B. 799; *May v. Burdett* (1846), 16 L. J. Q. B. 64; *Winsor v. R.* (1866), L. R. 1 Q. B. 289; *R. v. Murphy* (1869), L. R. 2 P. C. 535; *Manton v. Brocklebank* (1923), 92 L. J. K. B. 624.

**97. —]**—MELVILLE'S (LORD) CASE (1806), 29 State Tr. 549.

*Annotations:—*Mentd. *Mortimer v. M'Callan* (1840), 6 M. & W. 58; *Chubb v. Salomons* (1852), 3 Car. & Kir. 75; *Adams v. Lloyd* (1858), 31 L. T. O. S. 219; *Pye v. Butterfield* (1864), 5 B. & S. 829.

**98. — Accident whilst pilot on board vessel.]**—The captain & pilot of a steamboat were both indicted for manslaughter of a person who was on board of a smack, by running the smack down. The running down was attributed, on the part of the prosecution, to improper steerage of the steamboat, arising from there not being a man at the bow to keep a look-out at the time of the accident. It was proved that there was a man on the look-out when the vessel started, about an hour previous. According to one witness, the captain & pilot were both on the bridge between the paddle-boxes:—*Held*: under these circumstances there was not such personal misconduct on the part of either as to make them guilty of felony.—*R. v. ALLEN* (1835), 7 C. & P. 153.

*Annotation:—*Refd. *R. v. Hughes* (1857), 7 Cox, C. C. 301.

**99. — Negligence of servant causing death.]**—Deft. was a person who made fireworks contrary to 9 Will. 3, c. 7. He kept a quantity of combustibles at his house for the purpose of his business as a maker of fireworks. During his absence, through the negligence of his servants, a fire broke out amongst such combustibles, & a rocket becoming thereby ignited flew across the street, & setting fire to a house opposite, caused the death of a person therein:—*Held*: deft. was not guilty of manslaughter, as the death was not occasioned by the unlawful act of deft., but by the negligence of his servants.—*R. v. BENNETT* (1858), Bell, C. C. 1; 28 L. J. M. C. 27; 32

L. T. O. S. 110; 22 J. P. 757; 4 Jur. N. S. 1088; 7 W. R. 40; 8 Cox, C. C. 74, C. C. R.

**100. — Authority of editor of newspaper.]**—On the trial of a criminal information for libel against the proprietors of a newspaper it appeared that defts. had appointed an editor with general authority to conduct the paper, & left it entirely to his discretion what should be inserted therein, & that such editor had inserted the libel in question without the knowledge or express authority of defts.:—*Held*: the general authority given to the editor was not *per se* evidence that defts. had authorised or consented to the publication of the libel, within the meaning of Libel Act, 1843 (c. 96), s. 7.

Criminal intention is not to be presumed, but is to be proved, & in the absence of any evidence to the contrary, a person who employs another to do a lawful act is to be taken to authorise him to do it in a lawful & not in an unlawful manner (LUSH, J.).—*R. v. HOLBROOK* (1878), 4 Q. B. D. 42; 48 L. J. Q. B. 113; 39 L. T. 536; 43 J. P. 38; 27 W. R. 313; 14 Cox, C. C. 185, D. C.

*Annotations:—*Apprvd. *R. v. Bradlaugh* (1883), 15 Cox, C. C. 217; *R. v. Ramsey* (1883), Cab. & El. 126. *Refd.* *R. v. London Corpn.* (1886), 16 Q. B. D. 772; *R. v. Tibbits*, [1902] 1 K. B. 77; *R. v. Key* (1908) 1 Cr. App. Rep. 135.

**101. — Letter written by solicitor.]**—In order to make a client criminally responsible for a letter written by his solr. it must be shown that the letter was written in pursuance of the instructions of the client.—*R. v. DOWNER* (1880), 43 L. T. 445; 45 J. P. 52; 14 Cox, C. C. 486, C. C. R.

**102. — Quasi-criminal offence.]**—By the general principles of criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*, & therefore, in ordinary cases a master cannot be liable criminally for an offence committed by his servant. But there are exceptions to this rule in the case of *quasi*-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine; & the reason for this is, that the Legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; & if it is done the offender is liable to a penalty whether he had any *mens rea* or not, & whether or not he intended to commit a breach of the law. Where the act is of this character then the master, who, in fact, has done the forbidden thing through his servant, is responsible & is liable to a penalty (CHANNELL, J.).—PEARKS, GUNSTON & TEE, LTD. *v.* WARD, HENNER *v.* SOUTHERN COUNTIES DAIRIES CO., [1902] 2 K. B.

PART I. SECT. 3. SUB-SECT. 3.—A.

*a. Whether master liable.—Making false entry in Customs declaration.]*

Defts., relying upon a statement of the Minister of Customs reported in Commonwealth *Hansard* & the newspapers that the goods in question were free, instructed their clerk to pass an entry in the following terms: "39 bales of paper for wrapping fruit—Free." The clerk had no knowledge of the size of the paper, but was informed by a Custom's official that, being free it was 10 by 10, & by the latter's direction he inserted those figures. The paper was not, in fact, 10 by 10, & defts. were charged under Commonwealth Customs Act, 1901, s. 234 (d), with having made an entry which was false in that particular:—*Held*: defts. should have been convicted.

The fact that sect. 183 of the above Act makes special provision in one case as to the responsibility of a principal for the act of the agent does not in other cases in any way limit the responsibility of a principal for acts done in contravention of the Act, by his agent or servant in the ordinary course of his employment.—*DAWSON v. JACK* (1902), 28 V. L. R. 634.—AUS.

*b. — Trespass by servant.]*—The owner of sheep was prosecuted for wilfully causing them to trespass on a common contrary to Pounds Act, 1890, s. 30 (7). The servant of the owner, who was in charge of the sheep at the time, wilfully caused them to trespass, but the owner was not privy to or aware of the trespass:—*Held*: the owner was not liable to be convicted under the sect.—*HOWELL v. BULLEN*,

[1915] V. L. R. 445.—AUS.

No liability attaches to a master, in respect of an indictable offence committed by his servant, when he has no personal part in the offences & when the punishment is fine & imprisonment & possibly death. In the absence & without the knowledge & against the instructions of his master, a tailor's salesman sold military badges, which, although not exposed for sale, were in his master's shop:—*Held*: master was not guilty of the offence under War Preamption Regulations, 1915, of selling badges.—*MURPHY v. KENNEY*, [1916] V. L. R. 335.—AUS.

*d. — Using forged trade mark.]*—Deft. was indicted & convicted under Criminal Code, s. 400 (b) for having unlawfully filled bottles with an article

1; 71 L. J. K. B. 656; 87 L. T. 51; 66 J. P. 774; 20 Cox, C. C. 279.

*Annotations*.—**Apld.** *Pearks Dairies v. Tottenham Food Control Committee* (1918), 88 L. J. K. B. 623. **Refd.** *Korten v. West Sussex County Council* (1903), 88 L. T. 466. **Mentd.** *Smithies v. Bridge* (1902), 71 L. J. K. B. 555; *Hawke v. Hulton*, [1909] 2 K. B. 93; *Re Royal Naval School, Seymour v. Royal Naval School*, [1910] 1 Ch. 806; *Chuter v. Freeth & Pocock*, [1911] 2 K. B. 832; *R. v. Ascanio Puck & Palce* (1912), 76 J. P. 487; *R. v. Puck* (1912), 11 L. G. R. 136; *Moussell v. L. & N. W. Ry.*, [1917] 2 K. B. 836.

**103. — Stolen goods received by servant.**—A master cannot be convicted of receiving stolen property well knowing it to have been stolen where the only evidence is that his servant received the goods, & there is no evidence that the servant received them with the authority or knowledge of the master.—*R. v. PEARSON* (No. 2) (1908), 72 J. P. 451; 1 Cr. App. Rep. 77, C. C. A.

**104. — Nuisance adjoining highway—Highway Act, 1835 (c. 50), s. 70.**—H. was the owner of a portable steam threshing machine & used to let it out to farmers who hired it. One day he sent his servant with it to a farm on hire, & the servant, by the farmer's direction, fixed it in the yard within the distance from the highway prohibited by sect. 70 of the above Act. H. was not aware of this, & was not present or in any way interfered.—**Held**: as H. was not present & took no part in the act, he could not be convicted under sect. 70 of the above Act, of committing a nuisance adjoining the highway.—*HARRISON v. LEAPER* (1862), 5 L. T. 640; 26 J. P. 373.

**105. — Danger in highway.**—A cart was injured through contact with a heap of stone which had been allowed to remain after nightfall upon a highway. The stone had been laid there by a carter who acted under the orders of a person to whom the surveyor had given general directions as to repairing the road, but the surveyor did not himself know that the stone had been laid on the road.—**Held**: the facts did not show any evidence of an offence by the surveyor within the meaning of Highways Act, 1835 (c. 50), s. 56.—*HARDCASTLE v. BIELBY*, [1892] 1 Q. B. 709; 61 L. J. M. C. 101; 66 L. T. 343; 56 J. P. 549.

**106. — Using naked lights in coal mine—Coal Mines Regulation Act, 1887 (c. 58), s. 50.**—A limited company were owners of a coal mine, & C. was the managing director. A certificated manager had the control of the working, & C. did not interfere beyond finding the money to carry on the works, & publishing the rules. Some one having used naked lights contrary to the rule.—**Held**: C. was an "agent" but as he had taken all reasonable means by publishing the rules, he was not liable for the offence within sect. 50 of the above Act.—*STOKES v. CHECKLAND* (1893), 68 L. T. 457; 57 J. P. 232; 9 T. L. R. 235; 37 Sol. Jo. 251; 17 Cox, C. C. 631; 5 R. 240.

*Annotation*.—**Refd.** *Stokes v. Mitcheson*, [1902] 1 K. B. 857.

**107. — Provision of safety lamps in mines—23 & 24 Vict., c. 151, s. 22.**—As a general rule no

penal consequences are incurred where there has been no personal neglect or default, & a *mens rea* is essential to an offence under a penal enactment, unless a contrary intention appears by express language or necessary inference.

Safety lamps were given out in a mine to which sect. 22 of the above Act applied, without being duly locked as required by sect. 10 of the Act; a competent lampman had been appointed, & there was no personal default in either the owners or the agent of the mine.—**Held**: the owners & the agent of the mine were not liable to be convicted under sect. 22 of the above Act.—*DICKENSON v. FLETCHER* (1873), L. R. 9 C. P. 1; 43 L. J. M. C. 25; 29 L. T. 540; 38 J. P. 88.

**108. — Smoking chimney—Smoke Nuisance (Metropolis) Act, 1853 (c. 128).**—*CHISHOLM v. DOULTON*, No. 32, ante.

**109. — Delivery of short weight—Weights & Measures Act, 1889 (c. 21), s. 29 (2).**—In order to convict the seller of coal of an offence under sect. 29 (2) of the above Act there must be an actual representation, by him, as to the weight of the coal sold, & a representation made to an inspector, by a servant in charge of a vehicle carrying coal for delivery to a purchaser, is not of itself the representation of the master so as to make him liable.—*ROBERTS v. WOODWARD* (1890), 25 Q. B. D. 412; 59 L. J. M. C. 129; 63 L. T. 200; 55 J. P. 116; 38 W. R. 770; 17 Cox, C. C. 139, D. C.

*Annotations*.—**Distd.** *Franklin v. Godfrey* (1894), 63 L. J. M. C. 239. **Apld.** *Paul v. Hargreaves* (1903), 77 L. J. K. B. 535.

**110. — ———.**—A metal label affixed to a sack of coal, indicating that the sack when full contains half a hundredweight, constitutes a representation by the seller to the purchaser, within the above sect., that the sack when filled & delivered by the carter at the purchaser's residence contains that weight of coal.—*FRANKLIN v. GODFREY* (1894), 63 L. J. M. C. 239; 43 W. R. 46; 38 Sol. Jo. 683; 10 R. 523, D. C.

*Annotation*.—**Refd.** *Paul v. Hargreaves* (1903), 77 L. J. K. B. 535.

**111. — Sale of adulterated food—Sale of Food & Drugs Act, 1875 (c. 63), s. 6.**—A servant of appts. sold lard adulterated with foreign matter without a proper label indicating its character. On the hearing of a summons against appts. under sect. 6 of the above Act, it was proposed, on behalf of appts., to call evidence to show that the action of the servant was contrary to their express instructions.—**Held**: sect. 6 of the above Act does not make a master responsible for the unauthorised acts of his servant.—*KEARLEY v. TONGE* (1891), 60 L. J. M. C. 159, D. C.

*Annotations*.—**N.F.** *Houghton v. Mundy* (1910), 8 L. G. R. 838. **Refd.** *Pearks, Gunston & Tee v. Ward, Hennen v. Southern Counties Dairies Co.*, [1902] 2 K. B. 1.

**112. — Overloading vessel—Merchant Shipping Act, 1876 (c. 80), s. 28.**—A British ship was to the knowledge of the master so loaded in a foreign port as to submerge the centre of the

of food for the purpose of sale or traffic therein, such bottles having stamped upon them the trade mark of an incorporated co. The bottles in question were filled by deft.'s servant without deft.'s knowledge. The jury returned a verdict of "guilty without knowledge".—**Held**: the clear object of the statute being to protect manufacturers and others in the use of their registered trade marks, knowledge on the part of deft. was not of the essence of the offence & that the trial judge was right in treating the verdict as one of guilty.—*R. v. NEWCOMBE* (1918), 52 N. S. R. 85; 40 D. L. R. 85; 29 Can. Cas. 249.—**CAN.**

**e. — Landlord's responsibility in case of riot.**—Accused was the sole proprietor of a village. A serious riot, involving loss of life, took place at village A., & the accused's naib, instead of doing anything to prevent or suppress the riot, accompanied the rioters & stood close by, while the riot was going on, after which he absconded. The accused, who had no knowledge that a riot was likely to be committed, was convicted under Penal Code, s. 154, & fined.—**Held**: a landlord is liable, under that sect. for the acts of commission as well as omission, not only of himself, but of his agent or manager. Knowledge, on the part of the owner

or occupier of the land, of the acts or intentions of the agent, is not an essential element of an offence under that sect., & he may be convicted under that sect., although he may be in entire ignorance of the acts of his agent or manager.—*KAZI ZEAMUDDIN AHMED v. R.* (1901), 1 L. R. 28 Calc. 504.—**IND.**

**f. — Sale of agricultural seeds—False entry.**—The owner of the shop in which the sample is taken is guilty of an offence under Weeds & Agricultural Seeds (Ireland) Act 19 (c. 31), s. 5 (2), & ——— & address is wilfully given by



**Sect. 3.—Liability of master for act of servant or agent: Sub-sect. 3, A. & B.; sub-sect. 4.]**

disc required by sect. 28 of the above Act to be made upon her. The owner, who resided in England, appointed the master, but was not aware of the overloading:—*Held*: there was no evidence that he had "allowed" the overloading within the meaning of s. 28 of the above Act.—*MASSEY v. MORRIS*, [1894] 2 Q. B. 412; 63 L. J. M. C. 185; 70 L. T. 873; 58 J. P. 673; 42 W. R. 638; 38 Sol. Jo. 547; 7 Asp. M. L. C. 586; 10 R. 342, D. C.

*Annotation*:—*Mentd. Collman v. Mills* (1869), 13 T. L. R. 122.

**113. — Employment of children—Employment of Children Act, 1903 (c. 45).]**—On a charge against deft., a baker, of employing a child in contravention of the above Act, it appeared that the child was employed in delivering deft.'s bread to his customers, but that the child was employed to do the work, & paid for doing it, by a servant of deft.'s, for his own ends, without authority from deft. so to employ the child, & without deft.'s knowledge:—*Held*: the child was not, within the meaning of the above Act or in fact, employed by deft.—*ROBINSON v. HILL*, [1910] 1 K. B. 94; 79 L. J. K. B. 189; 101 L. T. 573; 73 J. P. 514; 20 T. L. R. 17; 7 L. G. R. 1065, D. C.

**114. — Using unlicensed vehicle—Customs & Inland Revenue Act, 1888 (c. 8), s. 4 (3).]**—*STRUTT v. CLIFT*, No. 36, *ante*.

**115. — Sending circulars inviting infant to borrow money—Betting and Loans (Infants) Act, 1892 (c. 4), s. 2.]**—Under sect. 2 of the above Act a master is not criminally responsible for an act done by his servant contrary to orders & without his knowledge, if he has reasonable ground for believing the person to whom the circular is sent to be of full age.—*PUBLIC PROSECUTIONS DIRECTOR v. WITKOWSKI* (1911), 104 L. T. 453; 75 J. P. 171; 27 T. L. R. 211; 22 Cox, C. C. 425, D. C.

**116. — Use of general identification mark on motor car—Motor Car Registration & Licensing Order, 1903.]**—Applts. were manufacturers of motor cycles to whom a general identification mark had been assigned. Their stock of motor cycles was placed by them under the charge of a man in their employment. This man took out one of their motor cycles without their knowledge or authority & used it for his own private purposes. No record as required by the above order was kept on the occasion of this user of the motor cycle:—*Held*:

manager of the business, although without the authority or consent of the principal.—*AGRICULTURE & TECHNICAL INSTRUCTION DEPARTMENT v. BURKE*, [1915] 2 I. R. 128.—*IR*.

**g. — Selling intoxicating liquor in less than lawful quantity.]**—A holder of a spirit merchant's licence who sells less than two gallons of liquor can be convicted under Liquor Act, 1898, s. 45:—*Held*: the licensee was liable where the sale was made by a person left in charge of his shop, without evidence that the licensee had expressly authorised the sale.—*Ex p. NORRIS* (1906), 6 S. R. N. S. W. 47.—*AUS*.

**h. — Sale of intoxicating liquor to unlicensed person.]**—A clerk to a distiller, having sold a cask of whiskey to a party who had not a licence to sell spirits, at the request of the purchaser, sent it to him with a permit obtained in the name of another party:—*Held*: this amounted to the statutory offence & the employers were liable for the acts of their clerk, these having been done within the sphere of his employment.—*ADVOCATE-GENERAL v. GRANT* (1853), 15 Duml. (Ct. of Sess.) 980.—*SCOT*.

**k. — Intoxicating liquor—Treating.]**—In each of two public-houses the servant or person in charge supplied excisable liquor to one person which was paid for by another. One of the public-houses was occupied by the licensee-holder, the other was occupied by a firm of which the licensee-holder was a partner. In the former case the servant was the servant of the licensee-holder & in the latter case he was servant of the firm. In both cases the sales were effected without knowledge of the employers:—*Held*: in both cases, the licensee-holders were guilty of a contravention of the order, although sales were effected without their knowledge, & also in the case of the house occupied by the firm, although the servant was in the employment of the firm & not of the licensee-holder.—*GAIR v. BREWSTER, SOUTAR v. HUTTON*, [1916] S. C. (J). 36.—*SCOT*.

**l. — Sunday trading.]**—The servant of K., a storekeeper, while left by K. in charge of the store, sold articles to a customer on a Sunday. K. was ignorant of the sale & had, in fact, forbidden the servant to sell on

as the user of the motor cycle was unauthorised by & unknown to applts., the failure to keep a record did not render them guilty of the offence charged under the above order.—*PHILLON & MOORE, LTD. v. KEEL*, [1914] 3 K. B. 165; 83 L. J. K. B. 1516; 111 L. T. 214; 78 J. P. 247; 24 Cox, C. C. 234; 12 L. G. R. 950, D. C.

**117. — Sale of intoxicating liquor to non-member of club—Refreshment House Act, 1860 (c. 27), s. 19.]**—Applts., trustees & members of the managing committee of a club, were convicted under Licensing Acts, 1825 (c. 81), s. 26, & 1835 (c. 85), s. 17, & sect. 19 of the above Act, for selling liquor without a proper licence to persons not members of the club. It appeared that the liquor was sold in the club premises by the steward of the club, who in selling it acted contrary to the orders of applts. & without their knowledge or assent:—*Held*: the conviction was wrong, for ts. were not, under the circumstances, responsible for the act of the steward.—*NEWMAN v. LEACH*, 2 T. L. R. 600, D. C.

*Annotations*:—*Distd. Bond v. Evans* (1888), 21 Q. B. D. 249; *Brown v. Foot* (1892), 61 L. J. M. C. 110.

**118. — Sale of intoxicating liquors to child in unsealed bottle—Intoxicating Liquors (Sale to Children) Act, 1901 (c. 27), s. 2.]**—*EMARY v. NOLLOTH*, No. 31, *ante*.

**119. — — — — —.]**—A barmaid, contrary to express orders, knowingly sold intoxicating liquor to a child under fourteen years of age in a bottle not corked & sealed. The licensee-holder, although not in the bar, was within call, & the justices found as a fact that he had not delegated to the barmaid the charge & control of the bar:—*Held*: the licensee-holder could not be convicted under sect. 2 of the above Act on a charge of "knowingly allowing" the barmaid so to sell the liquor.—*MCKENNA v. HARDING* (1905), 60 J. P. 354, D. C.

**120. — — — — —.]**—A licensee-holder left the management of a public-house to a manager. A barmaid, contrary to express orders, sold intoxicating liquor to a child under fourteen years of age in a bottle not corked & sealed, contrary to sect. 2 of the above Act. At the time the manager was in an adjoining bar, & might have seen, but did not see, what she was doing:—*Held*: although the manager was at the time in charge of the

Sunday. The magistrate convicted K. of a contravention of Act 24, 1878, s. 1. On appeal by K., the conviction was upheld.—*KAJEE v. R.* (1919), 40 N. L. R. 321.—*S. AF*.

**m. — Sale of indecent pictures.]**—The accused who were general dealers, purchased, with other stock taken over at the same time, a large number of walking sticks, containing photographs, which were harmless save four or five. S., a servant in the employ of the accused, discovered indecent photographs in the four or five sticks, and without informing the accused, who were ignorant that there were indecent photographs in some of the sticks, sold one of the sticks containing an indecent photograph, & the accused were convicted of a contravention of Act 31 of 1892, s. 2:—*Held*: in the absence of evidence (a) that the accused might have contemplated the possibility of a contravention of the Act under which they were charged, owing to the character & scope of their servant's duties, or (b) that the accused's ignorance was due to their own default or neglect the conviction must be quashed.—*R. v. WERNER*, [1917] E. D. L. 71.—*S. AF*.

premises, neither the license-holder nor the manager knowingly allowed or connived at the sale.—*ALLCHORN v. HOPKINS* (1905), 69 J. P. 355, D. C.

**B. Servant acting Outside Scope of Authority.**

**121. General rule.**—In point of law, the buying a pamphlet in a public open shop of a known professed bookseller & publisher of pamphlets, of a person acting in the shop, *prima facie* is evidence of a publication by the master himself; but it is liable to be contradicted, where the fact will bear it, by contrary evidence tending to exculpate the master, & to show that he was not privy nor assenting to it nor encouraging it (*LORD MANSFIELD, C.J.*).—*R. v. ALMON* (1770), 5 Burr. 2686; 20 State Tr. 803; 98 E. R. 411.

*Annotations*.—*Refd.* *R. v. Shipley* (1784), 4 Doug. K. B. 73; *A.-G. v. Siddon* (1830), 1 Cr. & J. 220.

**122. Suffering gaming on licensed premises—Licensing Act, 1872 (c. 94), s. 17 (1)—Servant not in charge of premises.**—Where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person, employed on the premises, but there was no evidence to show any connivance or wilful blindness on the part of the licensed person, & it did not appear that the servant was in charge of the premises:—*Held*: the justices were right in refusing to convict the licensed person of suffering gaming on the premises under sect. 17 of the above Act.—*SOMERSET v. HART* (1884), 12 Q. B. D. 360; 53 L. J. M. C. 77; 48 J. P. 327; 32 W. R. 594, D. C.

*Annotations*.—*Distd.* *Bond v. Evans* (1888), 21 Q. B. D. 249. *Fold.* *Somerset v. Wade*, [1894] 1 Q. B. 574. *Consd.* *Smith v. Slade* (1900), 64 J. P. 712; *Buxton v. Scott* (1909), 100 L. T. 390. *Refd.* *Boyle v. Smith*, [1906] 1 K. B. 432; *Ex p. Marshall* (1907), 71 J. P. 501.

**123. Selling intoxicating liquor at unauthorised place—Licensing Act, 1872 (c. 94), s. 3.**—*Resp.*, who was licensed to sell by retail, at his brewery, beer for consumption off the premises, employed a drayman to deliver beer to customers. The drayman had no authority to sell any beer for *resp.*, his sole duty being to deliver beer to customers only who had previously given orders for it, & he had been expressly ordered not to sell or deliver beer to other persons, & to bring back to the brewery any beer which he was unable to deliver. The drayman sold & delivered some

bottled beer from his van to persons in a street who had not previously ordered it:—*Held*: *resp.* was not liable to be convicted under sect. 3 of the above Act.—*BOYLE v. SMITH*, [1906] 1 K. B. 432; 75 L. J. K. B. 282; 94 L. T. 30; 70 J. P. 115; 54 W. R. 519; 22 T. L. R. 200; 21 Cox, C. C. 84, D. C.

*Annotation*.—*Consd.* *Elder v. Bishop Auckland Co-op. Soc.* (1917), 86 L. J. K. B. 1412.

**Sale of intoxicating liquor to child in non-sealed vessel.**—*See* Nos. 31, 119, 120, *ante*.

**Sale of liquor to non-member of club.**—*See* No. 117, *ante*.

**SUB-SECT. 4.—SERVANT ACTING WITHIN GENERAL SCOPE OF AUTHORITY.**

**124. Public nuisance—Authority to manage works—Pollution of river.**—Indictment against a gas co. for a nuisance, in conveying the refuse of gas into a great public river, whereby the fish were destroyed, & the water was rendered unfit for drink, etc.:—*Held*: the directors were answerable for an act done by their superintendent & engineer, under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, & though such plan was a departure from the original & understood method, which the directors had no reason to suppose was discontinued.—*R. v. MEDLEY* (1834), 6 C. & P. 292.

*Annotations*.—*Refd.* *R. v. Stannard* (1863), 12 W. R. 208; *Tarry v. Ashton* (1876), 1 Q. B. D. 314. *Mentd.* *Sherras v. De Rutzen*, [1895] 1 Q. B. 918.

**125. Obstruction of river by debris.**—On an indictment for working a stone quarry on the margin of a public navigable river so as to allow the rubbish from it to fall into the river & obstruct the navigation, it was proposed on behalf of *deft.*, who did not personally attend to the business, to show that he gave directions to conduct it in a proper manner, & provided proper places for depositing the rubbish. The Judge, having excluded the evidence as immaterial:—*Held*: *deft.* was liable for the acts of his servants, though done without his knowledge & in disregard of his orders, & the evidence was rightly excluded.—*R. v. STEPHENS* (1866), L. R. 1 Q. B. 702; 7 B. & S. 710; 35 L. J. Q. B. 251; 14 L. T. 593; 30 J. P.

**PART I. SECT. 3, SUB-SECT. 3.—B.**

**n. Selling intoxicating liquor without licence.**—In a prosecution for a penalty for selling liquor without licence, proof that the sale was made by a person in *deft.*'s shop in his absence, & without showing any general or special employment of such person by *deft.* in the sale of liquors, is sufficient *prima facie* evidence against him.—*Ex p. PARKES* (1855), 3 All. 237.—**CAN.**

**o. —.**—The owner of a shop is not criminally liable for the sale of liquor without a licence by a female attendant in his absence.—*R. v. KING* (1869), 20 C. P. 246.—**CAN.**

**p. —.** *Servant expressly forbidden.*—There cannot be a conviction under Yukon Liquor License Ordinance, s. 78, where *deft.*'s servant who made the sale had been explicitly forbidden to sell.—*R. v. OLE TYSTAD* (1909), 11 W. L. R. 561.—**CAN.**

**q. Selling intoxicating liquor during prohibited hours.**—By order of Central Control Board (Liquor Traffic) for Scotland, West Central Area, dated 12 Aug. 1915, Act 2 (2), it is made an offence for any person either "by himself or by any servant or agent" to sell exciseable liquor during prohibited hours to any person in any licensed premises for consumption off the

premises:—*Held*: the word "agent" was used in its ordinary legal signification & therefore that a licensee of premises was not responsible for every sale which took place within his premises, no matter by whom effected, but only for sales by himself, his servant, or a person who could be properly described as his agent.

A licensee charged with contravening the order has been rightly acquitted when the liquor had been sold without any authority by a boy whose licensee's shopman was authorised to employ only as an occasional messenger.—*AULD v. DEVLIN*, [1918] S. C. (J.) 41.—**SCOT.**

**r. Selling drugs contrary to Opium & Narcotic Drug Act, 1911 (Can) (c. 17).**—*R. v. LEDUC* (1921), 69 D. L. R. 568; 38 Can. Crim. Cas. 177.—**CAN.**

**s. Sale of milk.**—In the prosecution of a dairyman for selling by the hand of his servant, milk which was not genuine, it was proved that the servant who sold the milk had no authority to do so, his duty being merely to deliver milk to his master's customers:—*Held*: as the servant had exceeded his authority in selling the milk there had been no sale by the accused, & he must therefore be acquitted.—*LINDSAY v. DEMPSTER*, [1912] S. C. (J.) 110.—**SCOT.**

**t. —.**—A servant employed by a dairy co. to sell its milk, in disobedience to his instructions, charged a higher price for the milk than the authorised maximum rate, but did not account to his employers for the portion of the price in excess of that rate:—*Held*: in these circumstances the servant so far as he sold milk at a price beyond the authorised rate was acting outwith the scope of his employment & accordingly the co. was not guilty of a contravention of Milk Order of Sept. 7, 1917, Art. (1).—*CITY & SUBURBAN DAIRIES v. MACKENNA*, [1918] S. C. (J.) 105.—**SCOT.**

**PART I. SECT. 3, SUB-SECT. 4.**

**a. Nuisance—Offensive smell in house.**—A bucket of slops was poured by a maid-servant into the pan of a closet, thereby causing excreta & urine to overflow on to the floor of the closet & create an offensive smell. The master of the house to which the closet was annexed did not know of the occurrence having taken place, but on two previous occasions a similar thing had happened & had been complained of to the master's servants, & on one of these occasions it had been conveyed to the master's knowledge. The master was proceeded against on information before justices under



*Sect. 3.—Liability of master for act of servant or agent: Sub-sect. 4.]*

822; 12 Jur. N. S. 961; 14 W. R. 859; 10 Cox, C. C. 340.

*Annotations:—Consd.* Coppen v. Moore (No. 2), [1898] 2 Q. B. 306. *Refd.* Mullins v. Collins (1874), L. R. 9 Q. B. 292; Tarry v. Ashton (1876), 1 Q. B. D. 314; R. v. Holbrook (1877), 47 L. J. Q. B. 35; R. v. Holbrook (1878), 4 Q. B. D. 42; Chisholm v. Doulton (1889), 22 Q. B. D. 736; Bostock v. Ramsey U. D. C. (1899), 63 J. P. 728. *Mentd.* Sherras v. De Rutzen, [1895] 1 Q. B. 918; Barker v. Herbert, [1911] 2 K. B. 633.

126. — **Smoking chimney—Public Health Act, 1875 (c. 55), s. 96.**—G.'s mill sent forth black smoke more than ten minutes. The furnace was properly constructed, & efficient firemen superintended, & the stoker's own negligence was the sole cause of the smoke. G. was summoned for an offence contrary to sect. 96 of the above Act:—*Held*: the justices were wrong in dismissing the charge & in holding that G. was not liable.—*NIVEN v. GREAVES* (1890), 54 J. P. 548, D. C.

127. — **Private Act.**—Applts. were the owners & the occupiers of a dyehouse which had a furnace & a chimney appertaining thereto. In consequence of negligent stoking on the part of one of the servants of applts., of which applts. were ignorant, smoke which was not completely burned was allowed to escape from the chimney of the dyehouse:—*Held*: applts. were rightly convicted of an offence under 10 Edw. 7 & 1 Geo. 5, c. cxvii., s. 52.—*ARMITAGE, LTD. v. NICHOLSON* (1913), 108 L. T. 993; 77 J. P. 239; 29 T. L. R. 425; 23 Cox, C. C. 416; 11 L. G. R. 547, D. C.

128. **Slaughtering animals contrary to bye-law—Disobedience of orders—Public Health (London) Act, 1891 (c. 76), s. 142 (2) (b).**—Bye-laws made under the repealed Slaughter-houses (Metropolis) Act, 1847, but kept in force by sect. 142

above Act, make it an offence for the licensed occupier of a slaughter-house to slaughter sheep in the pound of the slaughter-house or in view of other sheep. During the absence of resp., the licensed occupier of a slaughter-house, his foreman, in direct disobedience of his orders & in order to save himself trouble, slaughtered a sheep in the pound in view of other sheep:—*Held*: the bye-law was good & resp. was guilty of an offence under it, for he was liable for the act of his servant, that act having been committed within the general scope of his employment, although contrary to the orders of his master.—*COLMAN v. MILLS*, [1897] 1 Q. B. 396; 66 L. J. Q. B. 170; 75 L. T. 590; 61 J. P. 102; 13 T. L. R. 122; 18 Cox, C. C. 481, D. C.

129. **Importation of prohibited goods—12 Car. 2 (c. 8), s. 4.**—*IDLE v. VANHECK* (1727), Bunb. 230; 145 E. R. 657.

*Annotation:—Consd.* Mitchell v. Torup (1766), Park. 227.

130. **Concealing smuggled goods.**—A.-G. v. SIDDON, No. 12, *ante*.

131. **Soliciting order for intoxicating liquor at unlicensed place—Revenue Act, 1867 (c. 90), s. 17.**—Applts. owned two shops, in respect of one of which they held a licence to retail beer to be consumed off the premises. At the unlicensed shop they displayed crates containing bottles of

Health Act, 1890 (No. 1098), s. 221:—*Held*: he was properly convicted as, though he had no knowledge of the occurrence complained of he had carelessly or negligently allowed it to occur after previous warning given to him, & the act was done by his servant in the ordinary scope of her employment as a domestic servant, her knowledge would be taken to be that of her master.—*MARTIN v. MCGINNIS* (1894), 20 V. L. R. 556.—**AUS.**

b. **Sale of intoxicating liquor without license—Sale by wife.**—Where applt. was fined by the magistrate for selling liquor without a license. On appeal, it was contended for him, (1) that the liquor was sold by his wife:—*Held*: the act of the wife is the act of her husband.—*BURKE v. WHITE* (1892), 7 Nfld. L. R. 690.—**NFLD.**

c. **Delay in admitting police.**—Where an act is made illegal by a

beer & a price list of the beer per crate. They received orders for beer at this latter shop, but the orders were forwarded to the licensed shop for execution, & they were executed or not at the discretion of the manager there. No cash was accepted at the unlicensed shop in respect of these orders. An assistant at the unlicensed shop accepted an order for beer, & the order was forwarded to & executed at the licensed shop:—*Held*: the applts. had committed an offence under sect. 17 of the above Act.—*ELIAS v. DUNLOP*, [1900] 1 K. B. 266; 75 L. J. K. B. 168; 94 L. T. 164; 70 J. P. 103; 22 T. L. R. 162; 50 Sol. Jo. 158; 21 Cox, C. C. 105, D. C.

132. **User of unlicensed vehicle—Customs & Inland Revenue Act, 1888 (c. 8), s. 4 (3).**—*STRUTT v. CLIFT*, No. 36, *ante*.

*See, further, REVENUE.*

133. **Rendering false accounts—Railway Clauses Consolidation Act, 1845 (c. 20), ss. 98, 99.**—The owners of goods may, without *mens rea*, be guilty of giving a false account with intent to avoid payment of tolls under sects. 98 & 99 of the above Act, & if their manager actually gives the false account with intent to avoid the payment, the owners, though a limited co., are liable.—*MOUSEL BROTHERS v. LONDON & NORTH WESTERN RY.*, [1917] 2 K. B. 836; 87 L. J. K. B. 82; 118 L. T. 25; 81 J. P. 305; 15 L. G. R. 706, D. C.

*Annotations:—Consd.* R. v. Leinster (1923), 87 J. P. 191. *Refd.* Pearks' Dairies v. Tottenham Food Control Committee (1918), 88 L. J. K. B. 623; Warrington v. Windhill Industrial Co-op. Soc. (1918), 82 J. P. 149; Griffiths v. Studebakers (1923), 87 J. P. 199.

134. **False trade description—Merchandise Marks Act, 1887 (c. 28), s. 2.**—The above Act renders the master or principal criminally liable for the acts of his servants and agents in all cases within sect. 2 (1) & (2), where the conduct constituting the offence is pursued by such servants or agents within the scope or in the course of their employment. The master or principal can only be relieved from criminal responsibility where he can prove that he had acted in good faith & had done all it was reasonably possible to do to prevent the commission by his agents & servants of offences against the Act.—*COPPEN v. MOORE* (No. 2), [1898] 2 Q. B. 306; 67 L. J. Q. B. 689; 78 L. T. 520; 62 J. P. 453; 46 W. R. 620; 14 T. L. R. 414; 42 Sol. Jo. 539; 19 Cox, C. C. 45.

*Annotations:—Apld.* Christie, Manson & Woods v. Cooper, [1900] 2 Q. B. 522. *Consd.* Buckingham v. Duck (1918), 120 L. T. 84. *Refd.* Cameron v. Wiggins (1900), 70 L. J. Q. B. 15; Langley v. Bombay Tea Co., [1900] 2 Q. B. 460; Trade & Customs Comr. v. Bell, [1902] A. C. 563; R. v. Butcher (1908), 99 L. T. 622; Armitage v. Nicholson (1913), 108 L. T. 993; Mousell v. L. & N. W. Ry., [1917] 2 K. B. 836; Burns v. Scholfield (1922), 128 L. T. 382. *Mentd.* Hobbs v. Winchester Corpn., [1910] 2 K. B. 46.

*See, further, TRADE MARKS, TRADE NAMES & DESIGNS.*

135. **Sale of adulterated food—Sale of Food & Drugs Act, 1875 (c. 63), s. 6.**—P., a servant of applt., was employed to sell milk out of cans by retail. The cans were received by applt., the master, on arrival from the country, & a sample taken from each can before it was sent out for sale. Applt. had published a warning to his

statute which absolutely prohibits the act, an employer is criminally responsible for a commission of that act by his servants in the course of their employment. Act No. 27, 1882, s. 142, makes the accused criminally responsible for unnecessary delay in admitting the police to his premises even if that unnecessary delay is not the act of the accused but of his servants.—*R. v. DEBUSAY* (1919), C. P. D. 211.—**S. AF.**

servants that any servant whose can of milk did not correspond with the sample taken from it would be liable to instant dismissal. P.'s can was duly sampled, & the sample proved to be unadulterated. Subsequently to his taking out the can for the sale of milk, P. admitted watering the milk, some of which milk he sold to an inspector, who thereupon summoned applt., the master, as a person selling to the prejudice of the purchaser an article of food not of the nature, substance, & quality of the article demanded, under sect. 6 of the above Act. Applt. was convicted by a magistrate:—*Held*: applt. was rightly convicted, on the ground that he was the seller within the meaning of the Act, & was liable for his servant's action in selling adulterated milk.—*BROWN v. FOOT* (1892), 61 L. J. M. C. 110; 66 L. T. 649; 56 J. P. 581; 8 T. L. R. 268; 17 Cox, C. C. 509, D. C.

*Annotations*:—*Consd.* *Parker v. Alder*, [1899] 1 Q. B. 20. *Refd.* *Pearks, Gunston & Tee v. Ward, Hennen v. Southern Counties Dairies Co.*, [1902] 2 K. B. 1; *Smithies v. Bridge* (1902), 71 L. J. K. B. 555; *Andrews v. Luckin* (1917), 87 L. J. K. B. 507; *Buckingham v. Duck* (1918), 120 L. T. 84; *Warrington v. Windhill Industrial Co-op. Soc.* (1918), 82 J. P. 149; *Whittaker v. Forshaw*, [1919] 2 K. B. 419.

136. ———.]—Resp., a grocer, while his assistant was out of the shop, had made up for his own use a half pound packet consisting of a mixture of butter & margarine. This packet was inadvertently left upon the counter while resp. went to attend to a customer in another part of the shop, but it was not placed there for the purpose of sale. Resp.'s assistant then came in, & immediately afterwards a man came in & asked for half a pound of salt butter, & was served by the assistant with the same half pound of mixed butter & margarine. The assistant, seeing the half pound packet lying on the counter ready made, thought that it was there for the purpose of sale, but in selling it he was acting without the authority & contrary to the express instructions of resp. that he was to sell butter always from the bulk & not in ready made packages. Upon an information against the resp. under sect. 6 of the above Act, for selling an article which was not of the nature, substance, & quality of the article demanded:—*Held*: resp. was liable for the act of his servant, even though such act was unauthorised by him & was done contrary to his express instructions.—*HOUGHTON v. MUNDY* (1910), 103 L. T. 60; 74 J. P. 377; 8 L. G. R. 838, D. C.

*Annotation*:—*Distd.* *Whittaker v. Forshaw*, [1919] 2 K. B. 419.

137. ———.]—Resps., retailers, purchased milk from a dairy farmer under a contract, by which the latter agreed to supply milk, with a warranty of quality. The milk was delivered to the proper railway station at 5.13 a.m. & was fetched away by resps. at 8 a.m. the same morning by their servant. He poured the contents of the can into two smaller cans, & then took them round for distribution among resps.' customers. He had no authority to sell milk to anybody except members of resps.' society who previously ordered a supply. While so delivering the milk the servant sold a small quantity to a non-member, the agent of applt., an inspector of weights & measures, which was deficient in quality & not of the nature, substance, & quality demanded. When charged under sect. 6 of the above Act, resps. gave due notice under Sale of Food & Drugs Act, 1899 (c. 51), s. 20 (1), & that they intended to rely on the above warranty by virtue of sect. 25 of the above Act. The magistrate found that resps. purchased the milk as the same in nature,

substance, & quality as that demanded by applt. & that they sold it in the same state as when they received it from the railway co., & had no reason to believe at the time of the sale to the applt. that the milk was otherwise than of the nature, substance, & quality demanded. No evidence was offered by resps. before the magistrates dealing with the period which elapsed between the arrival of the milk at the station & its being fetched by the resps.:—*Held*: in selling to applt. resps.' servant had not acted without their authority, but had only misused the actual authority to sell which they had given him, & therefore resps. had sold the milk to applt. within the meaning of sect. 6 of the above Act.—*ELDER v. BISHOP AUCKLAND CO-OPERATIVE SOCIETY, LTD.* (1917), 86 L. J. K. B. 1412; 117 L. T. 281; 81 J. P. 202; 33 T. L. R. 401; 61 Sol. Jo. 593; 26 Cox, C. C. 1; 15 L. G. R. 579, D. C.

*Annotation*:—*Refd.* *Buckingham v. Duck* (1918), 120 L. T. 84.

138. — By person having no authority to sell.]—Resp.'s daughter, aged thirteen years, in accordance with her usual practice & general instructions from resp., a farmer, took each morning a pint of milk from resp.'s farmhouse in a can to deliver at the house of a customer in fulfilment of an order previously given by the customer. Resp. entrusted his daughter with the pint of milk for the purpose only of delivering it to the customer. On one particular morning an inspector under the Food & Drugs Acts met the daughter as she was carrying the pint of milk to the customer's house but before she had arrived there, & demanded to purchase from her a pint of milk which she delivered to him out of the can containing the pint of milk intended for the customer. The milk so sold to the inspector contained added water to the extent of 24 per cent. The daughter delivered the milk to the inspector because he demanded it & because "some people are fined for not doing as the policemen tell them." On an information against resp. for selling milk to the prejudice of the purchaser, justices held that the daughter had no authority to sell the pint of milk to the inspector, but in fact delivered it to him because she was afraid to refuse it after his demand, & that consequently there was no sale by resp. to the prejudice of the inspector. On a case being stated by the justices:—*Held*: the justices were entitled to find that the daughter had no authority to make any contract of sale, inasmuch as her instructions were limited to carrying the milk.—*WHITTAKER v. FORSHAW*, [1919] 2 K. B. 419; 88 L. J. K. B. 989; 121 L. T. 320; 83 J. P. 210; 35 T. L. R. 487; 63 Sol. Jo. 608; 17 L. G. R. 457; 26 Cox, C. C. 475, D. C.

139. Refusal to sell to officer—Sale of Food & Drugs Act, 1875 (c. 63), s. 17.]—*FARLEY v. HIGGINBOTHAM* (1898), 42 Sol. Jo. 309, D. C.

*See, further*, FOOD & DRUGS.

140. Sale of food contrary to regulations—Food (Conditions of Sale) Order, 1917.]—Resps., a limited co., owned a shop for the sale of food. & they caused to be posted in the shop a notice that in relation to the sale of sugar there were at the shop no conditions involving the purchase of other goods. Resps.' manager also gave express instructions to all their assistants that they must impose no conditions on the sale of food. On an information against resps. for imposing, in connection with the sale of sugar, a condition relating to the purchase of another article, contrary to the above Order, the justices found that an assistant, who, with the authority of resps.' manager, was serving at the counter, had, in

*Sect. 3.—Liability of master for act of servant or agent: Sub-sect. 4. Sect. 4: Sub-sect. 1.]*

connection with the sale of sugar, imposed a condition relating to the purchase of another article, but they held that, as resps. had expressly forbidden the assistant to impose any condition, they were not criminally responsible:—*Held*: the terms of the order showed that it was intended to make a master criminally responsible for the act of his servant, acting within the scope of his employment, even when such act was done in disobedience to express instructions, & therefore the justices ought to have convicted.—*WARRINGTON v. WINDHILL INDUSTRIAL CO-OPERATIVE SOCIETY* (1918), 88 L. J. K. B. 280; 118 L. T. 505; 82 J. P. 149; 26 Cox, C. C. 218; 16 L. G. R. 456, D. C.

*Annotation*:—*Reid. Buckingham v. Duck* (1918), 120 L. T. 84.

141. — **Disobedience of orders—Milk (Prices) Order, 1917.**—*BUCKINGHAM v. DUCK*, No. 51, *ante*.

142. — **Margarine (Maximum Prices) Order, 1917.**—*PEARKS' DAIRIES, LTD. v. TOTTENHAM FOOD CONTROL COMMITTEE*, No. 52, *ante*.

143. **Selling intoxicating liquor without licence—Licensing Act, 1872 (c. 94), s. 3.**—A. was charged under sect. 3 of the above Act with selling intoxicating liquor without a licence. A. kept a tobacco shop & refreshment house, but had no licence to sell liquors by retail. A.'s wife sold bottles of ale to customers, but there was no evidence that A. knew anything of her so acting:—*Held*: a conviction by the justices making A. liable for the acts of his wife was wrong.—*ALLEN v. LUMB* (1893), 57 J. P. 377, D. C.

144. —*J.*—Resp., who was the proprietress of a hydro, & held no licence for the sale of intoxicating liquor, bought beer at wholesale prices, & beer was sold at the retail price by her servant at the hydro to one of the guests, & her book-keeper received the money. On an information against resp. for selling beer by retail without a licence, the justices declined to convict on the ground that resp. being an unlicensed person, was not responsible for acts committed by her servant without her knowledge:—*Held*: there was evidence that resp. had retailed beer without a licence & the justices ought to have convicted.—*JONES v. HARTLEY* (1918), 88 L. J. K. B. 271; 118 L. T. 815; 82 J. P. 291; 26 Cox, C. C. 255, D. C.

145. **Selling intoxicating liquor to drunken person—Disobedience of orders—Licensing Act, 1872 (c. 94), s. 13.**—Resp., a licensed person, gave orders to his servants that no drunken persons were to be served. During his absence one of his servants sold intoxicating liquor to a drunken person:—*Held*: resp. was guilty of an offence under sect. 13 of the above Act for he was liable for the act of his servant, that act having been done by the servant within the general scope of his employment, although contrary to the orders of his master.—*POLICE COMRS. v. CARTMAN*, [1896] 1 Q. B. 655; 74 L. T. 726; 60 J. P. 357; 44 W. R. 637; 18 Cox, C. C. 341, D. C.

*Annotations*:—*Consd. Worth v. Brown* (1896), 62 J. P. Jo. 658; *Star Cinema (Shepherd's Bush) v. Baker* (1921), 126 L. T. 506. *Reid. Coppen v. Moore* (1898), 78 L. T. 520; *Emery v. Nolloth*, [1903] 2 K. B. 264; *Boyle v. Smith*, [1906] 1 K. B. 432; *Caldwell v. Bethell*, [1913] 1 K. B. 119.

146. **Permitting drunkenness on licensed premises—Licensing Act, 1872 (c. 94), s. 13.**—*WORTH v. BROWN* (1896), 40 Sol. Jo. 515; 62 J. P. Jo. 658, D. C.

*Annotation*:—*Reid. Emery v. Nolloth* (1903), 67 J. P. 354.

147. **Supplying intoxicating liquor to constable**

**on duty—Licensing Act, 1872 (c. 94), s. 16 (2).**—The servant of a licensed victualler knowingly supplied liquor to a constable on duty, without the authority of his superior officer:—*Held*: the licensed victualler was liable to be convicted under sect. 16 (2) of the above Act, although he had not knowledge of the act of his servant.—*MULLINS v. COLLINS* (1874), L. R. 9 Q. B. 292; 43 L. J. M. C. 67; 29 L. T. 838; 38 J. P. 629; 22 W. R. 297.

*Annotations*:—*Consd. Somerset v. Hart* (1884), 12 Q. B. D. 360; *Nowman v. Jones* (1886), 17 Q. B. D. 132. *Reid. Bosley v. Davies* (1875), 33 L. T. 528; *R. v. Holland JJ.* (1882), 46 J. P. 312; *Bond v. Evans* (1888), 21 Q. B. D. 249; *Chisholm v. Doulton* (1889), 58 L. J. M. C. 133; *Sherras v. De Rutzen* (1895), 15 R. 388; *Coppen v. Moore* (No. 2), [1895] 2 Q. B. 306. *Mentd. Roberts v. Woodward* (1890), 63 L. T. 200; *Massey v. Morris* (1894), 63 L. J. M. C. 185.

148. **Suffering gaming on licensed premises—Licensing Act, 1872 (c. 94), s. 17 (1).**—Applt. was charged under sect. 17 of the above Act with suffering gaming to be carried on on her premises, an hotel at E. It was proved by witnesses that, while standing in the public street at E. between half-past one & a quarter to two in the morning, they could hear the conversation of three persons in a room in the hotel. These three persons were a horse trainer, a jockey, & a gentleman of N., & from what was heard of their conversation, it was evident that they were playing for money. No direct evidence was given that applt. knew of the gaming. Applt. stated that the house was closed at 11 p.m., that the three men were then in their private room, that she saw no cards, & did not supply any, & did not know of any card playing. The hall porter, whose duty it was to attend upon customers, stated that he closed the house after 11 p.m., & retired to his own chair in a parlour beyond the bar, at the extreme end of the house. He knew nothing whatever of any gambling. The justices drew the inference from the porter's evidence that his chair was removed to the greatest possible distance from the room where the guests were, in order that he might not hear what passed, & they thought that applt. knew that gaming was intended to be carried on, & that she purposely took pains not to know what her guests were doing:—*Held*: applt. was responsible for the conduct of the hall porter whom she left in charge of the hotel, & there was evidence that the porter suspected what was going on, & connived at it.—*REDGATE v. HAYNES* (1876), 1 Q. B. D. 89; 45 L. J. M. C. 65; 33 L. T. 779; 41 J. P. 86, D. C.

*Annotations*:—*Folld. Crabtree v. Hole* (1879), 43 J. P. 799; *Bond v. Evans* (1888), 21 Q. B. D. 249. *Reid. R. v. Holland JJ.* (1882), 46 J. P. 312; *Somerset v. Hart* (1884), 12 Q. B. D. 360; *Chisholm v. Doulton* (1889), 58 L. J. M. C. 133; *Somerset v. Wade*, [1894] 1 Q. B. 574; *Lawson v. Edminson*, [1908] 2 K. B. 952.

149. —*J.*—C. was a licensed alehouse keeper, & employed a manager, D., to live on the premises, & attend to them. One night after closing hours police constables passing on opposite side of street heard noises as if of persons gaming, & climbed up & looked through the window, & saw the gaming on the premises for money. C., on being summoned, proved that manager went to bed, leaving "Boots" to attend to house, & the justices found as a fact that "Boots" knew of the gaming, but wilfully shut his eyes & ears:—*Held*: the justices were right in convicting C., who was liable for the neglect of the "Boots."—*CRABTREE v. HOLE* (1879), 43 J. P. 799, D. C.

*Annotation*:—*Reid. Somerset v. Hart* (1884), 12 Q. B. D. 360.

150. —*J.*—Where gaming had taken place upon licensed premises to the knowledge of



## Sect. 4.—Grounds of defence

*criminal liability: Sub-sects. 1, 2 & 3.*

returning to land the natives. Deft., a naval officer, finding the natives on board, seized the vessel. In an action for such seizure the jury, being asked whether deft. had reasonable cause for thinking that the vessel was employed in breaking the Act, found a verdict for deft.:—*Held*: the carrying of the natives, having been commenced before the Act was passed, was not an offence against the Act.—*BURNS v. NOWELL* (1880), 5 Q. B. D. 444; 49 L. J. Q. B. 468; 43 L. T. 342; 44 J. P. 828; 29 W. R. 39; 4 Asp. M. L. C. 323, C. A.

## SUB-SECT. 2.—IGNORANCE OR MISTAKE OF FACT.

**160. Ignorance—General rule.**—When guilty knowledge is in issue there ought not, especially in the case of a deft. of good character, to be a conviction if the facts are as consistent with ignorance as knowledge.—*R. v. JELLYMAN* (1921), 16 Cr. App. Rep. 43, C. C. A.

**161. Wilful neglect of child—Prevention of Cruelty to Children Act, 1904 (c. 15), s. 1 (3).**—Applt. was indicted for manslaughter. He was found guilty of wilful neglect under sect. 1 (3) of the above Act, & sentenced to imprisonment. The verdict of the jury was "guilty of wilful neglect through ignorance":—*Held*: the words the jury added did not negative the wilfulness, & the words "through ignorance" did not necessarily contradict a finding that the neglect was

—*VAN CHU LIN v. BRABAZON, CHAN YEE HOP v. BRABAZON* (1916), 35 N. Z. L. R. 1095.—**N.Z.**

**e. Mistake of law giving rise to *bona fide* claim of right.**—Prisoner was convicted of stealing a dead sow, the property of R. The sow had strayed into prisoner's land & he had killed it, & afterwards made it into pork, taking steps to conceal from R. that the pig was his. The Chairman of Quarter Sessions ruled that under Impounding Act of 1865 (29 Vict. No. 2), s. 27, a person was not justified in appropriating the carcase of an animal killed by him under the authority of the section, without making reasonable efforts to ascertain the owner. At the same time he told the jury that prisoner must be acquitted, if mistaking the effect of that sect., he thought he had a right to the carcase:—*Held*: the direction was right.—*R. v. DILLON* (1878), 1 N. S. W. S. C. R. N. S. 159.—**AUS.**

**g. Bigamy.**—Mistake of law is no defence to a charge of bigamy.—*NARANTAKAPH AVULLAH v. PARAKHAL MANNER* (1922), 1 L. R. 45 Mad. 986.—**IND.**

## PART I. SECT. 4, SUB-SECT. 2.

**160 i. Ignorance—General rule.**—Where an act committed in certain circumstances has been made an offence by statute, the question whether knowledge or belief of the existence of those circumstances is essential to the offence, depends upon the intention of the Legislature.

A prisoner was charged with having indecently assaulted a girl under 12. The jury found specially that the prisoner, while stupefied with drink, had entered in the dark, & for an immoral purpose, the house where the girl was, believing it to be a house of ill-fame:—*Held*: even assuming that the prisoner had reasonable grounds for his belief, his ignorance that the person

wilful.—*R. v. PETCH* (1909), 25 T. L. R. 401; 2 Cr. App. Rep. 71, C. C. A.

**162. Assault on constable—In execution of his duty.**—To support a charge of assault on a constable in the execution of his duty, it is not necessary that deft. should know that he was a constable then in the execution of his duty; it is sufficient that the constable should have been actually in the execution of his duty & had then been assaulted.—*R. v. FORBES & WEBB* (1865), 10 Cox, C. C. 362.

*Annotations*:—*Consd. R. v. Maxwell & Clanchy* (1909), 73 J. P. 176. *Refd. R. v. Prince* (1875), L. R. 2 C. C. R. 154.

**163.**—[On an indictment for assaulting a police officer in the execution of his duty, the *onus* is on deft. to prove that he did not know that the person assaulted was a police officer.—*R. v. MAXWELL & CLANCHY* (1909), 73 J. P. 176; 2 Cr. App. Rep. 28, C. C. A.]

**164. Mistake—Killing wrong person.**—If a man intending to kill a thief or a house breaker in his own house, happens by mistake to kill one of his own family, it cannot be imputed to him as a criminal action.—*LEVETT'S CASE* (1639), cited in Cro. Car. 538; 1 Hale, P. C. 474; 79 E. R. 1064. *Annotations*:—*Refd. Cook's Case* (1640), Cro. Car. 537; *R. v. Tolson* (1889), 23 Q. B. D. 168.

**165. Poison put into wrong bottle.**—*R. v. NOAKES*, No. 177, *post*.

**166. Shooting at wrong person.**—A man who was living apart from his wife obtained entrance, in the night time, into her house by opening an area window. The wife heard that some one was in the house, came downstairs with a pistol, & fired a shot which wounded her husband. She said she did not know it was her husband till

ignorance, with a strong recommendation to mercy," of the offence created by sect. 224 (1) is a verdict of guilty of that offence.—*R. v. NEWSON* (1909), 29 N. Z. L. R. 373.—**N.Z.**

**m. Slaughter of cow in calf.**—In a prosecution of a farmer for selling a heifer in calf for slaughter contrary to Live Stock (Sales) Order, 1918:—*Held*: the fact that the seller did not know the heifer was in calf was no defence to the charge.—*ANDERSON v. ROSE*, [1919] S. C. (J.) 20.—**SCOT.**

**n. What amounts to ignorance.**—A butcher slaughtered a cow which after grading had been allocated to him by an official of the Food Control Department. When slaughtered the cow was found to be in calf, & the butcher was charged with a contravention of the Live Stock (Sales) Order, 1919, s. 1. The sheriff convicted the accused, finding in fact that when the cow was graded the grader did not consider the cow to be in calf, nor did the allocator when the cow was allocated, that before the cow was slaughtered the allocator discovered the cow to be in calf but did not inform the accused, & that when the cow was sent to be slaughtered the accused did not know that the allocator had discovered it to be in calf. The accused appealed:—*Held*: even if justifiable ignorance was a good defence to the charge, the sheriff's findings in fact did not disclose justifiable ignorance.—*BEATTIE v. WAUGH* (1920), 57 Sc. L. R. 471.—**SCOT.**

**o. Mistake—General rule.**—The maxim *Actus non facit reum nisi mens sit rea*, applies to excuse a deft. from an act which would otherwise be unlawful only where the belief on which deft. acts, is a belief as to the facts &

he assaulted was under the age of 12 years, was in law no answer to the charge.—*R. v. GIBSON* (1885), 11 V. L. R. 94.—**AUS.**

**g. Possession of still.**—A person is not guilty of having in his possession a still under Inland Revenue Act, s. 108 (e) if, though the still be on his premises, he has no knowledge of its existence.—*R. v. CALPAN* (1920), 2 W. W. R. 135; 51 D. L. R. 672; 32 Can. Crim. Cas. 267; 30 Man. L. R. 316.—**CAN.**

**h. Possession of apparatus for smoking opium.**—Where a person is accused of being in unlawful possession of opium without a permit, the fact that he had no knowledge that the apparatus for smoking the same was in his possession, is no answer to the charge, unless it can be shown that it was placed there by other persons.—*R. v. SUNG LUNG* (1923), 39 Can. Crim. Cas. 187.—**CAN.**

**k. Indecent matter in newspaper.**—The sale of a newspaper containing matter of an indecent, immoral, or obscene nature is an act which in itself *prima facie* imports a guilty mind, but in such a case honest ignorance of the contents of the newspaper in question is a defence.—*R. v. EWART* (1905), 25 N. Z. L. R. 709.—**N.Z.**

**l. Ship in unseaworthy condition.**—Although it is necessary for the prosecution to show *scienter* in order to establish a breach of Shipping & Seamen Act, 1908, s. 224 (2), which prohibits a master from knowingly taking a British ship to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered, *scienter* or knowledge is not a necessary ingredient of the offence created by sect. 224 (1) of that Act, which prohibits any person from sending a British ship to sea in such an unseaworthy state, etc. Therefore a verdict of a jury of "guilty through

after she had fired, but thought that there were burglars in the house. The jury were directed that if prisoner had reasonable grounds for believing that the person was in her house for a felonious purpose, & only fired for the purpose of frightening such person, not knowing it was her husband, she ought to be acquitted.—*R. v. DENNIS* (1905), 69 J. P. 256.

**167. — Abduction of girl under sixteen.]—**Prisoner was convicted under Offences against the Person Act, 1861 (c. 100), s. 55, of unlawfully taking an unmarried girl under the age of sixteen out of the possession & against the will of her father. It was proved that prisoner did take the girl, & that she was under sixteen; but that he *bond fide* believed, & had reasonable ground for believing, that she was over sixteen:—*Held*: the latter fact afforded no defence, & prisoner was rightly convicted.—*R. v. PRINCE* (1875), L. R. 2 C. C. R. 154; 44 L. J. M. C. 122; 32 L. T. 700; 39 J. P. 676; 24 W. R. 76; 13 Cox, C. C. 138, C. C. R.

*Annotations:—Distd.* *R. v. Moore* (1877), 13 Cox, C. C. 544. *Consd.* *R. v. Tolson* (1889), 23 Q. B. D. 168;

**p. — Sale of intoxicating liquor on Sunday.]—**When a licensee is charged under Licensed Victualler's Further Amendment Act, 1896, s. 36, with unlawfully supplying liquor on a Sunday to a person not a *bond fide* traveller, it is a good defence that such licensee was deceived by false representation of such person that he was a *bond fide* traveller. It is not necessary that such persons should also have been convicted of obtaining liquor by means of such false representation.—*BARRETT v. SULLIVAN* (1900), S. A. L. R. 48.—**AUS.**

**q. — Bigamy.]—**Criminal Code, s. 16, does not save all common law defences to a charge of bigamy, but only those which are not altered by or inconsistent with the provisions of the Code. The provisions of sect. 307, declaring an honest belief in death & an existing valid divorce good defences, are inconsistent with a defence or merely a belief, no matter how honest or reasonable, in a divorce; & if such ever constituted a defence, it is not continued by sect. 16; & *semble*, it never constituted a valid defence, being an exception for the Crown to show *mens rea*.—*R. v. BLEILER* (1912), 21 W. L. R. 18; 1 D. L. R. 878; 2 W. W. R. 5.—**CAN.**

#### PART I. SECT. 4, SUB-SECT. 3.

**168 i. May negative intent.]—**Prisoner being indicted for stealing & receiving certain horses was acquitted of the stealing but found guilty of receiving. After the verdict of guilty had been pronounced & minuted by the clerk the jury said they recommended the prisoner to mercy on the ground that they thought that she believed herself to have some claim to the property:—*Held*: in the circumstances the verdict was wrong & prisoner ought not to have been convicted.—*R. v. DICKSON* (1865), 4 N. S. W. S. C. R. 298.—**AUS.**

**168 ii. —.]—**A servant absenting himself from his employment in the *bond fide* belief that he has a right to do so is not liable to a conviction for unlawfully absenting himself though he may be mistaken.—*R. v. MOLLISON, Ex p. CRICHTON* (1876), 2 V. L. R. 144.—**AUS.**

**168 iii. —.]—**A. was convicted summarily of "wantonly breaking up a carriage-way" in violation of a bye-law of a municipality. A's father had conditionally purchased the land across which the alleged road ran, & that A. always cultivated the portion reserved for a road in common with the rest of his land, ploughing across it & taking

crops off it every year for six years. The breaking up complained of was the ploughing across the road by A. who was tilling a crop of corn growing there. There was no evidence of any proclamation of the road or any dedication to the public other than a reservation by a surveyor & a marking by order of the surveyor-general:—*Held*: conviction was wrong, inasmuch as the act complained of was not done wantonly but in assertion of a right.—*Ex p. WATT* (1878), 1 N. S. W. S. C. R. N. S. 24.—**AUS.**

**168 iv. —.]—**Deft. who had been for many years an opium smoker was suffering from dyspnoea & consulted a medical man who prescribed "Ext opii 2 ozs. liquid for smoking purposes." By virtue of this prescription the deft. obtained two ozs. of opium from a chemist. He was prosecuted under the Aborigines Protection & Restriction of the Sale of Opium Act, 1897, for unlawfully having opium in his possession:—*Held*: he had not committed an offence against the Act.—*MORONEY v. QUOK YEN*, [1908] S. Q. R. 205.—**AUS.**

**168 v. —.]—**Prisoner & his wife were absolutely divorced in Illinois, where they were domiciled, by a decree which gave the custody of their child, five years old, to the wife, with permission to prisoner to take it out with him in the day time, but to return it the same day. The prisoner, having thus obtained the child, brought it to Canada:—*Held*: prisoner's contention that he has acted in good faith because he had been advised that the decree of divorce having been obtained collusively, was a nullity.—*R. v. WARRE* (1902), 3 O. L. R. 368; 5 Can. Crim. Cas. 246.—**CAN.**

**168 vi. —.]—**A., the servant of B., was convicted of criminal trespass in going upon the land of C., one of B.'s tenants & preventing him from cutting his crops. B. was convicted of abetment of criminal trespass. A. & B. pleaded that they were acting in the exercise of the legal right of distraint. It appeared that no written demand under Rent Act (Bengal Act VIII of 1869), s. 72, for the amount of the arrears, together with an account exhibiting the grounds on which demand had been made, was served on C., & that no written authority under sect. 76 had been given by B. to A.:—*Held*: it lay upon A. & B. to show that they had conformed to the provisions of the law, or at least had acted with the *bond fide* intention of distraining the complainant's crops;

*Sherras v. De Rutzen*, [1895] 1 Q. B. 918. *Reid, Cundy v. Le Cocq* (1884), 13 Q. B. D. 207; *Chisholm v. Doulton* (1889), 60 L. T. 966; *Derbyshire v. Houlston*, [1897] 1 Q. B. 772; *Burrows v. Rhodes*, [1899] 1 Q. B. 816; *Hobbs v. Winchester Corpn.*, [1910] 2 K. B. 471; *R. v. Wheat, R. v. Stocks*, [1921] 2 K. B. 119. *Mentd.* A.-G. v. Bradlaugh (1885), 14 Q. B. D. 667.

**my—Reasonable belief of death.]—**See Part XXVII., Sect. 1, sub-sect. 3, B., *post*.

**Reasonable belief of divorce.]—**See No. 8038, *post*.

#### SUB-SECT. 3.—BONÂ FIDE CLAIM OF RIGHT.

**168. May negative intent.]—**Where intent is a necessary ingredient to any particular crime, *bond fide* belief in a claim of right may be a good defence as showing there was no criminal intent.—*R. v. HALL* (1828), 3 C. & P. 409.

**169. —.]—**The ct. will not grant a criminal information against a party who appears to have acted *bond fide* on a conviction that he was exercising a legal right.—*R. v. BLURTON* (1838), 2 Jur. 33.

& the conviction was right.—*JHUMUK NONIAH v. SHADASHI ROY* (1881), I. L. R. 7 Cal. 26.—**IND.**

**168 vii. —.]—**Appl't. was charged with having wilfully obstructed the driving of horses along a public road or thoroughfare. The public use of the road had been discontinued, but the informant still used it as a means of access to his slaughter yard. Appl't. held an occupation license for certain land, of which the road in question formed part, & he had fenced it in:—*Held*: appl't. having acted under reasonable supposition of right, the conviction was wrong.—*LUDEMANN v. BARNETT*, 2 J. R. N. S. 108.—**N.Z.**

**168 viii. —.]—**Accused was charged, under Criminal Code Act, 1893, s. 318, with the crime of mischief in wounding a horse by shooting it. Accused gave evidence admitting wilfully shooting the horse, but attempting to justify it. He stated that it had for six months before been repeatedly trespassing on land in his possession & breaking his fences; that he had great difficulty in turning it out; that he could not catch it; & that he had failed to find out who the owner was. The judge directed the jury that there was no evidence that the accused acted with colour of right within the meaning of Criminal Code Act, 1893, s. 307 (2):—*Held*: the direction was right. To amount to "colour of right" there must be an honest belief in the existence of a state of facts which, if it actually existed, would at law justify or excuse the act done.—*R. v. FETZER* (1900), 19 N. Z. L. R. 438.—**N.Z.**

**168 ix. —.]—**A person, who had been convicted on a summary complaint of having wilfully, maliciously, & mischievously destroyed a wall on a fen or lot of ground specified, appealed against the conviction. The following facts were stated in the case:—The wall in question had been erected many years before the proceedings in question. It was not stated in the complaint, & was not proved, to whom the wall belonged, but appl't., who had been previously warned against interfering with it, claimed a right of property in it, or in the ground on which it stood, although he asserted a right of way over the ground, which the wall obstructed. No violence or disorderly conduct was proved beyond the operations necessary to break down the wall, which was of little value:—*Held*: the facts found proved sufficiently instructed the crime of malicious mischief.—*FORBES v. ROSS* (1898), 25 R. (Ct. of Sess.) 60; 35 Sc. L. R. 743; 6 S. L. T. 12.—**SCOT.**



**Sect. 4.—Grounds of defence and exemptions from criminal liability: Sub-sects. 3, 4 & 5.]**

**170. — Even though erroneous.]**—The belief, although erroneous, of prisoner in the existence of a right to do the act complained of excludes criminality.—*R. v. TWOSE* (1879), 14 Cox, C. C. 327.

**Annotation:—***Refd. R. v. Rutter* (1908), 1 Cr. App. Rep. 174.

**171. — Recovery of goods.]**—Prisoners were indicted for burglariously entering the house of S. with intent to steal the goods of H., an excise officer. It appeared that prisoners had entered the house to recover some tea, which had been seized by H., on behalf of the supposed owner:—

**170 i. — Even though erroneous.]**—The removal of property in the assertion of a *bond fide* claim of right unfounded in law & fact does not constitute theft. A colourable pretence to obtain or keep possession of property does not avail as a defence. Whether the claim is *bond fide* or not must be determined upon all the circumstances of the case & a ct. ought not to convict unless it holds that the claim is a mere pretence.—*ARFAN ALI v. IL* (1916), 1 L. R. 44 Cal. 66.—**IND.**

**Question for jury.]**—Where a prisoner charged with larceny sets up that he took the article under a claim of right, the question for the jury is, whether he honestly believed the article to be his & not whether he had reasonable grounds for so believing.—*R. v. NUNDAH* (1916), 16 S. R. N. S. W. 482; 33 N. S. W. N. 196.—**AUS.**

**s. — — —.]**—The accused shot a bull which was trespassing & had repeatedly trespassed upon his land & inflicted damage upon his stock, he being under the belief that he was justified in doing so:—**Held:** the question whether the circumstances of this belief constituted a colour of right justifying the act was a question for the jury.—*R. v. MCKENZIE* (1895), 13 N. Z. L. R. 309.—**N.Z.**

**Right previously adjudicated upon by the courts.]**—Prisoner was indicted with having unlawfully taken away a female child then about eight years & a half, with intent to deprive the parent of & then having the lawful charge of the child, of the possession of such child. He pleaded "Not guilty." The child was taken away with intent to deprive the mother of the possession of the child. The Supreme Ct. had refused an application by prisoner for a writ of *habeas corpus* directed to the mother to produce the child. The trial judge held that, in view of the order made by the Supreme Ct. on the application for a writ of *habeas corpus*, the prisoner was not entitled to the custody of the child, & that the taking was therefore unlawful. He directed the jury accordingly, & told them that they ought to convict the prisoner, unless they thought that when he got possession of the child he was claiming in good faith a right to the possession of the child. The jury found the prisoner guilty:—**Held:** the direction to the jury was right in law, & that conviction should be affirmed.—*R. v. MIKKELSEN* (1912), 31 N. Z. L. R. 1261.—**N.Z.**

**a. — Right claimed impossible in law.]**—The usual reservation in a patent of land bounded by navigable water of "free access to the shore for all vessels, boats, & persons," gives a right of access only from the water to the shore. Where a person who had broken down fences & had driven across private property to the shore:—**Held:** he could not successfully assert, when charged under R. S. O. 1897, c. 120, s. 1, & the criminal code, s. 511,

that he had "acted under a fair & reasonable supposition of right" in so doing.—*R. v. DAVY* (1900), 27 A. R. 508.—**CAN.**

**b. — — —.]**—Where deft. to a summons seeks to justify the act complained of as done in exercise of a right which could not exist in law, he cannot have "fair & reasonable grounds for a *bond fide* claim of right," & the justices should convict. Prosecutor was convicted of trespass on the lands of C. He admitted the entry on the lands, but claimed it was made in exercise of a right of way. The public right of way from a public road across C's lands to a private bathing-place on the land of R. C's neighbour. The justices stated in their order that the right claimed was not "substantially supported by evidence":—**Held:** the right claimed being one impossible in law, the conviction was good.—*R. v. TYRONE TRUSTEES*, [1917] 2 I. R. 96.—**IR.**

**c. — Claim founded on religious belief.]**—Medical attendance & remedies are necessities within Criminal Code, ss. 209 & 210, & any one legally liable to provide such is criminally responsible for neglect to do so. Conscientious belief that it is against the teachings of the Bible & therefore wrong to have recourse to medical attendance & remedies is no excuse.—*R. v. BROOKS* (1902), 9 B. C. R. 13.—**CAN.**

**d. — Belief in witchcraft.]**—Appet. being charged with murder, admitted the killing, but claimed that he was not legally responsible for his act on the ground that he believed deceased had killed two of his children by witchcraft:—**Held:** he was not thereby relieved from responsibility, & he was rightly convicted.—*R. v. RADEBE* (1915), App. D.—**S. AF.**

**e. — Mixed legal & moral right.]**—Deft. was charged with having, wilfully, maliciously & without colour of right, entered on certain creek placer mining claims, & cut a hole in a dam, thereby causing water to be conveyed to one of the claims, to the injury thereof. Accused entered upon the property & tore out part of the dam, throwing out a box which was meant for a sluice-gate & some stakes supporting the dam. Deft. set up a *bond fide* colour of right:—**Held:** colour of right means an honest belief in a state of facts which, if it existed, would be a legal justification or excuse; & upon the evidence, deft. was not proceeding upon an honest belief that he had a legal right to do what he did, but rather upon a hazy belief in a mixed legal & moral right, which would not excuse.—*R. v. WATIER* (1910), 15 W. L. R. 427.—**CAN.**

**f. — Matter rather civil than criminal.]**—J. & W. were charged at common law with having been guilty of the crime of malicious mischief in that they did wickedly, feloniously, & maliciously break down & destroy four feet of a paling of a green occupied by G. The magistrate convicted the accused. G. had been tenant under

**Held:** the indictment could not be supported, there being no intention to steal. **Qu.:** if the indictment had laid the intent to be to rescue the goods found, which is felony by statute.—*R. v. KNIGHT & ROFFEY* (1781), 2 East, P. C. 510, C. C. R.

**172. — Recovery of money.]**—A., at C. fair, came up to B., the prosecutor's father, being a stranger to him, & gave him eleven sovereigns to buy him a horse, & B. put them into his pocket. B. refused to give the eleven sovereigns back, & A. & prisoner, who was in his company, assaulted him, but could not get the money from him. On the next day prisoner asked B. for the eleven sovereigns, & at L. fair, on a subsequent day,

the comrs. of police for the burgh for some months of a portion of the green (no part of which had previously been let) adjoining the property of J. On entering on the lease G., at the request of the comrs. of police, put up, at his own expense, a wooden paling round his ground. When doing so he left open a space of six feet for an access to the property of J., which entered by way of the green. Jul. 21, 1879, by order of the Chief Magistrate of the burgh, he closed up the space of six feet with a paling. July 24, J. & W., without giving any notice to G., broke down the fence at the place where their access had previously been. For the defence it was proved that J. had for many years possessed a property adjoining the green, & adjacent to that part of it leased by G.; that his only access to his property, July 21, 1879, was by way of the green; & through the gap in the fence left by G., & that this access was closed by the fence erected on that day:—**Held:** though the conduct of applt. was perhaps not to be commended, yet in the circumstances he was justified in removing the barrier erected across his access, & any question as to his right fell to be settled by a civil action rather than criminally in the police ct.—*BLACKS v. LAING* (1879), 7 R. (Ct. of Sess.) 1.—**SCOT.**

**g. — False statement known by prisoner to be false.]**—L., a duly qualified medical practitioner, charged under REGISTRATION OF DOCTORS, Deaths & Marriages Act, 1915, s. 22, with having wilfully made for the purpose of their being inserted in a Register of deaths false statements concerning the particulars required to be registered in reference to the death of H. L. had acquired a medical practice & had put in charge of it B., a medical student in the fifth years of his course, who undertook to call in L. on all needful occasions. L. stated that owing to the conditions created by the existing war such an arrangement was recognised by the Medical Society as proper. B. attended a patient, H., who died after a few days' illness. L. himself never attended or saw H., but he gave a certificate of death in which he stated, "I attended H. I last saw her on 16.7.16." Defence was that L. honestly thought that he was entitled to give the certificate because B. was his agent & had in that capacity & on his behalf attended H. Jury were in effect directed to convict L., & they brought in verdict of guilty:—**Held:** as the statements were false & were known by L. to be false & were intentionally made by him the conviction was right. The fact that L. honestly believed that he was entitled to give such certificate afforded no defence.—*R. v. LOWE*, [1917] V. L. R. 155.—**AUS.**

**h. — Right based on fraudulent Order-in-Council.]**—Order-in-Council passed with a fraudulent or unlawful design cannot be invoked to exempt the ministers who secured or connived at its passage from the criminal

prisoner having seen prosecutor receive seven sovereigns, demanded the eleven sovereigns of him, & knocked him down, & tried to get the seven sovereigns out of his pocket:—*Held*: there was such a semblance of a claim of right, that this was not an assault with intent to rob.—*R. v. BODEN* (1844), 1 Car. & Kir. 395.

See Part XXXIV., Sect. 26, sub-sect. 3, post.

On summary prosecution.]—See MAGISTRATES.

Trespass in pursuit of game.]—See GAME.

Certiorari to quash proceedings.]—See CROWN PRACTICE, Vol. XVI., pp. 424–426, Nos. 2836–2856.

See, further, MAGISTRATES.

#### SUB-SECT. 4.—ACCIDENT.

**173. Killing in lawful sport.]**—If men tilt or turney in the presence of the King, or if two masters of defence playing their prizes kill one another, this shall be no felony, because felony must be done *animo felonico* (*per CUR.*).—*WEAVER v. WARD* (1616), Hob. 134; *Moore*, K. B. 864; 80 E. R. 284.

*Annotations*:—*Mentd.* *Mitchil v. Alestree* (1676), 1 Vent. 295; *Bessey v. Ollot & Lambert* (1682), T. Raym. 467; *Dickenson v. Watson* (1682), T. Jo. 205; *Gibbon v. Pepper* (1695), 2 Salk. 637; *R. v. Keite* (1696), 1 Ld. Raym. 138; *R. v. Gill* (1719), 1 Stra. 190; *Scott v. Shepherd* (1773), 3 Wils. 403; *McManus v. Crickett* (1800), 1 East, 106; *Leame v. Bray* (1803), 3 East, 593; *Hall v. Fearnley* (1842), 12 L. J. Q. B. 22; *Sharrod v. L. & N. W. Ry.* (1849), 4 Exch. 580; *Stanley v. Powell*, [1891] 1 Q. B. 86.

**174. Casual damage.]**—A man is not criminally answerable for a casual damage done to another.—*R. v. GILL* (1719), 1 Stra. 190; 93 E. R. 466.

**175. Unintentional assault.]**—When A. threw a stick, which struck pltf., but it did not appear for what purpose the stick was thrown:—*Held*: it was fair to conclude that the stick was thrown for a proper purpose, & the striking of pltf. was an accident.—*ALDERSON v. WAISTELL* (1844), 1 Car. & Kir. 358.

**176. Effect of carelessness—Obstruction caused by accident.]**—A. having a right to cross a railway with a waggon laden with timber, did so shortly before a train came up, & owing to an accident,

the waggon broke down on the line, but the engine cut through the logs of wood without injury:—*Held*: although the party was guilty of carelessness yet, as he did not intend to create an obstruction, he was not liable to the penalty imposed by a railway Act for wilful obstruction.—*BATTING v. BRISTOL & EXETER Ry. Co.* (1860), 3 L. T. 665; 25 J. P. 534; 9 W. R. 271.

**177. Effect of negligence—Mistake by chemist.]**—A mistake on the part of a chemist in putting a poisonous liniment into a medicine bottle, instead of a liniment bottle, in consequence of which the liniment was taken by his customer internally with fatal result, the mistake being made under circumstances which rather threw prisoner off his guard:—*Held*: this did not amount to such criminal negligence as would warrant a conviction for manslaughter.—*R. v. NOAKES* (1866), 4 F. & F. 920.

**178. —.]**—To render a person liable to conviction for manslaughter through neglect of duty, there must be such a degree of culpability in his conduct as to amount to gross negligence.—*R. v. FINNEY* (1874), 12 Cox, C. C. 625.

#### SUB-SECT. 5.—INNOCENT MOTIVE.

**179. Whether an excuse—Removal of corpse from burial ground.]**—It is a misdemeanour at common law to remove without lawful authority a corpse from a grave in a burying ground belonging to a congregation of protestant dissenters, although the motive of the person so acting may be pious & laudable.—*R. v. SHARPE* (1857), *Dears. & B.* 160; 26 L. J. M. C. 47; 28 L. T. O. S. 295; 21 J. P. 86; 3 Jur. N. S. 192; 5 W. R. 318; 7 Cox, C. C. 214, C. C. R.

*Annotations*:—*Consd. R. v. Price* (1884), 12 Q. B. D. 247. *Reid. Williams v. Williams* (1882), 20 Ch. D. 659.

**180. — Publication of obscene book.]**—The publication of an obscene pamphlet is a misdemeanour, & is not justified or excused by innocent motives or object.—*R. v. HICKLIN* (1868), L. R. 3 Q. B. 360; 37 L. J. M. C. 89; 16 W. R. 801; 11 Cox, C. C. 19; *sub nom.* *R. v. WOLVERHAMPTON RECORDER, Re SCOTT v.*

jurisdiction of the cts.—*R. v. KELLY* (1916), 35 W. L. R. 46; 11 W. W. R. 46.—*CAN.*

**k. — Unlawful means to exercise right.]**—Assuming the existence of a *bona fide* belief in a claim of right, that does not justify the employment of the means prohibited by the Code, s. 111, in an attempt to exercise that right.—*R. v. BONNER* (1913), 18 B. C. R. 454.—*CAN.*

**l. — Right of private defence.]**—If the accused are justified in resisting the theft of the crops, they cannot be considered as member of an unlawful assembly, with the common object to assert a right to the disputed land & crops, because some members thereof may have exceeded the right of private defence; but if some of the members continue in it, after the others have exceeded the right by the infliction of unnecessary violence, & aid & abet the latter, they also must be considered as having exceeded the right. Where the accused, three of whom were armed with a sword, a scythe, & an iron-shod stick respectively, & the rest with lathis, went in a large body to a certain disputed land, where the labourers of the opposite party were reaping some musouri crop & attacking them, fatally wounding one & severely injuring another:—*Held*: the accused who ordered the attack & those who

used the sword, scythe & iron-shod stick had exceeded the right of private defence, & so also the others, who continued in the unlawful assembly thereafter & aided & abetted the former.—*BAIJNATH DHANUK v. R.* (1908), 1 L. R. 36 Calc. 296.—*IND.*

**m. — Malicious injury to property.]**—A man who has been for years in possession of land, & *bona fide* believing it to be his own, cuts down a fence erected on it by the owner, cannot be convicted of malicious injury to property.—*PRICE v. NGATUERE TAWHAO* (1884), 3 N. Z. L. R. 145.—*N.Z.*

**n. — Where statute says "wilfully" injure.]**—*Semble*: the word "wilfully" in Police Offences Act, 1884, s. 6 (3), means only "intentionally," & does not imply *mens rea*, though a *bona fide* belief that there is a right to do the act is an answer to the charge.—*RYAN v. STANFORD* (1897), 15 N. Z. L. R. 390.—*N.Z.*

**o. — —.]**—Accused was charged with, & convicted of, contravening Act 17 of 1912 (S.A.), s. 21, "in that he wilfully injured a certain fence." He pleaded a *bona fide* assertion of a right of way:—*Held*: inasmuch as "wilfully" in the sect. in question means "intentionally" & not "with evil intent," the accused could not escape criminal liability by

showing that he acted *bona fide* in the assertion of a right.—*R. v. CHINN* (1917), E. D. L. 114.—*S. AF.*

#### PART I. SECT. 4, SUB-SECT. 4.

**p. Effect of somnambulism.]**—To an indictment charging a panel with the murder of his child, he pleaded "not guilty," & further, "that at the time the crime was committed he was asleep." After evidence, the jury, under the judge's direction, returned a verdict finding that the panel killed his child, but that at the time he was in a state in which he was unconscious of the act by reason of the condition of somnambulism, & was accordingly not responsible. The panel was thereupon discharged after his giving an undertaking that in future no one but himself would sleep in the room which he might occupy.—*H.M. ADVOCATE v. FRASER* (1878), 4 Couper, 70.—*SCOT.*

#### PART I. SECT. 4, SUB-SECT. 5.

**q. Whether an excuse—Belief in power to cure snake-bites.]**—Certain snake-charmers by professing themselves able to cure snake-bites, induced several persons to let themselves be bitten by a poisonous snake. From the effect of the bite three of these persons died.—*Held*: that the offence was murder under Penal Code, s. 300 (2)



*Sect. 4.—Grounds of defence and exemptions from criminal liability: Sub-sects. 5 & 6. Sect. 5: Sub-sect. 1, A. & B. (a).]*

WOLVERHAMPTON JJ., 18 L. T. 395; *sub nom.* SCOTT v. WOLVERHAMPTON JJ., 32 J. P. 533.

*Annotations:—Consd.* Steele v. Brannan (1872), L. R. 7 C. P. 261. *Refd.* R. v. Prince (1875), L. R. 2 C. C. R. 154; R. v. Adams (1888), 5 T. L. R. 85. *Mentd.* R. v. Barraclough, [1906] 1 K. B. 201.

181. ———.]—Where it was found, as a matter of fact, that a book was an obscene book:—*Held*: the publication of it was none the less a misdemeanour, & proper to be prosecuted as such, because applt. had published it without any corrupt motive, & solely for the purpose of carrying on a public controversy on matters of general interest & importance.—STEELE v. BRANNAN (1872), L. R. 7 C. P. 261; 41 L. J. M. C. 85; 26 L. T. 509; 36 J. P. 360; 20 W. R. 607.

182. ———.]—Neglect to procure medical aid.]—Since the Poor Law Amendment Act, 1868 (c. 122), s. 37, it is manslaughter if a child die from neglect of a parent to provide medical aid for the child, & it is no answer to the charge of manslaughter that the parent so neglected from a conscientious religious belief that it was wrong to call in medical aid, & that medical aid was not required, & not from any intention to disobey the law.—R. v. DOWNES (1875), 1 Q. B. D. 25; 45 L. J. M. C. 8; 33 L. T. 675; 40 J. P. 438; 24 W. R. 278; 13 Cox, C. C. 111, C. C. R.

183. ———.]—The intentional failure of a person, who has the necessary means to procure medical aid for a child in his care or charge, who is, to the knowledge of such person, in a dangerous state of health, & for whom medical aid & medicine were essential things that reasonably careful persons would have provided for children in their care, is evidence of "wilful neglect" within Prevention of Cruelty to Children Act, 1894 (c. 27), s. 1, & if the jury find that the death of the child was caused or accelerated by want of medical aid, such person is guilty of manslaughter. It makes no difference that such person believes that to call in medical aid would be wrong, as being contrary to the teaching of the Bible, or as showing want of faith.—R. v. SENIOR, [1899] 1 Q. B. 283; 68 L. J. Q. B. 175; 79 L. T. 562; 63 J. P. 8; 47 W. R. 367; 15 T. L. R. 102; 43 Sol. Jo. 114; 19 Cox, C. C. 219, C. C. R. *Annotation:—Refd.* Oakley v. Jackson, [1914] 1 K. B. 216.

184. ———.]—Abduction.]—R. v. JARRETT (1885), *Times*, Nov. 9, 11.

& (3), unless it could be brought within the 5th exception to that sect. If the prisoners, really believing themselves to have the powers they professed to have, induced the deceased to consent to take the risk of death, the offence would be culpable homicide not amounting to murder.—R. v. PUNAI FATTAMA (1869), 3 B. L. R. A. C. 25; 12 W. R. 7.—IND.

#### PART I. SECT. 4, SUB-SECT. 6.

187 i. *When a defence—Military orders.*]—Deft., a corporal, was tried for the murder of White, a private of the same regiment, & convicted of manslaughter. White having been placed in confinement while in a state of intoxication, deft., with two men, were ordered by S., a sergeant of the regiment, to have the deceased tied so that he could not make a noise by kicking & shouting. The order was not executed in such manner as to entirely put an end to the noise, & a second order was given to tie up the deceased so that he could not shout. In carrying the latter order deft. caused deceased to be placed on the

floor face downwards, with his hands cuffed behind his back; a rope was fastened to his feet, which were drawn up behind his back, & the rope passed over his shoulders & across his mouth & back again to his feet.—*Held*: (1) whether the illegality consisted in the order of the sergeant or in the manner in which it was carried out, deft. might properly be convicted; (2) the jury were justified in finding that the death of White was caused or accelerated by the way in which he was tied by deft. or by his directions.—R. v. STOWE (1870), 8 N. S. R. 121.—CAN.

187 ii. ———.]—Accused was a sepoy in a native infantry regiment. On the occasion of a fire in the city of A., he & the rest of his co. turned out to assist in extinguishing it. He with other sepoys was stationed by their officer with orders to keep clear a space in front of the burning house, & not to allow any one not in uniform to intrude on that space. The police under the city chief constable were also engaged at the fire, & on some one of them coming round from the rear,

#### SUB-SECT. 6.—SUPERIOR ORDERS.

185. *When a defence—Order by mine-owner to workmen.*]—If A. & B. are the owners of adjoining mines, & A., asserting that a certain airway belongs to him, directs his workmen to stop it up, & they, acting *bonâ fide*, & believing that A. has a right to give such an order, do so, they are not guilty of felony within 7 & 8 Geo. 4, c. 30, s. 6, for stopping up the airway of a mine, even though A. knew that he had no right to the airway; but if either of the workmen knew that the stopping of the airway was a malicious act of his master, such workmen would be guilty of the felony.—R. v. JAMES (1837), 8 C. & P. 131.

*Annotation:—Refd.* R. v. Day (1844), 8 J. P. 186.

186. ———.]—Orders to engine driver.]—On an indictment against the engine driver & fireman of a train for manslaughter of persons killed while travelling in a preceding train, by prisoners' train running into it, it appeared that on the day in question special instructions had been issued to them, which in some respects differed from the general rules & regulations, & altered the signal for danger, so as to make it mean not "stop," but "proceed with caution"; that the trains were started by the superior officers of the co. irregularly, at intervals of about five minutes; that the preceding train had stopped for three minutes, without any notice to prisoners except the signal for caution, & that their train was being driven at an excessive rate of speed; & that then they did not slacken immediately on perceiving the signal, but almost immediately, & that as soon as they saw the preceding train they did their best to stop, but without effect.—*Held*: (1) if prisoners honestly believed they were observing the rules, & if they were not obviously illegal, prisoners were not criminally responsible; (2) the fireman, being bound to obey the directions of the engine driver, & so far as appeared, having done so, there was no case against him.—R. v. TRAINER (1864), 4 F. & P. 105.

*Annotation:—As to (2) Refd.* R. v. Elliott (1889), 16 Cox, C. C. 710.

187. ———.]—Military orders.]—A gun discharged in the ordinary & regular course of ball practice by an artilleryman missed the mark & killed a man who was lawfully passing near the spot. The artilleryman was acting under the command of a superior officer, who was acting in obedience to the general orders of the major-general:—*Held*: the major-general was not guilty of manslaughter.

they were warned off by the sentries. A *fracas* between the soldiers & the police took place, & the chief constable was kicked by the accused. For this he was charged before the magistrate, & fined for voluntarily causing hurt under Penal Code, s. 323. In evidence it appeared that the police attempted to force the military guard, which had been posted as above stated, & it was further proved that the chief constable was not in uniform, & that the accused did not know who he was. It was not alleged that the kick was unnecessarily violent:—*Held*: the conviction was bad. The magistrate having found that the chief constable was not in uniform, & that the accused did not know who he was, the kick was justifiable as given in good faith for the purpose of preventing much greater harm under Indian Penal Code, s. 31, & as a means of acting up to the military order.—R. v. BOSTAN (1892), 1 L. R. 17 Bom. 626.—IND.

187 iii. ———.]—In a trial of a boatswain & a marine of one of H.M.'s ships for the crime of culpable homicide in having fired on a party of

In using the place, although an improper one, was he obeying military orders? If so, he would not be guilty. Supposing that deft. had been personally engaged in this firing, if he thought that the place from which the gun was fired was not improper, assisted by additional precautions which might be used, he would not be responsible, because he was acting under the direction of superior authority (BYLES, J.).—*R. v. HUTCHINSON* (1864), 9 Cox, C. C. 555.

188. ———.]—A military person cannot maintain an action against his officer for acts done by or under orders from his superiors, which they would have a right to give, & which he would be bound by military law to obey, unless, at all events, he has himself caused & procured such orders by means of reports or representations, malicious, or for some sinister & improper motive, & also without any reasonable or probable ground.—*KEIGHTLY v. BELL* (1866), 4 F. & F. 763.

*Annotations.*—*Refd.* *Dawkins v. Rokeby* (1866), 4 F. & F. 806; *Marks v. Frogley*, [1898] 1 Q. B. 888. *Mentd.* *Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255; *R. v. Army Council, Ex p. Ravenscroft*, [1917] 2 K. B. 504; *Fraser v. Balfour* (1918), 87 L. J. K. B. 1116; *Heddon v. Evans* (1919), 35 T. L. R. 642.

## SECT. 5.—CRIMINAL CAPACITY.

### SUB-SECT. 1.—INFANCY.

#### A. Infants under Seven.

#### 189. Absolute presumption of incapacity.]—

(1) An infant of seven years old cannot be guilty of felony, whatever circumstances proving discretion may appear, for *ex presumptione juris* he cannot have discretion, & no averment shall be received against that presumption.

(2) If he be above seven years old & under fourteen, though *prima facie* he is to be judged not guilty, yet if it appear by strong circumstances, & pregnant evidence, that he had discretion to judge between good & evil, judgment of death may be given against him.—*ANON.* (1448), cited in 1 Plowd. at p. 19, note f.; 75 E. R. 30.

*Annotation.*—*Generally, Refd.* *Reniger v. Fogossa* (1550), 1 Plowd. 1.

190. ———.]—Where a child is under the age of seven years, the law presumes him to be incapable of committing a crime; after the age of fourteen, he is presumed to be responsible for his actions, as entirely as if he were forty; but between the ages of seven & fourteen, no presumption of law arises at all, & that which is termed a malicious intent,

trawlers & killed one of them, the jury was directed that the marine was bound to obey the orders of the boatswain, unless his orders were flagrantly illegal; & that if the jury were of opinion that the prisoners had acted according to the usage of the Naval Service & not recklessly, they were entitled to an acquittal. Jury returned a verdict of "not guilty."—*H.M. ADVOCATE v. HAWTON & PARKER* (1861), 4 Irv. 58.—*SCOT.*

*r.* ——— *Onus of proof.*—Obedience to the orders of a superior officer whilst on active service is a complete defence to a charge of murder by killing a person under such circumstances, provided that such orders were not manifestly illegal. The onus of proving that such orders were not manifestly illegal rests upon the accused.—*R. v. CELLIERS*, [1903] O. R. C. 1.—*S. AF.*

### PART I. SECT. 5, SUB-SECT. 1.—A.

189 i. *Absolute presumption of incapacity.*—An infant under seven years of age is *doli incapax*.—*HUGHINGTON*

a guilty knowledge, that he was doing wrong, must be proved by the evidence, & cannot be presumed from the mere commission of the act (ERLE, J.).—*R. v. SMITH* (1845), 5 L. T. O. S. 393; 9 J. P. 682; 1 Cox, C. C. 260.

191. ———.]—(1) An infant under the age of seven years cannot incur the guilt of felony.

(2) Deft. caught a child in the act of stealing a piece of wood from his premises, & gave him into custody. The child was discharged by the magistrate on the ground that he was under the age of responsibility, & the child afterwards, by his next friend, brought an action against deft. for false imprisonment:—*Held*: a plea of felony was no answer to the action, & the jury having given the child £20 damages, the ct. would decline to interfere on the ground of excess.—*MARSH v. LOADER* (1863), 14 C. B. N. S. 535; 2 New Rep. 280; 11 W. R. 784; 143 E. R. 555.

#### B. Infants under Fourteen.

##### (a) In General.

192. *Presumption of incapacity—Rebutted by proof of mischievous discretion.*—*ANON.*, No. 189, ante.

193. ———.]—If a child more than seven & under fourteen years of age, is indicted for felony, it will be left to the jury to say whether the offence was committed by prisoner, & if so, whether, at the time of the offence, prisoner had a guilty knowledge that he or she was doing wrong. The presumption of law is, that a child of that age has not such guilty knowledge, unless the contrary be proved by the evidence.—*R. v. OWEN* (1830), 4 C. & P. 236.

194. ———.]—(1) A child under fourteen, indicted for murder, must be proved conscious of the nature of the act.

(2) *Semble*: as a general principle, the crime of murder cannot be committed unless there has been an act done with a consciousness that it is likely to cause death.

(3) A girl of thirteen years of age gave an infant about ten weeks old poison so that it died, because she was tired of hugging the child about:—*Held*: the jury must be satisfied, before they could find prisoner guilty, that she was conscious, that her act was deliberate, & that she had arrived at that maturity of the intellect which was a necessary condition of the crime charged.—*R. v. VAMPLEW* (1862), 3 F. & F. 520.

195. ——— *Express evidence essential.*—*R. v. SMITH*, No. 190, ante.

*r. BALTINGLASS DISTRICT COUNCIL* (1901), 35 I. L. T. 204.—*IR.*

189 ii. ———.]—A child under seven is presumed to be *doli incapax*, & this presumption cannot be rebutted by evidence to the contrary.—*R. v. GEORGE* (1882), 2 E. D. C. 392.—*S. AF.*

189 iii. ———.]—*R. v. LOURIE* (1892), 9 S. C. 432; 2 C. T. R. 319.—*S. AF.*

*s.* ——— *Effect of Children's Act.*—

Children's Ct. Act does not effect the presumptions of law relating to the incapacity of infants to commit criminal offences.—*MCDONALD v. LUCAS*, [1922] V. L. R. 47.—*AUS.*

*t.* ——— *Effect of discharge of child on receiver of stolen property.*—The fact that a child has been tried for theft & discharged under Code of Criminal Procedure, 1872, s. 215, on the ground of want of understanding within the meaning of Penal Code, s. 83, is no bar to the conviction of a person charged under Penal Code, s. 411, with receiving the property alleged to have been stolen.—*R. v. BEGARAYI KRISHNA SARANU* (1883), I. L. R. 6 Mad. 373.—*IND.*

### PART I. SECT. 5, SUB-SECT. 1.—B. (a).

#### 192 i. *Presumption of incapacity*—

under fourteen is *prima facie doli incapax*, unless the presumption is rebutted by strong evidence of a mischievous discretion. A boy under fourteen deliberately set fire to heather growing on a mountain:—*Held*: the act was malicious within Malicious Damage Act, 1861 (c. 97), inasmuch as sect. 58 of that Act renders it unnecessary to prove that the person committing the damage was actuated by express malice against the owner.—*HUGHINGTON v. BALTINGLASS DISTRICT COUNCIL* (1901), 35 I. L. T. 204.—*IR.*

195 i. ——— *Express evidence essential.*—A child 12 years of age sold bread without a licence, & was convicted of a contravention of Ord. 13, 1870, s. 6:—*Held*: in the absence of any proof that the child knew that he was doing a forbidden act, he could not be criminally punished for the

**Sect. 5.—Criminal capacity: Sub-sect. 1, B. (a) & (b) & C.; sub-sect. 2, A.]**

**196.** — — — — —.]—The commission of a crime is in itself no evidence whatever of the guilty state of mind which is essential before a child between the ages of seven & fourteen can be condemned (BUCKNILL, J.).—R. v. KERSHAW (1902), 18 T. L. R. 357.

**197.** — — — — —.]—Where a boy aged thirteen was charged with manslaughter of a schoolfellow whom he had wounded in the course of play, & evidence was given that prisoner was not of a mischievous disposition & the wound was caused accidentally, the jury were directed that they should first consider whether it would be their duty to find prisoner guilty if he were over fourteen, & then whether mischievous discretion deprived him of the shelter which he would otherwise have; & further, that if the prosecution sought to show, contrary to the legal presumption, that prisoner, although under fourteen, was responsible criminally, they must give very clear & complete evidence of what was called mischievous discretion.—R. v. GORRIE (1918), 83 J. P. 136.

**198.** — — — — — **What amounts to mischievous discretion.**—An infant between eight & nine years old was found guilty of burning two barns; & on it appearing in examination that he had "malice, revenge, craft, & cunning," he was sentenced to be hanged, & hanged accordingly.—R. v. DEAN (1629), cited in 4 C. & P. at p. 237, n.; 1 Hale, P. C. 25, n.

*Annotation:—*Reid. R. v. Waite (1892), 67 L. T. 300.

*See* Children's Act, 1908 (c. 67), s. 103.

**199.** — — — — —.]—R. v. YORK (1748), Fost. 70.

**200.** — — — — — **Child under control of parents.**—(1) Where coining implements were found in a house occupied by a man, his wife, & a child ten years of age, the jury were directed to acquit the child of a felonious possession.

(2) If coining implements are found in a house occupied at the time by a man & his wife, the presumption is that they are in the possession of the husband alone, unless there are circumstances to show that the wife was acting separately & without

offence.—R. v. GEORGE (1882), 2 E. D. C. 392.—S. AF.

**195 ii.** — — — — —.]—R. v. LOURIE (1892), 9 S. C. 432; 2 C. T. R. 319.—S. AF.

**195 iii.** — — — — —.]—Children between the ages of 7 & 14 are presumed to be *doli incapax*, & before they can be convicted of a crime there must be some evidence to rebut the presumption.—R. v. KHOLL, [1914] C. P. D. 840.—S. AF.

**195 iv.** — — — — —.]—Two boys, aged 16 & 10 years respectively, were convicted by a magistrate of the theft of certain clothing. There was nothing to distinguish the guilt of the one from that of the other, but the magistrate reprimanded & discharged the elder, & sentenced the younger to receive ten cuts with the cane.—*Held*: as the magistrate had merely reprimanded the elder accused, he should not have inflicted a substantial punishment upon the younger, who must be presumed to be *doli incapax*. The conviction & sentence upon the younger accused were accordingly quashed.—R. v. ROBINSON (1914), C. P. D. 1017.—S. AF.

**a.** — — — — — **What evidence necessary.**—The question as to the capacity of a child eight years old to conspire ought to be left to the jury; but the presiding judge ought to direct

her husband's sanction; they cannot both be convicted.

(3) The fact of a wife attempting to break up coining implements at the time of her husband's apprehension, if done with the object of screening him, is no evidence of a guilty possession.—R. v. BOOBER (1850), 14 J. P. 355; 4 Cox, C. C. 272.

**(b) Sexual and Unnatural Offences.**

**201. Rape.**—The presumption of law that an infant under the age of fourteen is unable to commit a rape, is not affected by 9 Geo. 4, c. 31, ss. 16 & 17.—R. v. GROOMBRIDGE (1836), 7 C. & P. 582.

*Annotation:—*Reid. R. v. Waite, [1892] 2 Q. B. 600.

**202.** — — — — —.]—If, on a trial of an indictment for a rape, it appear that prisoner was under fourteen years of age at the time he committed the offence, he must be acquitted of the rape, but the jury may convict him of an assault under 7 Will. 4, & 1 Vict. c. 85, s. 11.—R. v. BRIMLOW (1840), 9 C. & P. 366; 2 Mood. C. C. 122.

*Annotations:—*Consd. R. v. Bird (1851), 5 Cox, C. C. 20; R. v. Waite, [1892] 2 Q. B. 600.

**203.** — — — — — **Attempt to commit.**—(1) A male under fourteen cannot be convicted under Criminal Law Amendment Act, 1885 (c. 69), s. 4, of carnal knowledge of a girl under thirteen.

(2) A boy under fourteen is under a physical incapacity to commit the offence [of rape]. The question whether he could be convicted of the offence does not arise, but it certainly seems to me that a person cannot be guilty of an attempt to commit an offence which he is physically incapable of committing (LORD COLERIDGE, C.J.).—R. v. WAITE, [1892] 2 Q. B. 600; 61 L. J. M. C. 187; 67 L. T. 300; 41 W. R. 80; 8 T. L. R. 782; 36 Sol. Jo. 745; 17 Cox, C. C. 554, C. C. R.

*Annotation:—*As to (1) Consd. R. v. Williams, [1893] 1 Q. B. 320.

**204.** — — — — —.]—A male under fourteen who is tried on an indictment under Criminal Law Amendment Act, 1885 (c. 69), s. 4, for carnal knowledge of a girl under thirteen, though entitled to acquittal for that offence, may, under sect. 9 of the Act, be convicted of indecent assault.

*Qu.*: whether he might have been convicted of an attempt to commit rape.—R. v. WILLIAMS,

years of age who assists his father in committing a crime is presumed so to do in obedience to his father's orders, & is not punishable, even if he knew that he was doing a forbidden act, unless, in the case of a child above seven years of age, the crime was so heinous as obviously to absolve him from the duty of obedience.—R. v. ALBERT (1895), 12 S. C. 272.—S. AF.

**PART I. SECT. 5, SUB-SECT. 1.—B. (b)**

**201 i. Rape.**—The presumption of law against the possibility of the commission of the offence of rape by a boy under the age of 14 years has no appln. to India.—R. v. PARAS RAM DUBE (1915), 1 L. R. 37, Ill. 187.—IND.

**b.** — — — — — **Conviction for indecent assault.**—Though a boy under fourteen years of age is by law deemed incapable of committing rape, yet where the evidence, if believed, is of such a nature that if the accused were over that age it would warrant his conviction for rape, he may on that evidence be convicted of indecent assault.—R. v. ANGUS (1907), 26 N. Z. L. R. 948.—N.Z.

**c. Sodomy.—Conviction for assault.**—*Def.*, a boy, under the age of fourteen years, was convicted of the offence of committing an unnatural offence upon the person of a younger

the jury that they can only convict upon strong & pregnant evidence that the child was acquainted with the nature & consequence of the offence charged. The evidence of the capacity of a child between seven & fourteen years old to commit a crime should be stronger in the inverse ratio of the child's age. The fact of a child eight years old having committed perjury is not conclusive evidence that the perjury was committed as part of a conspiracy. L. was convicted upon the evidence of A., a child between seven & eight years old, of the offence of rape. A. & her father were then indicted for conspiring together, to accuse L. of the crime. No direct evidence was offered of A.'s capacity to understand the nature of a conspiracy, but her age, the notes of her evidence on the trial of L. & the evidence of another child, who swore that A. had subsequently admitted L.'s innocence to her, were relied on as proofs of capacity. The judge left it to the jury to say whether A. was of capacity to conspire.—*Held*: this evidence was not sufficiently strong & pregnant to rebut the presumption of innocence; & the judge ought to have directed an acquittal.—R. v. ADAMS (1882), 1 N. Z. L. R. C. A. 311.—N.Z.

**200 i.** — — — — — **Child under control of parents.**—A child under fourteen

[1893] 1 Q. B. 320; 62 L. J. M. C. 69; 41 W. R. 392; 9 T. L. R. 198; 5 R. 186, C. C. R.

**205. — Assault with intent to commit.]—**A boy under the age of fourteen cannot be convicted of an assault with intent to commit a rape.

This boy being under fourteen cannot be found guilty of rape except as a principal in the second degree (VAUGHAN, B.).—R. v. ELDERSHAW (1828), 3 C. & P. 396.

**206. — —.]—**A boy who, at the time of the offence, is under fourteen, cannot, in point of law, be guilty of an assault with intent to commit a rape; & if he were under that age, no evidence is admissible to show that, in point of fact, he could commit the offence of rape.—R. v. PHILIPS (1839), 8 C. & P. 736.

*Annotation:—*Refd. R. v. Waite, [1892] 2 Q. B. 600.

**207. — Principal in the second degree.]—**R. v. ELDERSHAW, No. 205, *ante*.

**208. Carnal knowledge.]—**(1) A boy under fourteen years of age cannot, by law, be convicted of feloniously carnally knowing & abusing a girl under ten years old, even though it be proved that he has arrived at the full state of puberty.

(2) To constitute penetration on a charge of this offence, the parts of the male must be inserted in those of the female, but, as matter of law, it is not essential that the hymen should be ruptured.

(3) A. was charged with feloniously carnally knowing & abusing a girl under ten. B. was charged with being present, aiding & abetting. A.'s counsel called no witnesses. B., who had no counsel, called a witness to prove an alibi for A.:—*Held*: this evidence was in effect evidence for A., & in strictness counsel for the prosecution had a right to reply on the whole case, but it was *summum jus*, & ought to be exercised with great forbearance.—R. v. JORDAN & COWMEADOW (1839), 9 C. & P. 118.

**209. — Criminal Law Amendment Act, 1885 (c. 69), s. 4.]—**R. v. WAITE, No. 203, *ante*.

**210. — —.]—**R. v. WILLIAMS, No. 204, *ante*.

**211. Indecent assault.]—**R. v. WILLIAMS, No. 204, *ante*.

**212. Sodomy—Principal in the second degree.]—**Applt. took two boys to a narrow space between two sheds & attempted to commit sodomy with the elder, after telling the younger, aged ten, to keep watch, & give notice of the approach of any other person. There was no evidence that the younger boy had guilty knowledge fit to be left to a jury:—*Held*: (1) the younger boy was not an accomplice; (2) if there was any evidence of guilty knowledge, it was for the jury to say whether there was any guilty knowledge or not; (3) it was desirable that the jury should be directed to receive the evidence of witnesses of tender age with caution.—R. v. CRATCHLEY (1913), 9 Cr. App. Rep. 232, C. C. A.

*Annotations:—*As to (3) Refd. R. v. Dossi (1918), 13 Cr. App. Rep. 158; R. v. Warren (1919), 14 Cr. App. Rep. 4.

**213. — —.]—**Boys under the age of fourteen years cannot be accomplices in sodomy.—R. v. TATAM (1921), 15 Cr. App. Rep. 132, C. C. A.

#### C. Infants under Twenty-one.

**214. General rule.]—**R. v. SMITH, No. 190, *ante*.

**215. Larceny as bailee.]—**An infant, over fourteen years of age, fraudulently converted to

his own use goods which had been delivered to him by the owner, under an agreement for the hire of the same:—*Held*: he was rightly convicted of larceny as a bailee of the goods under Larceny Act, 1861 (c. 96), s. 3.—R. v. McDONALD (1885), 15 Q. B. D. 323; 52 L. T. 583; 49 J. P. 695; 33 W. R. 735; 1 T. L. R. 561; 15 Cox, C. C. 757, C. C. R.

*Annotation:—*Mentd. R. v. Ashwell (1885), 16 Q. B. D. 190.

**216. Bankruptcy offence—Debtors Act, 1869 (c. 62), s. 12.]—**W. was convicted under sect. 12 of the above Act for that he, within four months before the presentation of a bkpcy. petition against him upon which he was adjudged bkpt., quitted England, taking with him, with intent to defraud, property exceeding £20, which ought by law to have been divided amongst his creditors. At the times when he quitted England, & when he was adjudged bkpt., W. was an infant. The debts proved against his estate in the bkpcy. were trade debts, contracted since the passing of the Infants Relief Act, 1874 (c. 62), & it did not appear that any debts for necessities supplied to him existed:—*Held*: the conviction could not be upheld.—R. v. WILSON (1879), 5 Q. B. D. 28; 49 L. J. M. C. 13; 41 L. T. 480; 44 J. P. 105; 28 W. R. 307; 14 Cox, C. C. 378, C. C. R.

*Annotations:—*Consd. R. v. Macdonald (1885), 1 T. L. R. 561. Refd. Re Jones, Ex p. Jones (1881), 50 L. J. Ch. 673; Leslie v. Sheill, [1914] 3 K. B. 607.

*See, now*, Bankruptcy Act, 1914 (c. 59), s. 159. *See* BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 28–30, Nos. 218–237.

**217. Non-repair of highway.]—***Semble*: infancy would not exempt a party, liable in other respects, from indictment for non-repair of a highway, if there were no other person against whom performance of the repairs could be enforced.—R. v. SUTTON (1835), 3 Ad. & El. 597; 1 Har. & W. 428; 5 Nev. & M. K. B. 353; 4 L. J. K. B. 215; 111 E. R. 540.

*Annotation:—*Mentd. Russell v. Shenton (1842), 3 Q. B. 449.

**Enforcement of duty to repair highways.]—***See*, generally, HIGHWAYS, STREETS & BRIDGES.

#### SUB-SECT. 2.—INSANITY.

##### A. In General.

**218. General rule.]—**There are four manners of *non compos mentis*, (1) idiot or fool natural, (2) he who was of good & sound memory & by the visitation of God has lost it, (3) lunatic, *qui gaudet lucidis intervallis*, & sometimes is of good & sound memory, & sometimes *non compos mentis*, (4) by his own act, as a drunkard.

Although he who is drunk is for the time *non compos mentis*, yet his drunkenness does not extenuate his act or offence, nor turn to his avail; but it is a great offence in itself, & therefore aggravates his offence, & does not derogate from the act which he did during that time.—BEVERLEY'S CASE (1604), 4 Co. Rep. 123 b; 76 E. R. 1118.

*to (2) Refd. Ex p. Cranmer (1806), 12 Co. Rep. 170 a; Shaftsbury v Shaftsbury (1723), Gilb. Ch. 173; Yates v. Boen (1738), 2 Stra. 1104; Ex p. Southcot (1751), 2 Ves. Sen. 401; Oxenden v. Compton (1793), 4 Bro. C. C. 231; Murley v. Sherren (1838), 8 Ad. & El. 754; Humphreys v. Griffiths (1840), 6 M. & W. 89; Molton v. Camroux (1848), 2 Exch. 487; Stanton v. Percival (1865), 5 H. L. Cas. 257; Imperial Loan Co. v. Stone, [1892] 1 Q. B. 599; Re Walker, [1905] 1 Ch. 160.*

boy:—*Held*: (1) at common law, which in this particular was unchanged by anything in the criminal code, deft. was incapable of committing the

offence charged, & the conviction must be set aside; (2) if the act was committed against the will of the other party deft. could be punished for an

assault under sect. 260 of the code.—R. v. HARTLEN (1898), 30 N. S. R. 317. —CAN.

*Sect. 5.—Criminal capacity: Sub-sect. 2, A. & B. (a) & (b).]*

**219. Presumption of sanity.]—**(1) If in an indictment for treason it be stated as an overt act that prisoner discharged at the Sovereign a pistol loaded with powder & a certain bullet, & thereby made a direct attempt on the life of the Sovereign, the jury must be satisfied that the pistol was a loaded pistol, *i.e.* that there was something in it beyond the powder, & wadding. (2) *Semble:* it is not necessary for them to be satisfied that it was actually loaded with that which is generally known by the name of a bullet.

(3) If to such a charge the defence set up be insanity, the question for the jury will be whether the prisoner was labouring under that species of insanity which satisfies them that he was quite unaware of the nature, character, & consequences of the act he was committing; or, in other words, whether he was under the influence of a diseased mind, & was really unconscious at the time he was committing the act that it was a crime.

(4) Persons *prima facie* must be taken to be of sound mind till the contrary is shown (LORD DENMAN, C.J.).—*R. v. OXFORD* (1840), 9 C. & P. 525; 4 State Tr. N. S. 497; 1 Town. St. Tr. 102. *Annotations:—As to (3) Refd.* Felstead v. R., [1914] A. C. 534. *Generally, Mentd.* Molton v. Camroux (1848), 12 Jur. 800.

**220. —.]—M'NAGHTEN'S CASE**, No. 229, *post*.

**221. —.]—R. v. STOKES**, No. 253, *post*.

**222. —.]—R. v. LAYTON**, No. 254, *post*.

**Rebutted by proof of partial insanity.]—**  
-sect. 2, B., *post*.

### B. Partial Insanity.

(a) *Law before M'Naghten's Case.*

**223. Absence of understanding.]—**If he was under visitation of God & could not distinguish between good & evil & did not know what he did he could not be guilty of any offence against the law; for guilt arises from the mind & the wicked will & intention of a man. If a man be deprived of his reason & consequently of his intention, he cannot be guilty. It is not every frantic & idle humour of a man that will exempt him from justice & the punishment of the law. When a man is guilty of a great offence it must be very plain & clear, before a man is allowed such an exemption. Therefore it is not every kind of frantic humour, or something unaccountable in a man's actions that points him out to be such a

madman as is exempted from punishment. It must be a man that is totally deprived of his understanding & memory & doth not know what he is doing, no more than an infant, a brute, or a wild beast (TRACY, J.).—ARNOLD'S CASE (1724), 16 State Tr. 695.

**224. —.]—HADFIELD'S CASE** (1800), 27 State Tr. 1281.

*Annotations:—Consd.* Yarrow v. Yarrow (1892), 8 T. L. R. 215. *Refd.* R. v. Oxford (1840), 9 C. & P. 525; Clift v. Schwabe (1846), 7 L. T. O. S. 342; R. v. Burton (1863), 3 F. & F. 772. *Mentd.* R. v. Hill (1851), 4 New Sess. Cas. 613.

**225. —.]—BELLINGHAM'S CASE** (1812), 1 *linson on Lunatics*, 636.

*Annotations:—Refd.* R. v. Offord (1831), 5 C. & P. 168; R. v. Townley (1863), 3 F. & F. 839.

**226. Ability to distinguish right from wrong.]—***R. v. BOWLER* (1812), 54 Annual Register, 309; 1 Collinson on Lunatics, 673, n.; Shelford on Lunatics, 2nd edn., 590; 1 Russell on Crimes & Misdemeanours, 8th edn., 64.

*Annotation:—Refd.* R. v. Oxford (1840), 9 C. & P. 525.

**227. —.]—**To justify the acquittal of prisoner indicted for murder, on the ground of insanity, the jury must be satisfied that he was incapable of judging between right & wrong, & at the time of committing the act did not consider that it was an offence against the laws of God & nature.—*R. v. OFFORD* (1831), 5 C. & P. 168.

*Annotation:—Refd.* R. v. Townley (1863), 3 F. & F. 839.

**228. —.]—R. v. OXFORD**, No. 219, *ante*.

(b) *M'Naghten's Case and after.*

**229. Lack of knowledge of nature & quality of act—Lack of knowledge that act was wrong.]—**

(1) A person labouring under partial delusions only, & not otherwise insane, who did the act charged with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or wrong, or of producing some public benefit, is punishable, if he knew at the time that he was acting contrary to the law of the land. If a party labouring under an insane delusion as to existing facts, & not otherwise insane, commits an offence, he must be considered in the same situation as if the facts in respect to which the delusion exists were real.

(2) To establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature & quality of the act he was doing, or if he did know it, that he did not know that what he was doing was wrong.

### PART I. SECT. 5, SUB-SECT. 2.—A.

**219 i. Presumption of sanity.]—**Every man is presumed to be sane & to be able to control his actions.—*R. v. T. S.* 783.—**S. AF.**

### PART I. SECT. 5, SUB-SECT. 2.—B. (a).

**d. Mental delusion.]—**Species of mental delusion, or monomania held not to be free from responsibility for a criminal act.—*H.M. ADVOCATE v. WHELPS* (1842), 1 Broun, 378.—**SCOT.**

### PART I. SECT. 5, SUB-SECT. 2.—B. (b).

**229 i. Lack of knowledge of nature & quality of act—Lack of knowledge that act was wrong.]—**On a trial for murder, here was evidence of abnormality of his brain, & that the accused was suffering from morbid delusion on the subject of persecution by the man whom he killed & by others. When unmoning up, the judge laid down the act of criminal responsibility as stated

in *M'Naghten's Case* & left it to the jury to say whether they were or were not satisfied that at the time accused slew H. he was so insane that he did not know he was killing him, or if he did know he was killing him he did not know it was contrary to law:—*Held:* the judge correctly directed the jury in regard to the test for criminal responsibility.—*R. v. CURRIAN* (1922), 22 S. R. N. S. W. 405.—**AUS.**

**229 ii. —.]—R. v. RIEL** (No. 2) (1885), 1 Terr. L. R. 23.—**CAN.**

**229 iii. —.]—**To establish a defence on the ground of insanity, it must be clearly proved that the accused, at the time of committing the act was

from disease of the mind, as not to know the nature & quality of the act he was doing, or as not to know that what he was doing was wrong.—*R. v. DUBOIS* (1890), 17 Q. L. R. 203.—**CAN.**

**229 iv. —.]—R. v. JESSAMINE** (1912), 1 D. L. R. 285.—**CAN.**

**229 v. —.]—**The accused stabbed a child with a sword & killed

her. He was charged with murder, & a plea of insanity was set up at the trial. No motive could be assigned for his attack on the child, in which he persisted in the presence of other persons; & he had been in the habit of treating the child kindly & affectionately. He was suffering from fever & want of food at the time, & the medical evidence showed it was possible that the act was committed under a sudden attack of homicidal mania. He had abused some of his relations a short time before, the abuse being probably due to irritability of mind caused by fever. He was convicted of murder:—

nature of his act or that he was doing what was wrong or contrary to law. The conviction was right.—*R. v. VENKATASHAMI* (1889), 1 L. R. 12 Mad. 459.—**IND.**

**229 vi. —.]—**Where the unsoundness of mind deposed to was not such as would make the accused incapable of knowing the nature of the

If the accused was conscious that the act was one which he ought not to do & if that act was at the same time contrary to the law of the land, he is punishable.

(3) Where the defence of insanity is set up, a medical witness who never saw prisoner before but was present during the whole of the trial, cannot in strictness be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or whether prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any & what delusion at the time. Such questions involve the determination of the truth of the facts deposed to, which it is for the jury to decide. But where the facts are admitted or not disputed, & the question becomes one of science only, such questions may be allowed to be put in that general form, though this cannot be insisted on as a matter of right.

(4) The jury ought to be told in all cases that every man is to be presumed to be sane, & to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction (TINDAL, C.J.).—M'NAGHTEN'S CASE (1843), 10 Cl. & Fin. 200; 8 E. R. 718; *sub nom.* McNAUGHTON'S CASE, 4 State Tr. N. S. 847; 1 Town. St. Tr. 314; 1 Car. & Kir. 130, n.; *sub nom.* INSANE CRIMINALS, 8 Scott, N. R. 595, H. L.

*Annotations:—As to (2) Consd. R. v. Haynes (1859), 1 F. & F. 666. Follid. R. v. Burton (1863), 3 F. & F. 772. Apld. R. v. Davis (1881), 14 Cox, C. C. 563. Expld. R. v. Codere (1916), 12 Cr. App. Rep. 21. Consd. R. v. Jolly (1919), 83 J. P. 296; R. v. Holt (1920), 15 Cr. App. Rep. 10; R. v. True (1922), 127 L. T. 561. Refld. R. v. Kay (1904), 68 J. P. Jo. 376; R. v. Smith (1910), 26 T. L. R. 614; R. v. Marsland (1911), 7 Cr. App. Rep. 77. As to (3) Consd. R. v. Francis (1849), 14 J. P. 24. Generally, Consd. Public Prosecutions Director v. Beard, [1920] A. C. 479. Refld. Felstead v. R., [1914] A. C. 534. Mentid. R. v. Crouch (1844), 3 L. T. O. S. 186; Wensleydale Peerage Case (1856), 8 State Tr. N. S. 479; Boughton v. Knight (1873), L. R. 3 P. & D. 64; R. v. Oxford Bp. (1879), 4 Q. B. D. 525; R. v. Tolson (1889), 23 Q. B. D. 168; Yarrow v. Yarrow (1892), 8 T. L. R. 215; R. v. Ireland (1910), 4 Cr. App. Rep. 74; Grime v. Fletcher (1915), 59 Sol. Jo. 233.*

230. ———.]—To establish a defence on the ground of insanity it must be proved that at the time of committing the act accused did not know the nature & quality of the act he was doing, or if he did know it, that he did not know that what he was doing was wrong.—R. v. SMITH (1910), 26 T. L. R. 614; 5 Cr. App. Rep. 123, C. C. A.

231. ———.]—Meaning of "nature & quality."—The

act or that he was doing what was contrary to law:—*Held*: insufficient to exonerate him from responsibility for crime under Penal Code, s. 84.—R. v. KAZAI MIA (1895), 1 L. R. 22 Cal. 817.—*IND.*

229 vii. ———.]—Where the accused cut his wife's throat without any rational motive, & was captured at once without any attempt on his part to escape or offer resistance, & the evidence showed that before the commission of the offence he suffered from a failure of reasoning powers, & also that he entertained delusions as to dangers which threatened his wife:—*Held*: the facts proved unsoundness of mind which prevented the accused from knowing the nature of his act, & Penal Code, s. 84, applied.—*DIL. GAZI* (1907), 1 L. R. 34 Cal. 686.—*IND.*

229 viii. ———.]—H.M. ADVOCATE v. GIBSON (1844), 2 Broun, 332.—

———.]—If the man knew what was the act he was committing,

words "nature & quality" in the second & third answers of the judges to the House of Lords in *M'Naghten's Case*, No. 229, *ante*, refer only to the physical character of the act & were not intended to distinguish between the physical & moral aspects of the act.

The standard to be applied is whether according to the ordinary standard adopted by reasonable men the act was right or wrong. Once it is clear that applt. knew that the act was wrong in law, then he was doing an act which he was conscious he ought not to do, & as it was against the law, it was punishable by law (LORD READING, C.J.).—R. v. CODERE (1916), 12 Cr. App. Rep. 21, C. C. A.

232. Lack of knowledge that act was wrong.]—To entitle prisoner to be acquitted on the ground of insanity, he must, at the time of the committing of the offence, have been so insane that he did not know right from wrong.

If you think that, at the time of the committing of the offence, he did know right from wrong, he is responsible for his acts, although he is of weak intellect (MAULE, J.).—R. v. HIGGINSON (1843), 1 Car. & Kir. 129.

233. ———.]—On an indictment for maliciously setting fire to a building, it is not necessary to prove actual ill will in prisoner towards the owner, & in order to justify a jury in acquitting prisoner on the ground of insanity, they must believe that he did not know right from wrong.

If a man being in his right mind burns property belonging to another, a jury ought to infer malice from the act itself (CROMPTON, J.).—R. v. DAVIES (1858), 1 F. & F. 69.

234. ———.]—Insanity must conduce to the act charged.]—The insanity which makes a man punishable is an insanity which conduces to & occasions the act itself, which is inquired into. An insane man upon one subject, if he commits an act which is a crime upon another subject, cannot be excused by partial insanity, because his partial insanity has no reference to the act in question. You must have an insanity which conduces to the act in question about which you are inquiring. You must have a form of disease. It must be a disease of the mind, & the disease of the mind must be previously existing before the act done which you are inquiring into, & you must have a disease of the mind which makes the man, by reason of that disease of the mind, incapable of judging whether or not the act which he does at the time when he does it is a wrong act for him to

& if he further knew the nature of that act & its consequences & effects he was criminally answerable for it. It must be shown that prisoner was labouring under a mental disease, & that disease was the cause of the act.—R. v. BROWN (1866), 5

229 xi. ———.]—H.M. ADVOCATE v. MILLER (1874), 3 Couper, 16.—*SCOT.*

229 xii. ———.]—In a trial for murder where a defence was pleaded that the accused was at the time the acts labelled were committed insane & labouring under insane delusions, which impelled him to commit the said acts. The Lord Justice-General charged the jury that—(1) In order to exempt from criminal prosecution & liability to punishment, insanity must amount to such an alienation of reason that the panel did not know the nature or quality of the act which he was committing, or that if he did know its nature & quality, he was in such a state of mind that he was not aware that it was wrong. (2) That mental unsoundness, while it may not exist in such a degree as to be pleadable in bar of trial, or to exempt from punish-

ment, may still be present in such a degree as to reduce the offence from a higher to a lower class, e.g., from murder to culpable homicide.—H.M. ADVOCATE v. MCCLINTON (1902), 4 Adam, 1.—*SCOT.*

e. ———.]—Legal, not medical test to be applied.]—Penal Code, s. 84, down the legal test of responsibility in cases of alleged unsoundness of mind. It is by this test, as distinguished from the medical test, that the criminality of an act is to be determined. The accused killed his two young children with a hatchet. The reason given for the crime was that, while he was laid up with fever, the crying of the children annoyed him. It was alleged that the fever had made him irritable & sensitive to sound, but it did not appear that he was delirious at the time of perpetrating the crime. There was no attempt at concealment, & the accused made a full confession:—*Held*: as the accused was conscious of the nature of his act, he must be presumed to have been conscious of its criminality. He was therefore guilty of murder.—R. v. LAKSHMAN DAGDU (1886), 1 L. R. 10 Bom. 512.—*IND.*



**Sect. 5.—Criminal capacity: Sub-sect. 2, B. (b), (c) & (d) & C.]**

do. You must see that deft.'s disease of the mind was formed before the act was done. You must see that the effect of that disease of the mind is such as to disable him from distinguishing between whether, in doing the act which he is accused of, he is doing a wrong act or a right act for him to do, I say for him to do, because there are many people who know that an act done is a wrong act in itself, but do not know that it is a wrong act for them individually to do. Therefore the man who believes that it is a right act for him to do is punishable, but the man who believes that it is a wrong act for him to do is punishable (ALDERSON, B.).—PATE'S CASE (1850), 8 State Tr. N. S. 1.

235. —.]—Any disease which so disturbs the mind that you cannot think calmly & rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action, any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness & reason, may be fairly said to prevent a man from knowing that what he did was wrong (CHANNELL, J.).—R. v. KAY (1904), 68 J. P. Jo. 376.

236. Knowledge that act was wrong—Incapacity to control actions owing to mental disease.]—Where prisoner knew the nature & quality of his act & knew that it was wrong but through disease of the mind was unable to control a homicidal impulse, he was found to be insane so as not to be responsible according to law for his actions at the time when the act was done.—R. v. HAY (1911), 75 J. P. 480; 22 Cox, C. C. 268. Annotation:—*Reid*. R. v. True (1922), 127 L. T. 561.

237. —.]—It is not sufficient in all cases where the defence is insanity to direct the jury that they should consider merely whether prisoner at the time of the commission of the act charged knew the nature & quality of his act, & whether or not he was doing wrong. They may be directed to consider further whether he was in such a state of mental disease or natural mental infirmity as to deprive him of the capacity to control his actions.—R. v. FRYER (1915), 24 Cox, C. C. 403.

Annotation:—*Reid*. R. v. True (1922), 127 L. T. 561.

238. Impulsive insanity—Direction to jury.]—A judge is not bound to put to a jury a defence

resting merely on a hypothesis of impulsive insanity.—R. v. THOMAS (1911), 7 Cr. App. Rep. 36, C. C. A.

239. Prisoner certifiably insane—Direction to jury.]—When on a trial for murder the only defence is insanity & the only medical evidence called is that prisoner at the time of the felonious act was certifiably insane, the judge is not bound to direct the jury that they must find a special verdict under Trial of Lunatics Act, 1883 (c. 38), s. 2 (1). The proper direction must follow the rules in *M'Naghten's Case*, No. 229, *ante*.—R. v. TRUE (1922), 127 L. T. 561; 27 Cox, C. C. 287; 16 Cr. App. Rep. 164, C. C. A.

240. Special verdict—Need not be mentioned in summing up if clear direction given on question of sanity.]—When a defence of insanity is set up the judge is not bound to direct the jury that they may find a special verdict; it is sufficient if he directs them clearly that the issue is whether prisoner is sane or insane.—R. v. COLEMAN (1911), 7 Cr. App. Rep. 65, C. C. A.

**(c) Uncontrollable Impulse.**

241. Not a defence.]—A mere uncontrollable impulse of the mind, co-existing with the full possession of the reasoning powers, will not warrant an acquittal on the ground of insanity, the question for the jury being, whether prisoner, at the time he committed the act, knew the character & nature of the act, & that it was a wrongful one.—R. v. BARTON (1848), 3 Cox, C. C. 275; *sub nom.* ANON., 12 L. T. O. S. 7.

242. —.]—The circumstance of prisoner having acted under an irresistible influence to the commission of homicide is no defence, if at the time he committed the act he knew he was doing what was wrong.—R. v. BROUGH (1856), 1 F. & F. 667, n.

Annotation:—*Reid*. R. v. Haynes (1859), 1 F. & F. 666.

243. —.]—The circumstance of prisoner having acted under an irresistible influence to the commission of homicide is no defence, if at the time he committed the act he knew he was doing what was wrong.—R. v. HAYNES (1859), 1 F. & F. 666.

244. —.]—Uncontrollable impulse is not a defence in law.—R. v. QUARMY (1921), 15 Cr. App. Rep. 163, C. C. A.

Annotation:—*Reid*. R. v. True (1922), 127 L. T. 561.

245. — Unless if arising from mental disease.]

**PART I. SECT. 2, SUB-SECT. 5.—B. (e).**

241 i. Not a defence.]—Prisoner was charged with murder. The defence was insanity. J., called for the defence, gave it as his opinion that the prisoner knew the nature & quality of the act, & that it was wrong; but that, "mentally unbalanced as he was, he might be seized with an uncontrollable impulse, & not to be able to restrain himself".—*Held*: the defence was not established.—R. v. CREIGHTON (1909), 14 Can. Crim. Cas. 349.—CAN.

241 ii. —.]—Prisoner was charged with murder. The defence was insanity. Medical evidence was given that the prisoner was insane, incurably so, that he understood the nature & quality of the act & that it was wrong in the sense that it was forbidden by the law, but he had lost the power of inhibition, & could not resist the impulse he had to kill L., for whom he had watched on the street & shot several times, killing him almost instantly.—*Held*: prisoner was rightly convicted.—R. v. JESSAMINE (1912), 21 O. W. R. 392; 3 O. W. N. 753; 32

C. L. T. 280.—CAN.

241 iii. —.]—A person subject to insane impulses, but whose cognitive faculties appear to be unimpaired, is not by virtue of Penal Code, s. 84, exempt from criminal liability. *Semble*: in extreme cases it is difficult to say that the cognitive faculties are not affected when the will & the emotions are affected. It may therefore be said that, under the provisions of Penal Code, s. 84, exemption from criminal liability by reason of unsoundness of mind extends as well to cases where insanity affects the offender's will & emotions as to those where it affects his cognitive faculties.—R. v. KADER NASTYER (SHAH) (1896), 1 L. R. 23 Calc. 604.—IND.

241 iv. —.]—Accused was charged with the murder of his infant child, three months old. It was not disputed that he had killed the child, but the defence of insanity was set up on his behalf. The evidence was that he appeared to be fond of the child, but that his wife was a drunkard, & one of the medical witnesses called gave it as his opinion that, looking to the state of the accused's home, his wife's in-

temperance, the fact that he committed the deed, & the fact that he was not drunk, he must have been temporarily insane at the time. The medical evidence generally, & the other evidence, however, tended to show that the accused was not suffering from any mental disease.—*Held*: if the accused knew that he was killing his child, & knew that it was wrong, he could not be acquitted on the ground of insanity, & that it was no defence that he had a fixed idea to kill his child, his wife, & himself, & suffered from an impulse to do so which he could not control.—R. v. DEIGHTON (1900), 18 N. Z. L. R. 891.—N.Z.

245 i. — Unless arising from mental disease.]—Where the defence of insanity is interposed in a criminal trial the capacity to distinguish between right & wrong is not the sole test of responsibility in all cases. In the absence of legislation to the contrary, cts. of law are bound to recognise the existence of a form of mental disease which prevents the sufferer from controlling his conduct & choosing between right & wrong, although he may have the mental capacity to distinguish

—*R. v. DUNCAN* (1890), Wood Renton's Law & Practice in Lunacy, 901.

246. ————.]—*R. v. HAY*, No. 236, *ante*.

247. ————.]—*R. v. FRYER*, No. 237, *ante*.

248. ————.]—**Epilepsy.**—On an indictment for murder a plea that prisoner was guilty of the act charged, but insane at the time that he did it, was based on evidence that prisoner was an epileptic & acted under the influence of an uncontrollable impulse:—*Held*: if prisoner's mental condition at the time was such that by reason of disease of mind he was in fact deprived for the moment of all control over his actions the jury would be right in finding that he was insane.—*R. v. JOLLY* (1919), 83 J. P. 296.

*Annotation*:—*Reid. R. v. True* (1922), 127 L. T. 561.

249. ————.]—**Must amount to absolute insanity.**—Uncontrollable impulse is not a defence, unless it amounts to absolute insanity, & the ct. will not regard medical evidence which is merely a speculation upon such a theory & does not vouch for insanity in the sense defined by the judges in *M'Naghten's Case*, No. 229, *ante*.—*R. v. HOLT* (1920), 15 Cr. App. Cas. 10, C. C. A.

*Annotation*:—*Reid. R. v. True* (1922), 127 L. T. 561.

#### (d) Moral Insanity.

250. **Not a defence.**—The delusions which indicate a defect of sanity such as will relieve a person from criminal responsibility, are delusions of the senses, or such as relate to facts or objects, not mere wrong notions or impressions of a moral nature; & the aberration must be mental, not moral, to affect the intellect of the individual. It is not enough that they show a diseased or depraved state of mind, or an aberration of the moral feelings, the sense of right & wrong being still, although it may be perverted, yet not destroyed; & the theory of a moral insanity, or insanity of the moral feelings, while the sense of right & wrong remains, is not to be reconciled with the legal doctrine on the subject.

A medical man cannot be asked whether, having heard the evidence, he is of opinion that prisoner was sane or insane at the time of the doing of the act, as it is the very question the jury are to determine.—*R. v. BURTON* (1863), 3 F. & F. 772.

251. ————.]—**Moral aspect not to be considered—Belief in right to kill.**—Where, upon a trial for murder of a woman the plea of insanity is set up, the question for the jury is, did prisoner do the act under a delusion, believing it to be other than it was. If he knew what he was doing, & that it was likely to cause death, & was contrary to the law of God & man, & that the law directed

that persons who did such acts should be punished, he is guilty of murder.

If his real motive was that he conceived himself to have been ill-used, & either from jealousy of the man who was preferred to him, or from a desire of revenge upon her, committed the act, that would be murder. Those were the very passions which the law required men to control, & if the deed was done under the influence of those passions there is no doubt that it was murder. Prisoner claimed to exercise the same power over a wife as he could lawfully exercise over a chattel, but that was not a delusion, nor like a delusion. It was the conclusion of a man who had arrived at results different from those generally arrived at & contrary to the laws of God & man, but it was no delusion (*MARTIN, B.*).—*R. v. TOWNLEY* (1863), 3 F. & F. 839.

252. **Moral aspect not included in "nature & quality" of act.**—*R. v. CODERE*, No. 231, *ante*.

#### C. Onus of Proof.

253. **Lies on the defence—Must be proved affirmatively.**—(1) Where the defence of insanity is set up, in order to warrant the jury in acquitting prisoner, it must be proved affirmatively that he is insane; if the fact be left in doubt, & if the crime charged in the indictment be proved, it is their duty to convict him.

(2) Every man must be presumed to be responsible for his acts till the contrary is clearly shown. It is dangerous ground to take to say a man must be insane because men fail to discern the motive for his act. It would be a most dangerous doctrine to lay down that because a man committed a desperate offence with the certainty of instant death, or the certainty of future punishment before him, he was therefore insane (*ROLFE, B.*).—*R. v. STOKES* (1848), 3 Car. & Kir. 185.

254. ————.]—Where prisoner sets up insanity as a ground of defence, one cardinal rule is that the burden of proving his innocence on that ground rests on the party accused. The question in such a case for the jury, is not whether prisoner was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind.

The jury may come to a conclusion on this point from the conduct & acts of accused shortly before & down to the commission of the alleged crime. Although insanity on one point, for instance, a delusion as to property, will not exempt a party from responsibility, the fact is not immaterial in considering his responsibility at another time and on another subject. The want of motive

justified in returning a verdict under Penal Code, s. 84.—*R. v. NOBIN CHUNDER BANERJEE* (1873), 13 B. L. R. 20.—**IND.**

1. ————.]—**How far rebutted by admissions of prisoner.**—On a trial for murder, counsel for the accused admitted the shooting, that primarily such shooting amounted to murder, & that the only defence to be raised was insanity. When referring to the evidence given by the accused himself the judge said: "He says he knew at the time he shot him he was shooting him, & he knew he was doing wrong. He said afterwards he lost all knowledge of what took place. He knew it was contrary to the law of the land to shoot H."—*Held*: the reference to the accused's evidence would convey to the jury that that incriminating consciousness which it lay on the Crown to establish, was admitted by the accused, whereas his actual admissions did not go to that length.—*R. v. CURRAN* (1922), 22 S. R. N. S. W. 405.—**AUS.**

between right & wrong. The defence of insanity is established, if it be proved that the accused had, by reason of such mental disease, lost the power of will to control his conduct in reference to the particular act charged as an offence. The capacity of the accused to control his own conduct must be presumed until the contrary is proved. Whether there does exist a diseased condition of mind which absolutely prevents the sufferer from controlling his conduct is a question of fact.—*R. v. HAY* (1899), 16 S. C. 290.—**S. AF.**

222. ————.]—Acts which, under ordinary circumstances, would be criminal, entail no criminal liability if, at the time of commission, the person committing them act under an impulse which, by reason of mental disease, he

—*R. v. SMIT*, [1906]

victed of the murder of his wife; & the evidence clearly established the fact of killing, in circumstances which, in the absence of explanation, would constitute murder. The defence was, that deft. was insane:—*Held*: in view of the fact that the law presumes every man sane, the burden of establishing insanity is on the accused.—*R. v. ANDERSON* (1914), 26 W. L. R. 783.—**CAN.**

253 ii. ————.]—The onus of proving the plea of insanity as a defence to a charge of murder is on the accused, & it is not error for the trial judge to tell the jury that if the accused fails to prove to their entire satisfaction that he was insane, or leaves the question in doubt, his defence fails.—*R. v. KIERSTAD* (1918), 45 N. B. R. 553; 42 D. L. R. 193.—**CAN.**

253 iii. ————.]—The fact of unsoundness of mind as a defence in a criminal case must be clearly & distinctly proved before any jury is

#### PART I. SECT. 5, SUB-SECT. 2.—C.

253 i. **Lies on the defence—Must be proved affirmatively.**—Deft. was con-



**Sect. 5.—Criminal capacity: Sub-sect. 2, C. & D.]**

for the commission of the crime, & its being committed under circumstances which renders detection inevitable, are important points for the consideration of the jury, when coupled with evidence of insanity on any other particular point.

To ask a witness whether, in his opinion, prisoner is capable of judging between right & wrong, is an improper question, for that is what no witness thought of, or is prepared to answer.

Every person committing an outrage on the person or property of another, must be, in the first instance, taken to be a responsible being. A man going about the world marrying, dealing, & acting as if he was sane must be presumed to be sane till he proves the contrary (ROLFE, B.).—*R. v. LAYTON* (1849), 4 Cox, C. C. 149.

255. —.]—The defence of insanity ought to be raised at the trial, & not for the first time in the Ct. of Criminal Appeal. It is for the defence to prove insanity, not for the prosecution to prove sanity (LORD ALVERSTONE, C.J.).—*R. v. DE VERE* (1909), 2 Cr. App. Rep. 19, C. C. A.

256. — **Not proper for Crown to call evidence of insanity—Information to be given to defence of such evidence.**—(1) No general rule can be laid down at which stage of the trial it becomes the duty of the prosecution to proffer evidence of sanity, when there is reason to believe that insanity will be relied upon as a defence.

(2) The onus of proving insanity is upon the defence, it is not for the Ct. of Criminal Appeal but for the jury to deal with the question of prisoner's sanity or insanity (LORD ALVERSTONE, C.J.).

(3) It is not proper for the Crown to call evidence of insanity, but any evidence in the possession of the Crown should be placed at the disposal of prisoner's counsel to be used by him if he thinks fit (*per CUR.*).—*R. v. SMITH* (1910), 6 Cr. App. Rep. 19, C. C. A.

*Annotation.*—*Reff. R. v. Abramovitch* (1912), 7 Cr. App. Rep. 145.

257. —.]—On a trial for murder, where the defence is insanity, prisoner must be presumed to be sane & possessed of sufficient reason to be conscious of his crime unless he establishes the contrary & proves that he was suffering from such a disease of the mind as to be unconscious of the nature & quality of his act, or if so conscious, unconscious of the difference between right & wrong.—*R. v. COELHO* (1914), 30 T. L. R. 535, C. C. A.

258. — **Time for proffering evidence of sanity.**—*R. v. SMITH*, No. 256, *ante*.

259. —.]—When it is clear from the cross-

examination on behalf of prisoner that the defence will be insanity, & it is ascertained that no witnesses will be called to prove it, it is the proper practice for the judge, at the close of the case for the Crown, to allow medical evidence as to prisoner's sanity to be called.—*R. v. ABRAMOVITCH* (1912), 107 L. T. 416; 76 J. P. 287; 23 Cox, C. C. 179; 7 Cr. App. Rep. 145, C. C. A.

260. — **Not part of case for prosecution.**—(1) Evidence of the condition of prisoner's mind should not be called as part of the case for the Crown but in reply.

(2) The defence is not bound to give notice that medical evidence of prisoner's mental condition will be called.—*R. v. SMITH* (1912), 8 Cr. App. Rep. 72, C. C. A.

**D. Nature of Proof.**

261. **What is insufficient—Absence of motive.**—*R. v. STOKES*, No. 253, *ante*.

262. —.]—*R. v. LAYTON*, No. 254, *ante*.

263. — **Depression.**—On an indictment for murder, it being proved that prisoner, a soldier, shot his officer through the head, the only evidence for the defence being that the act was sudden, without apparent motive, & that he had been addicted to drink, & had been suffering under depression:—*Held*: this was not enough to raise the defence of insanity; the sole question was whether prisoner fired the gun intending to kill, & his expressions soon after the act were evidence of this, & alleged inadequacy of motive was immaterial, the question being not motive but intent.—*R. v. DIXON* (1869), 11 Cox, C. C. 341.

264. — **Weak intellect.**—*R. v. HIGGINSON*, No. 232, *ante*.

265. — **Mere eccentricity.**—It is not mere eccentricity or singularity of manner that will suffice to establish the plea of insanity; it must be shown that prisoner had no competent use of his understanding so as to know that he was doing a wrong thing in the particular act in question (TINDAL, C.J.).—*R. v. VAUGHAN* (1844), 3 L. T. O. S. 410; 1 Cox, C. C. 80.

266. — **Motive due to passion.**—*R. v. TOWNLEY*, No. 251, *ante*.

267. — **Evidence of chronic insanity—Negatived by evidence of premeditation & design.**—On a trial for murder, prisoner objecting to be defended by counsel, but in the result allowing counsel to act for him, he was not afterwards allowed to raise any objection to the proceeding, & a fiat for a writ of error was refused.

Prisoner being arraigned on two indictments, & having, with apparent intelligence, pleaded to

**PART I. SECT. 5, SUB-SECT. 2.—D.**

**g. In general.**—On the defence of insanity on a charge of murder it is a misdirection, justifying a new trial, for the judge to instruct the jury that such defence must be established beyond a reasonable doubt. Insanity, as a defence on such charge, may be found upon a substantial preponderance in the weight of evidence. The degree of proof required is not as great as that required to overcome the presumption of innocence in an accused.—*R. v. CLARK*, [1921] 2 W. W. R. 446; 61 S. C. R. 608; 59 D. L. R. 12.—**CAN.**

**h.** —.]—Circumstances calculated to induce the mental condition of insanity at the time of the commission of an offence may always be admitted to evidence the probability of such affection; the only limitation is that the circumstance be in itself capable in some degree of producing

such an effect that it came to the person's knowledge & that some further foundation for probability be laid by other evidence, *e.g.*, medical testimony, that there was a diseased mental condition.—*R. v. HAWKES* (1915), 32 W. L. R. 720; 9 W. W. R. 445; 25 D. L. R. 631.—**CAN.**

**k.** —.]—Soundness or unsoundness of mind is a fact which is to be judged of not merely or mainly as a question of law or of science, but on the ordinary rules which apply in daily life. . . . If it turns out that this man is able to conduct himself with propriety in the ordinary rules of life, that he is not excluded from the confidence of his fellows, & that there is no reason to distrust his sanity, then you will have advanced nine-tenths of the distance towards the result you desire to reach. . . . There is a further step which you must take, & it is here that the great difficulty & importance of the case lies. There are states of

mind which indicate unsoundness or insanity, which do not manifest themselves in ordinary life, but only on particular occasions, & in relation to special subjects. These are very exceptional instances. But if a man is clearly proved to labour under insane delusions, he is not of sound mind. Now, that the prisoner here laboured under a strong delusion about his mother is certain; & the question is, was it an insane delusion?—*H.M. Advocate v. Mackinn* (1876), 3 Couper, 258.—**SCOT.**

**l. What is insufficient—Mere delusion—Not acted on immediately.**—Whether a person who, under an insane delusion as to the existing facts, commits an offence in consequence thereof, is to be therefore excused, depends on the nature of the delusion. If he labours under a partial delusion only, & is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts,

one & declined to plead to the other, the plea of not guilty was entered for him by statute, with the assent of counsel who appeared for him. The case being then opened, & the first witness examined, & it being then set up by his counsel in the course of the case that he was insane now, or not in a fit state to be tried :—*Held* : the proper time for making that suggestion was before prisoner pleaded, & had it so been made, a jury should have been empannelled to try the question whether he was sane now & in a fit state to be tried, but as the trial had been begun, & it would be manifestly inconvenient now to recommence the trial of the collateral issue, & as, moreover, it appeared that the evidence as to prisoner's present sanity was very much mixed up with the general question of his sanity, it was open to the ct. under Criminal Lunatics Act, 1800 (c. 94), to take the whole of the evidence, & then leave to the jury both questions as to prisoner's state of mind at the time of the act, & at the time of trial.

There being no evidence of prisoner's insanity previous to the act of homicide, & all the evidence of it being that of medical men who had seen him since the act, & their opinion being that his insanity was chronic, & that therefore he was insane at the time of the act, because he was insane now ; but all the circumstances of the act of homicide, showing great premeditation, preparation, & design, especially with a view to disguise & escape, & his subsequent conduct, showing a consciousness that he had broken the law & incurred a capital penalty, the whole of the circumstances were left to the jury upon both issues, with a strong direction that if they were not satisfied that the prisoner did not know of the nature of the act, & did not now understand the nature of the proceedings, they should find him guilty.

A prisoner being arraigned in the name of F., said "I object to that name. That is not my name. My name is S." :—*Held* : the name was immaterial & could be amended if necessary.—*R. v. SOUTHEY* (1865), 4 F. & F. 864.

**268. — Eccentricity.—Knowledge shown by resisting arrest.**—On a trial for murder, the defence of insanity in the evidence showing a great amount of senseless extravagance & absurd eccentricity of conduct, coupled with habits of excessive intemperance, causing fits of *delirium tremens*, prisoner, however, not having been labouring under the effects of such a fit at the time of the act, & the circumstances & in speaking showing sense & deliberation, & a perfect understanding of the nature of the act :—*Held* : the evidence was

not sufficient to support the defence, as it rather tended to show wilful excesses & extreme folly than mental incapacity.

A prisoner trying to resist arrest, shows that he is well aware that he has committed an act which in law is criminal (*ERLE*, C.J.).—*R. v. LEIGH* (1866), 4 F. & F. 915.

**269. — Frenzied state of mind.**—Prisoner was tried for murder upon an indictment & at the same time upon a coroner's inquisition. At the trial the jury found the prisoner guilty, but added a rider to their verdict that at the time she committed the act she was in a frenzied state of mind :—*Held* : this did not amount to a verdict of insanity.

The coroner's jury had returned a verdict of wilful murder against prisoner, but added a rider that they all agreed that she was not responsible for what she did. At the trial the judge refused to admit evidence of this :—*Held* : the rider was no part of the inquisition, & evidence of it was rightly excluded at the trial.—*R. v. HARDING* (1908), 25 T. L. R. 139 ; 1 Cr. App. Rep. 219, C. C. A.

**270. — Mere delusion.**—Evidence of a mere delusion may not be evidence of insanity on a charge of murder.

The ct. is not entitled to express an opinion on a jury's recommendation to mercy.—*R. v. HARPER* (1913), 9 Cr. App. Rep. 41, C. C. A.

**271. — Mental deficiency only.**—Mental deficiency does not necessarily entitle a jury to return a special verdict on the ground of insanity. The jury had evidence before them which justified them in finding that applt. was not insane in the legal sense ; at the same time they considered him to be mentally deficient. All men who are sane are not of equal mental ability ; the verdict means that applt. was below the ordinary level of sane people, though not across the border line of sanity. It is only in exceptional circumstances that words amount to sufficient provocation. If words alone would amount to such provocation a preference expressed for another man would be enough (*DARLING*, J.).—*R. v. ALEXANDER* (1913), 109 L. T. 745 ; 23 Cox, C. C. 604 ; 9 Cr. App. Rep. 139 ; 77 J. P. Jo. 483, C. C. A.

*Annotation* :—*Consd.* *R. v. Lesbini*, [1914] 3 K. B. 1116.

**272. — —**—(1) The test to be applied in order to determine whether homicide which would otherwise be murder is manslaughter by reason of provocation is whether the provocation was sufficient to deprive a reasonable man of his self-control, not whether it was sufficient to

with respect to which the delusion exists, were real. The accused was convicted of having murdered his brother-in-law, a lad of 8 years old. In his confession to the magistrate the accused stated that he had seen the deceased arrange a clandestine meeting between his wife & a young man, whom he actually saw enter his wife's room some time before midnight & again leave it after a considerable interval, & that in consequence of what he saw he had not a wink of sleep that night & was devoid of his senses at the time he killed the deceased :—*Held* : there was no doubt the accused did actually believe he had ocular proof of his wife's infidelity, & if he had acted under the immediate influence of such a delusion, the estimate of his guilt must be made upon the basis of the actual existence of the facts in regard to which the delusion existed, & had the accused acted under the immediate influence of such provocation his guilt would have been greatly reduced ; but, as he did not do so, his offence

was murder under Penal Code, s. 302, nor was there any ground for the application of sect. 84 of that Code.—*GHATU PRAMANIK v. R.* (1901), 1 L. R. 28 Calc. 613.—*IND.*

**271 i. — Mental deficiency only.**—The judge, in a trial for murder, charged the jury that there was sometimes a state of mind bordering on insanity, but not amounting to it, which would entitle a jury, if they saw fit, to return a verdict of culpable homicide against the panel instead of that of murder, though if the crime was proved it would not entitle them to return a verdict of acquittal.—*H. M. ADVOCATE v. FERGUSON* (1881), 9 R. (Ct. of Sess.) 9 ; 19 Sc. L. R. 341.—*SCOT.*

*unhinged by long course of annoyance.*—The state of a panel's mind may be an element in enabling the jury to decide between murder & culpable homicide where not warranting acquittal on the ground of insanity. It having been proved

that the panel's mind had been unhinged by long continued course of verbal annoyance, the jury found him guilty of culpable homicide in shooting a fellow-servant for "booming" at him.—*H. M. ADVOCATE v. SMITH* (1893), 1 Adam, 34.—*SCOT.*

**n. — Mental state making prisoner only partially accountable for her acts.**—At the trial of a woman upon a charge of murdering her child by choking it immediately after its birth, the judge directed the jury that they were entitled to find the panel guilty of culpable homicide, if they were of opinion upon the evidence that her mental state at the time when the injury was inflicted, though not warranting an acquittal on the ground of insanity, was such as to make her only partially accountable for her acts.—*H. M. ADVOCATE v. ABERCROMBIE* (1896), 23 R. (Ct. of Sess.) 80 ; 33 Sc. L. R. 581.—*SCOT.*

**o. — Mind morbidly affected.**—A man was tried for the murder of

## CRIMINAL LAW AND PROCEDURE.

*Sect. 5.—Criminal capacity: Sub-sect. 2, D. & E.; sub-sect. 3, A.]*

deprive the particular person charged with murder, e.g. a person afflicted with defective control & want of mental balance, of his self-control.

(2) Mental deficiency short of insanity is not a good defence to a charge of murder.

The Ct. of Criminal Appeal is not minded in any degree to weaken the state of the law which makes a man who is not insane responsible for the ordinary consequences of his action (LORD READING, C.J.).—*R. v. LESBINE*, [1914] 3 K. B. 1116; 84 L. J. K. B. 1102; 112 L. T. 175; 24 Cox, C. C. 516; 11 Cr. App. Rep. 7, C. C. A.

**273. — Epilepsy & ill-will.**—*R. v. BOWLER* (1812), 54 Annual Register, 309; 1 Collinson on Lunatics, 673, n.; Shelford on Lunatics, 2nd ed. 590; 1 Russell on Crimes & Misdemeanours, 8th ed. 64.

*Annotation:—Reid. R. v. Oxford* (1840), 9 C. & P. 525.

**274. What may be sufficient—Epilepsy at the time of commission of crime.**—Epilepsy, to sustain the defence of insanity, must be proved to have existed at the time of the commission of the crime. When that defence has been set up at the trial, it is only in exceptional circumstances that the ct. will hear any further evidence on that subject. If it is part of the defence that prisoner is insane at the time of the trial, it should be alleged that he is unfit to plead.—*R. v. PERRY* (1919), 14 Cr. App. Rep. 48, C. C. A.

**275. — Liability to fits—Act done in a fit.**—Where a person is in a state of mind in which she is liable to fits of madness, it is for the jury to consider whether the act done was during such a fit, though there is nothing before or after the act to indicate it, & though there is some evidence of design & malice. A medical witness should give his opinion as to the state of mind, not as to the responsibility of prisoner; the latter is for the jury, under the direction of the judge.—*R. v. RICHARDS* (1858), 1 F. & F. 87.

**276. — — — — —**—Where a married woman fondly attached to her children, & apparently most happy in her family, had poisoned two of them with some evidence of deliberation & design, but it appeared that there was insanity in her family, & from her demeanour before & after the act, which, although not wholly irrational, yet was strangely erratic & excited, & from recent antecedents & the presence of certain exciting causes of insanity, & her own account of her sensations, the medical men were of opinion that she was labouring under actual cerebral disease, & that she was in a paroxysm of insanity at the

time of the act, this was left to the jury as evidence on which they might rightly find her not guilty on the ground of insanity.—*R. v. VYSE* (1862), 3 F. & F. 247.

his wife, who had been unfaithful, & whom he had killed by cutting her throat with a razor so as almost to sever the head from the body. The jury were charged that: (1) Even although the act might not have been long planned, the nature of the weapon & the force with which it was used made the act wilful murder apart from special defence. (2) In a sane man neither jealousy nor drink nor both combined could make such a crime less than murder. (3) The rule of law, that there might be present such a degree of insanity as to modify though not to destroy criminal responsibility could only be applied if the jury were satisfied that the panel suffered from some mental debility amounting to brain disease—that the jury must be satisfied that the panel had so brooded over his wife's conduct that, apart altogether from the ordinary effects of drink or jealousy & anger, his mind had become so morbidly

affected before they could bring in a verdict of culpable homicide.—*H.M. ADVOCATE v. ALKIN* (1902), 4 Adam, 88.—**SCOT.**

**p. — Mental degeneracy.**—At a trial of a person on a charge of murder, direction to the jury that mental degeneracy not amounting to insanity at the date when the alleged murder was committed is not an extenuating circumstance which can reduce the crime from that of murder to that of culpable homicide.—*H.M. ADVOCATE v. HIGGINS*, [1914] S. C. (J.) 1.—**SCOT.**

**q. — Under delusion.**—If a person does a criminal act under a delusion, & if the crime was the result solely of such delusion, & would not otherwise have been done, a plea of insanity is a good defence.—*R. v. VAN DER VEEN* (1909), T. S. 853.—**S. AF.**

time of the act, this was left to the jury as evidence on which they might rightly find her not guilty on the ground of insanity.—*R. v. VYSE* (1862), 3 F. & F. 247.

**277. — Exhausting disease causing delusions.**—A married woman, having killed her husband immediately after an apparent recovery from a disease, the result of child-birth, which caused a great loss of blood & exhausted the vessels of the brain, & thus so weakened its power & so tended to produce insane delusions of the senses, which, while suffering under such disease, she complained of, & which, by her own account, had now renewed at the time of the act of homicide although they were not such as would lead to it:—*Held*: there was evidence from which a jury might properly find that she was not in such a state of mind at the time of the act as to know its nature or be accountable for it.—*R. v. LAW* (1862), 2 F. & F. 222.

**278. — Hereditary tendency to insanity.**—To prove a plea of insanity, evidence that the grandfather of the person had been insane may be adduced, after it has been proved by medical testimony that such disease is often hereditary.

It is a matter of fact, & not a matter of law, that insanity is often hereditary in a family; but I think you should prove that, in the first instance, by the testimony of medical men (MAULE, J.).—*R. v. TUCHET* (1844), 4 L. T. O. S. 50; 1 Cox, C. C. 103.

### E. Method of Proof.

**279. Need not be scientific evidence.**—It is a mistake to suppose that in order to satisfy a jury of insanity, scientific evidence must be adduced. If the existence of facts is such as to indicate an unsound state of mind that is quite sufficient (BRETT, L.J.).—*R. v. DART* (1878), 14 Cox, C. C. 143.

**280. Evidence on symptoms of insanity.**—On a trial where the defence is insanity, a witness of medical skill may be asked whether such & such appearances, proved by other witnesses, in his judgment, symptoms of insanity. whether he can be asked, whether, from the other testimony given, the act with which prisoner is charged, is in his opinion, an act of insanity, which is the very point to be decided by the jury.—*R. v. WRIGHT* (1821), Russ. & Ry. 456, C. C. R. *Annotation:—Reid. R. v. Searle* (1831), 1 Mood. & R. 75.

**281. —**—When on a criminal charge prisoner's defence is insanity, a medical man, who has heard the trial, may be asked whether the facts proved show symptoms of insanity.—*R. SEARLE* (1831), 1 Mood. & R. 75.

### PART I. SECT. 5, SUB-SECT. 2.—E.

**r. Evidence on condition of mind at time of act—Medical evidence of opinion.**—The prisoner was convicted of attempting to murder his wife. The defence of insanity was set up, & in support thereof the general conduct & behaviour of the prisoner about the time of the commission of the crime, & the evidence of two medical practitioners, who stated that they inferred from that conduct & behaviour that the prisoner was insane, was relied on. The jury found the prisoner guilty, stating, in reply to a question of the learned judge, that they had considered the evidence on the defence of insanity. The prisoner appealed on a certificate of the judge to the Ct. of Criminal Appeal.—*Held*: the finding of the jury against the defence of insanity not only was not unreasonable, but was reasonable, & therefore the appeal should be dismissed.

**282. Evidence on condition of mind at time of act—Form of question to medical witness.]—***M'NAGHTEN'S CASE*, No. 229, *ante*.

**283. ———.]—***R. v. BURTON*, No. 250, *ante*.

**284. ———.]—**On a trial for murder evidence was called, on prisoner's behalf, to prove his insanity. A physician, who had been in ct. during the whole trial, was then called on the part of the prosecution, & asked whether, having heard the whole evidence, he was of opinion that prisoner, at the time he committed the alleged act, was of unsound mind:—*Held*: notwithstanding the opinion of the judges in *M'Naghten's Case*, No. 229, *ante*, such a question ought not to be put, but the proper mode of examination was to take particular facts, & assuming them to be true, to ask the witness whether, in his judgment, they were indicative of insanity on the part of prisoner at the time the alleged act was committed.—*R. v. FRANCIS* (1849), 14 J. P. 24; 4 Cox, C. C. 57.

**285. ———.]—***R. v. RICHARDS*, No. 275, *ante*.

**286. ——— Form of question to non-medical witness.]—***R. v. LAYTON*, No. 254, *ante*.

**287. ——— Shown by hereditary tendency.]—***R. v. TUCHET*, No. 278, *ante*.

**288. ——— Not to be replaced by reading extracts from medical books.]—**Counsel for prisoner in the course of stating evidence to the jury respecting his client's state of mind began to read from a medical work of high authority a passage illustrative of the effect of the evidence proposed to be adduced:—*Held*: he had no right to do this

**282 i. ——— Form of question to medical witness.]—**Where the defence of insanity is set up, a medical man, who has been present in ct. & heard the evidence, may be asked as a matter of science whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing right from wrong. Where the opinion sought is that of a medical expert who has had no previous acquaintance with the prisoner, & has merely read the depositions without hearing the witnesses, the question must be put to him in the form of a supposititious case, relating all the facts proved & asking if, assuming all such facts to be true, they will indicate in the accused any, & what, form of insanity.—*R. v. DUBOIS* (1890), 17 Q. L. R. 203.—*CAN.*

**s. ——— Shown by hereditary tendency—Whether evidence admissible.]—**Evidence of a paternal uncle of the panel having died insane, is inadmissible in support of a plea of insanity.—*H.M. ADVOCATE v. BROWN* (1855), 2 Irv. 154.—*SCOT.*

**t. ———.]—**In a charge of murder, where the defence was insanity at the time when the crime was said to have been committed, it was proposed by the panel to ask a medical witness "whether in determining if the panel had an access of delirium, it is not of importance to inquire whether there was insanity among her relations:—*Held*: question was inadmissible.—*H.M. ADVOCATE v. M'QUE* (1860), 3 Irv. 578; 32 Sc. Jur. 478.—*SCOT.*

**a. ———.]—**Question disallowed whether an uncle & grand-uncle & two aunts of the panel, whose names were specified had been insane.

**———.]—**In a trial for murder, in which a special defence that the panel was insane had been put in:—*Held*: in accordance with previous practice & precedents it was in-

competent to lead evidence of hereditary insanity.—*H.M. ADVOCATE v. LAING (or PATERSON)* (1872), 2 Couper, 222; 44 Sc. Jur. 378.—*SCOT.*

**c. ———.]—**In a trial for murder, where the defence was a plea of insanity at time of committing the act libelled, counsel for defence proposed to ask a medical expert whether insanity in ancestors was often transmitted to descendants. An objection to the question was sustained.—*H.M. ADVOCATE v. MCCLINTON* (1902), 4 Adam, 1.—*SCOT.*

**d. Admissibility of evidence—Presence of medical witnesses in court.]—**In a trial for murder, where the panel pleaded insanity at the time the act was committed, medical witnesses were, on the motion of the counsel for the panel, allowed to remain in ct. while the general evidence was being led, the counsel for the prosecution not objecting to the course.

A lieutenant of police & a police surgeon put certain questions to a prisoner supposed to be insane, who had been brought to the office on a charge of murder, but who had not as yet emitted a judicial declaration:—*Held*: the answers to these questions were inadmissible in evidence.

A prisoner's declaration is an element of evidence in the question of his insanity or sanity.—*H.M. ADVOCATE v. MILNE* (1863), 4 Irv. 301; 35 Sc. Jur. 470.—*SCOT.*

**e. Direction to the jury.]—***R. v. MOKE*, [1917] 3 W. W. R. 575.—*CAN.*

#### PART I. SECT. 5, SUB-SECT. 3.—A.

**f. General rule.]—**Under Roman-Dutch law drunkenness is as a general rule no defence to a crime, though it may be a reason for mitigation of punishment. If the drunkenness is not voluntary, i.e., not caused by the act of the accused & results in rendering the accused unconscious of what he is doing, he would not be responsible in law for an act done while in such a state. If constant drunkenness has

unless he intended to make the book evidence in the usual way.—*R. v. CROUCH* (1844), 3 L. T. O. S. 186; 9 J. P. 10; 1 Cox, C. C. 94.

#### SUB-SECT. 3.—DRUNKENNESS.

##### A. In General.

**289. Voluntary drunkenness no excuse for crime.]—***BEVERLEY'S CASE*, No. 218, *ante*.

**290. ———.]—**In a case of stabbing, where prisoner has used a deadly weapon, the fact that prisoner was drunk does not at all alter the nature of the case; but if prisoner had intemperately used an instrument, not in its nature a deadly weapon, at a time when he was drunk, the fact of his being drunk might induce the jury to less strongly infer a malicious intent in him at the time.

Prisoner's being intoxicated does not alter the nature of the offence. If a man choose to get drunk, it is his own voluntary act; it is very different from a madness which is not caused by any act of the person. That voluntary species of madness which it is in a party's power to abstain from, he must answer for (*ALDETON, B.*).—*R. v. MEAKIN* (1836), 7 C. & P. 297.

*Annotation:—Consol. Public Prosecutions Director v. Board*, [1920] A. C. 479.

**291. ——— Unless resulting in insanity—Permanent.]—**It is a maxim of law that if a man gets himself intoxicated, he is liable to the consequences & is not excusable on account of any crime he may commit when infuriated by liquor,

induced a state of mental disease rendering the accused unconscious of his act at the time, he is responsible & can be declared insane. Where a special intention is necessary to constitute a particular offence, drunkenness might reduce the crime from a more serious to a less serious one.—*R. v. BOURKE* (1916), T. P. D. 303.—*S. AF.*

**g. ——— Province of jury.]—**Where an accused person pleads insanity, the test in determining his mental condition is whether he had by reason of disease lost the power to control his conduct in reference to the act charged. Drunkenness is not such disease, but disease may result from or supervene upon drunkenness so as to exist independently of it; & in such a case the voluntary character of the acts of drunkenness which led up to the disease is not material.

It is for the jury to find whether the disease proved is such as to establish the defence of insanity &, if so, whether it existed at the time of the act charged.—*R. v. IVORY* (1916), W. L. D. 17.—*S. AF.*

**289 i. Voluntary drunkenness no excuse for crime.]—**When a man causes himself to be intoxicated, & while in that condition commits a criminal act, he is responsible.—*R. v. CORBETT*, [1903] S. R. Q. 246.—*AUS.*

**289 ii. ———.]—**A man is taken to intend the natural consequences of his acts & the natural consequence of drinking to excess is drunkenness, when there is no evidence to show that the prisoner, who was admittedly drunk, had become intoxicated without any intention on his part, then drunkenness should not be taken into consideration by a jury on an indictment for a crime in which intention to cause a specific result is not a necessary element.—*PARKER v. R.*, [1915] 17 W. A. L. R. 96.—*AUS.*

**289 iii. ———.]—***R. v. BOURKE*, [1915] V. L. R. 289.—*AUS.*

**h. ——— Unless resulting in insanity.]—**The accused, who was a

*Sect. 5.—Criminal capacity: Sub-sect. 3, A. & B.]*

provided he was previously in a fit state of reason to know right from wrong. If indeed the infuriated state at which he arrives should continue & become a lasting malady, then he is not amenable (HOLROYD, J.).—BURROW'S CASE (1823), 1 Lew. C. C. 75.

*Annotation:—Consd.* Public Prosecutions Director v. Beard, [1920] A. C. 479.

**292.** ———.]—Drunkenness is not insanity nor does it answer to what is termed an unsound mind, unless the derangement which it causes becomes fixed & continued, by the drunkenness being habitual & thereby rendering the party incapable of distinguishing between right & wrong (HOLROYD, J.).—RENNIE'S CASE (1825), 1 Lew. C. C. 76.

*Annotations:—Consd.* R. v. Baines (1886), Wood Renton's Law & Practice in Lunacy, 912; Public Prosecutions Director v. Beard, [1920] A. C. 479.

**293.** ———.]—**Temporary—Delirium tremens.**—Drunkenness is no excuse, but *delirium tremens* caused by drinking, & differing from drunkenness, if it produces such a degree of madness, even for a time, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility.—R. v. DAVIS (1881), 14 Cox, C. C. 563.

*Annotations:—Consd.* Public Prosecutions Director v. Beard, [1920] A. C. 479. *Refd.* R. v. Kay (1904), 68 J. P. Jo. 376; R. v. Jones (1910), 4 Cr. App. Rep. 207.

**294.** ———.]—R. v. BAINES (1886), *Times*, Jan. 25.

*Annotation:—Consd.* Public Prosecutions Director v. Beard, [1920] A. C. 479.

**295.** ———.]—Drunkenness is not a good defence unless it can be positively proved that it was of such a nature that the accused did not know the difference between right & wrong.—R. v. GALBRAITH (1912), 8 Cr. App. Rep. 101, C. C. A.

*Annotation:—Refd.* Public Prosecutions Director v. Beard (1920), 14 Cr. App. Rep. 159.

**296. Drunkenness caused by fraud or stratagem.]**—(1) Voluntary drunkenness is no excuse for crime. If a party be made drunk by stratagem, or the fraud of another, he is not responsible (PARK, J.).

(2) Drunkenness may be taken into considera-

habitual ganja-smoker, was charged with the murder of his wife & infant son. In his confession he stated that he had killed his wife because she quarrelled with him & objected to go to another village where he proposed a change of home on account of their poverty; he adhered to this statement when placed for trial before the Ct. of Session. The High Ct. held, that this was not a plea of guilty on the charge of murder, but an allegation of sudden provocation, & he ought to have been put on his trial in order that the ct. might ascertain whether the provocation was grave & sudden enough to prevent the offence from amounting to murder.—*Held:* unless the accused's habit of smoking ganja had induced in him such a diseased state of mind as to make him incapable of knowing the nature of his act or its criminality, Penal Code, s. 84, did not apply in his favour.—R. v. SAKHARAM (1890), 1 L. R. 14 Bom. 564.—**IND.**

**k.** ———.]—*Though temporary.*—Under Penal Code, s. 84, unsoundness of mind, producing incapacity to know the nature of the act committed or that it is wrong or contrary to law, is a defence to a criminal charge; but, by sect. 85 of that code, such incapacity is no defence, if produced by voluntary drunkenness. If, however, voluntary

drunkenness causes a disease which produces such incapacity, then sect. 84 applies, though the disease may be of a temporary nature.—R. v. BHELEKA AHAM (1902), 1 L. R. 29 Calc. 493.—**IND.**

—.]—H.M. ADVOCATE v. McDONALD (1890), 2 White, 517.—**SCOT.**

**PART I. SECT. 5, SUB-SECT. 3.—B.**

**297 i. General rule.]**—Ordinary drunkenness makes no difference to the knowledge with which a man is credited, & if an accused knew what the natural consequences of his act were he must be presumed to have intended to cause them. Indian Penal Code, s. 300, must be construed strictly. The intoxicated person with as if he had the same knowledge as he would have had if he had not been intoxicated, but it does not provide that he shall be dealt with as if he had the same intent.—*Re MANDRU GADABA* (1914), 1 L. R. 38 Mad. 479.—**IND.**

**297 ii.** ———.]—Where a person, while under the influence of liquor, commits an offence, that main ingredient of which is intention, if the drunkenness is such as to take away from the act all

tion to explain the probability of a party's intention in the case of violence committed on sudden provocation (PARK, J.).—PEARSON'S CASE (1835), 2 Lew. C. C. 144.

*Annotation:—Consd.* Public Prosecutions Director v. Beard, [1920] A. C. 479.

*B. As affecting Capacity to form Intent.*

**297. General rule.]**—Prisoner was charged with an assault arising out of an affray at a fair, & there seemed some ground for supposing that prisoner acted under apprehension of an assault upon himself. All concerned were drunk:—*Held:* though drunkenness was no excuse for crime it might be taken into account by the jury, when considering the motive or intent of a person acting under its influence.—R. v. GAMLEN (1858), 1 F. & F. 90.

**298.** ———.]—R. v. MOWBRAY (1912), 8 Cr. App. Rep. 8, C. C. A.

**299. Intent to murder.]**—R. v. GRINDLEY (1819), 1 Russell on Crimes & Misdemeanours, 7th ed. 88.

*Annotations:—N.F.* R. v. Carroll (1835), 7 C. & P. 145. *Dbtd.* Public Prosecutions Director v. Beard, [1920] A. C. 479. This case cannot now be regarded as an authority (LORD BIRKENHEAD, C.). *Refd.* R. v. Meade, [1909] 1 K. B. 895.

**300.** ———.]—The intoxication of a party charged with murder is not a proper circumstance to be taken into consideration, in order to show whether the act was premeditated or done only in sudden heat & impulse.—R. v. CARROLL (1835), 7 C. & P. 145.

*Annotation:—Refd.* Public Prosecutions Director v. Beard, [1920] A. C. 479.

**301.** ———.]—(1) On an indictment on 7 Will. 4, & 1 Vict., c. 85, s. 2, for the capital offence of inflicting an injury dangerous to life, with intent to murder, the jury ought not to convict, unless they are satisfied that prisoner had in his mind a positive intention to murder; & it is not sufficient that it would have been a case of murder if death had ensued.

(2) *Qu.*: whether, if husband & wife jointly commit this offence, she is entitled to the legal presumption of her having acted under coercion, but she is clearly not entitled to be acquitted on this ground at the end of the case for the prosecution, for if the jury find a verdict for an assault

criminal intention, then the act is not criminal.—R. v. MATHIESON (1906), 25 N. Z. L. R. 879.—**N.Z.**

**297 iii.** ———.]—As a general rule intoxication does not free a person from criminal liability for acts committed while under the influence of drink, but when the crime is of such nature as to require the presence of an intention to do some special act, e.g., malicious injury to property, intoxication affords an excuse, if it renders the person unconscious of the act he is committing. Intoxication, though not affording an excuse, may afford a ground for mitigation of sentence.—FOWLER v. R. (1906), T. S. 505.—**3. AF.**

**299 i. Intent to murder.]**—Drunkenness in the accused at the time of committing the offence is not sufficient to warrant the jury in finding him guilty of manslaughter only. On a trial for murder the unsound condition of the prisoner's mind at the time of the committing of the offence, if produced by voluntary drunkenness & not of a fixed or permanent character, is not a matter to be considered by a jury in determining whether the prisoner was guilty.—*Re BOON* (1876), 14 N. S. W. S. C. 483.—**AUS.**

only under 7 Will. 4, & 1 Vict., c. 85, s. 11, the wife is punishable as well as the husband.

It appears that both these persons were drunk, & although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, & yet he may be guilty of very great violence (PATTESON, J.).—*R. v. CRUSE* (1838), 8 C. & P. 541; 2 Mood. C. C. 53.

*Annotations*:—As to (1) *Consd. R. v. Bird* (1851), 5 Cox, C. C. 20. *Refd. R. v. Monkhouse* (1849), 4 Cox, C. C. 55; Public Prosecutions Director v. Beard, [1920] A. C. 479. As to (2) *Consd. R. v. Bird* (1851), 5 Cox, C. C. 20.

**302.** —[—]—(1) To do an act with malice aforethought means to do a cruel act voluntarily; & anybody who intentionally inflicts grievous bodily harm on another, intending to do bodily harm, is guilty of murder if he causes death.

(2) The intention of the party guilty of murder being an element of the crime itself, the fact that a man was intoxicated at the time he caused the death of another may be taken into consideration by the jury in considering whether he formed the intention necessary to constitute the crime of murder.

(3) Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself, & conducts himself in regard to it in such a careless manner as to be guilty of culpable negligence.

(4) Trials for Felony Act, 1836 (c. 114), does not deprive prisoners of the right of making a statement to the jury in cases of felony, they may, if they wish to do so, make a statement to the jury before the ct. is addressed by their counsel, which statement will, however, give the Crown a right of reply.—*R. v. DOHERTY* (1887), 16 Cox, C. C. 306.

*Annotations*:—As to (2) *Consd. Public Prosecutions Director v. Beard*, [1920] A. C. 479. *Refd. R. v. Mead* (1909), 25 T. L. R. 359.

**303.** — *Drunkenness may reduce murder to manslaughter.*—(1) A man is taken to intend the natural consequences of his acts. This pre-

sumption may be rebutted, in the case of a man who is drunk, by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, i.e. likely to inflict serious injury. If this be proved, the presumption that he intends to do grievous bodily harm is rebutted.

(2) Upon the trial of prisoner for murder evidence was given that he was drunk at the time of the commission of the act charged, & the judge gave the following direction to the jury:—

"In the first place, every one is presumed to know the consequences of his acts. If he be insane, that knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive, a particular motive, shall exist in the mind of the man who does the act, the law declares that if the mind at that time is so obscure by drink, if the reason is dethroned & the man is incapable therefore of forming that intent, it justifies the reduction of the charge from murder to manslaughter":—*Held*: the direction was right.—*R. v. MEADE*, [1909] 1 K. B. 895; 78 L. J. K. B. 476; 73 J. P. 239; 25 T. L. R. 359; 53 Sol. Jo. 378; 2 Cr. App. Rep. 54, C. C. A.

*Annotations*:—As to (1) *Consd. R. v. Beard* (1919), 14 Cr. App. Rep. 110. As to (2) *Refd. R. v. Honeyands* (1914), 10 Cr. App. Rep. 60.

**304.** —[—]—If an accused person was so drunk that he could not have contemplated the natural consequences of his act he may on a charge of murder be found guilty of manslaughter (AVORY, J.).—*R. v. BENTLEY* (1913), 9 Cr. App. Rep. 109, C. C. A.

**305.** —[—]—*R. v. MOWBRAY*, No. 298, *ante*.

**306.** — *Death resulting from rape.*—The rule laid down in *R. v. Meade*, No. 303, *ante*, that a person charged with a crime of violence resulting in death or serious injury may show, in order to rebut the presumption that he intended the natural consequences of his acts, that he was so drunk that he was incapable of knowing that what he was doing was dangerous, cannot be supported as a rule of general application but must be confined

**303 i.** — *Drunkenness may reduce murder to manslaughter.*—Drunkenness & sudden passion are grounds for reduction of offence to manslaughter. Evidence of drunkenness on the part of the accused is insufficient unless it is shown that he was so drunk as to be incapable of forming an intention. Evidence that the accused had been "drinking all the afternoon" is vague & insufficient to show that he was drunk when he committed the offence.—*R. v. SPARKES* (1918), 51 N. S. R. 482; 29 Can. Crim. Cas. 118; 41 D. L. R. 102.—*CAN.*

**303 ii.** —[—]—Prisoner, being intoxicated, & having been attacked by certain persons, who fled on hearing the deceased approach, & the prisoner, thinking that the deceased was one of his assailants, inflicted a wound upon him with a knife, of which deceased died.—*Held*: this was manslaughter.—*R. v. DARCY* (1849), 1 Ir. Jur. 207.—*IR.*

**303 iii.** —[—]—Aberration of mind not amounting to insanity may legitimately form an element in the question between murder & culpable homicide; & this principle was applied where the panel, at the date of the homicidal act, was labouring under *delirium tremens*.—*H.M. ADVOCATE v. GRANGER* (1878), 4 Couper, 86.—*SCOT.*

**303 iv.** —[—]—An old woman was charged with the murder of two infant grandchildren by placing them on a fire of live coals. At the trial it was proved that the accused was not

insane, but that she was of intemperate habits, & that she became violent when intoxicated; that on the evening in question she had been left in charge of the two children, with whom she was on affectionate terms; & that while under the influence of spirits, which she had taken in considerable quantity, she had placed the children on the fire in the room. The judge directed the jury that if they were of opinion that the panel was watching the children with no evil intention, & that under the influence of some momentary hallucination induced by drunkenness she had placed the children on the fire, the jury were entitled to return a verdict of culpable homicide.—*H.M. ADVOCATE v. BROWN* (1886), 13 R. (Ct. of Sess.) 50.—*SCOT.*

**303 v.** —[—]—A prisoner, charged with the murder of his wife by striking & kicking her, was proved to be of drunken habits, & to have been drunk at the time when the crime was committed. The Lord Justice-Clerk, in charging the jury, directed them that although intoxication in itself was no defence to a crime, still they could take such a condition into account in consideration whether the crime which the accused was alleged to have committed was murder or culpable homicide.—*H.M. ADVOCATE v. KANE* (1892), 3 White, 386.—*SCOT.*

**303 vi.** —[—]—A man was tried for the murder of his wife, who had been unfaithful, & whom he had killed by cutting her throat with a razor so as

almost to sever the head from the body. The jury were charged that in a sane man neither jealousy nor drink nor both combined could make such a crime less than murder.—*Held*: guilty.—*H.M. ADVOCATE v. AITKIN* (1902), 4 Adam, 88.—*SCOT.*

**303 vii.** —[—]—At the trial of a husband for the murder of his wife, it was proved that the wife's death was caused by violent blows with his fists inflicted upon her by the husband when the latter was in a state of intoxication. The husband was not insane, but there was evidence that he had been injured at one time in the head & was abnormally susceptible to alcohol & abnormally violent when under its influence. In defence it was contended that the intoxicated condition of the accused at the time when the assault was committed, reduced the crime from murder to culpable homicide. The jury were directed that the accused was guilty of murder unless at the time of the assault he was, owing to drunkenness, in such condition that he had not the intention & could not form the intention of doing serious injury to his wife.—*R. v. CAMPBELL*, [1921] S. C. (J.) 1.—*SCOT.*

*m. Intent to do bodily harm.*—Prisoner, while in a state of drunkenness, discharged a loaded revolver at the prosecutor, & wounded him, but the prosecutor recovered. The prisoner was then charged upon an indictment containing two counts, one for attempted murder, & the other for



*Sect. 5.—Criminal capacity: Sub-sect. 3, B. & C.; sub-sect. 4, A.]*

to the class of case with which the ct. was there dealing.

Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime ought to be taken into consideration, with the other facts proved, in order to determine whether he had that intent.

The test of criminal responsibility is not the same in the case of drunkenness as in the case of insanity, & upon a plea of drunkenness where insanity is not pleaded, the jury should not be asked to consider whether, if the accused knew what he was doing, he knew also that he was doing wrong.

Upon an indictment for murder it was proved or admitted that accused ravished a girl of thirteen years of age & in furtherance of the act of rape placed his hand upon her mouth & his thumb upon her throat, thereby causing death by suffocation. The sole defence was a plea of drunkenness. The jury were directed at the trial that, if they were satisfied by evidence that accused was so drunk that he did not know what he was doing or did not know that he was doing wrong, the defence of drunkenness succeeded to the extent of reducing the crime of manslaughter. Accused was convicted of murder & sentenced to death. The Ct. of Criminal Appeal substituted a verdict of manslaughter upon the ground that the judge was wrong in applying to a case of drunkenness the test of insanity, & that he ought to have directed the jury in accordance with the rule laid down in *R. v. Meade*, No. 303, *ante*:—*Held*: the rule in *R. v. Meade*, No. 303, *ante*, did not apply; drunkenness was no defence in this case unless it could be established that the accused at the time of committing rape was so drunk that he was incapable of forming the intent to commit it, which was not alleged, inasmuch as the death resulted from a succession of acts, the rape & the act of violence causing suffocation, which could not be regarded independently of each other; the trial judge was mistaken in applying a case of drunkenness not amounting to insanity, but that, read as a whole, the summing up did not amount to a misdirection; & the conviction of murder should be restored.—

**PUBLIC PROSECUTIONS DIRECTOR v. BEARD**, [1920] A. C. 479; *sub nom.* *R. v. BEARD*, 89 L. J. K. B. 437; 122 L. T. 625; 84 J. P. 129; 36 T. L. R. 379; 64 Sol. Jo. 340; 26 Cox, C. C. 573; 14 Cr. App. Rep. 159, H. L.

**307. Intent to commit suicide.**—Where, on the trial of an indictment for an attempt to commit suicide, it appeared that prisoner was, at the time of the alleged offence, so drunk that she did not know what she did:—*Held*: this negatived

the intent to commit suicide.—*R. v. MOORE* (1852), 3 Car. & Kir. 319; 16 Jur. 750.

*Annotation*:—*Reid*. Public Prosecutions Director v. Beard, [1920] A. C. 479.

**308. —.**—An attempt to commit suicide is a misdemeanour at common law.

The question for the jury is, whether prisoner had a mind capable of contemplating the act charged, & whether he did, in fact, intend to take away his life. The mere fact of drunkenness in this, as in other cases, is no excuse for the crime; but it is a material fact for the jury to consider, before coming to the conclusion that prisoner really intended to destroy his life.—*R. v. DOODY* (1854), 23 L. T. O. S. 12; 6 Cox, C. C. 463.

*Annotations*:—*Consd.* *R. v. Mann* (1914), 78 J. P. 200. *Reid*. Public Prosecutions Director v. Beard (1920), 14 Cr. App. Rep. 159.

**309. Intent to do unlawful act from which**

**quittal on charge of manslaughter.**—*R. v.* (1863), 1 Taylor, Medical Jurisprudence, 903.

**310. Intent**

**Felony reduced to common assault by evidence of drunkenness.**—Where a person being drunk, stabbed another:—*Held*: he could not be convicted under 1 W.M. & A. Vict. C. 80, unlawfully, maliciously, & feloniously

assault.—*R. v. HAYES* (1846), 10 J. P. 470.

**311. —.**—Prisoner was indicted for assaulting A., a police constable, with intent to resist his lawful apprehension. A. had information that a felony had been committed, & suspecting prisoner of having committed it, took him into custody. The assault was made in resisting such arrest:—*Held*: to make prisoner responsible, it was not necessary that A. should tell him the reason for his arrest.

In considering the question of intent, the jury should take into consideration the fact of prisoner being drunk; but drunkenness does not preclude the existence of an intent to do grievous bodily harm.—*R. v. BENTLEY* (1850), 14 J. P. 671; 4 Cox, C. C. 406.

**312. —.**—Prisoner shot at his father with a pistol:—*Held*: to rebut the presumption of an intent to do grievous bodily harm, mere drunkenness was not sufficient, but prisoner must make out to the satisfaction of the jury, that the effect of drink had been to render him in such a state of mind, as not to be aware of the consequences of his actions.—*R. v. MONKHOUSE* (1849), 14 J. P. 115; 4 Cox, C. C. 55.

*Annotations*:—*Consd.* Public Prosecutions Director v. Beard, [1920] A. C. 479. *Reid*. *R. v. Meade*, [1909] 1 K. B. 895.

**313. Intent to resist apprehension.**—*R. v. BENTLEY*, No. 311, *ante*.

**314. Intent to steal—Larceny—Drunkenness**

doing actual harm to the prosecutor with intent. The learned judge directed the jury that before they could find the prisoner guilty on either count they must be satisfied that the intent as charged had been proved, but that if they thought that such intent had not been proved they might still find him guilty of causing actual bodily harm under such circumstances that if death had been caused he would have been guilty of manslaughter. The jury found the prisoner not guilty of the crimes charged in the indictment, upon the ground that he was incapable of forming an intent, but guilty of the crime of causing bodily harm under such circumstances that if death had been caused he would have been guilty of manslaughter:—*Held*: the direc-

tion was right in law, & the prisoner was properly convicted.—*R. v. GARR* (1909), 28 N. Z. L. R. 546.—N. Z.

**n. Intent to commit rape.**—The prisoner was found guilty of an assault with intent to commit a rape. At the time of committing the offence he was intoxicated:—*Held*: in cases such as this, where the crime is statutory, & intention is essential to the charge, the jury should be instructed that they must find the specific intent charged, & that, in considering the evidence as to that intent, they should find only, if the prisoner was intoxicated, whether he was so much intoxicated as not to have been able to form any specific intent.—*R. v. RYAN* (1853), 1 Legge, 797.—AUS.

**o. —.**—An accused being charged with rape, the jury brought in a verdict of guilty of indecent assault, adding that they were of opinion that the accused was not responsible for his actions at the time. On a question then put by the presiding judge the jury stated that the accused was at the time unconscious of what he was doing on account of his drunkenness:—*Held*: the finding of the jury amounted to a verdict of guilty.—*R. v. BOURKE* (1916), T. P. D. 303.—S. AF.

**p. Intent to steal.**—On a trial for larceny, the jury found a verdict of guilty but added a special finding, that the prisoner was drunk at the time & did not know what he was doing:—*Held*: that amounted to a

no defence.]—Appeal against a conviction for larceny. Prisoner was found in possession of a pair of boots secreted up his coat. They had been exposed in a pawnbroker's shop, where prisoner & the assistant had been in conversation. The defence was that of drunkenness:—*Held*: the conviction would be affirmed.

I am not aware that the defence of drunkenness has ever been applied to such a case as this (LORD ALVERSTONE, C.J.).—*R. v. CHAPMAN* (1910), 4 Cr. App. Rep. 54, C. C. A.

*Annotation*:—*Refd.* Public Prosecutions Director v. Beard (1920), 14 Cr. App. Rep. 159.

#### C. Where Act done under Fear or Provocation.

**315. Relevancy as defence—Prisoner acting under fear of violence.**—Drunkenness may be taken into consideration to determine the apprehension under which prisoner acted.—*MARSHALL'S CASE* (1830), 1 Lew. C. C. 76.

*Annotation*:—*Refd.* Public Prosecutions Director v. Beard, [1920] A. C. 479.

**316. ——— To person or property.**—*GOODIER'S CASE* (1831), 1 Lew. C. C. 76, n.

*Annotation*:—*Refd.* Public Prosecutions Director v. Beard, [1920] A. C. 479.

**317. ———.]—***R. v. GAMLEN*, No. 297, ante.

**318. ——— Prisoner acting under provocation.**—*PEARSON'S CASE*, No. 296, ante.

**319. ———.]—**(1) Magistrates, on the examination of persons charged with felony, are only required by law to put down so much of the evidence as is material; but it is desirable that, in taking depositions, they should be extremely careful to make a full statement of all that the witnesses say, as since Trials for Felony Act, 1836 (c. 114), much time is occupied in endeavouring to establish contradictions between the testimony of the witnesses & their depositions, as to the omission of minute circumstances in their depositions, as well as in other particulars.

(2) If a person receive a blow, & immediately avenges it with any instrument he may happen to have in his hand, & death ensue, this will be only manslaughter, provided the fatal blow is to be attributed to the passion of anger arising from the previous provocation. The law requires that there should be provocation; & that the fatal blow should be clearly traced to the passion arising from that provocation. Therefore, if, from the circumstances, it appear that the party, before any provocation given, intended to use a deadly weapon towards any one who might assault him, this would show that a fatal blow given afterwards was not to be attributed to the provocation, & the crime would therefore be murder.

(3) If a man be drunk, this is no excuse for any crime he may commit; but where provocation by a blow has been given to a person who kills another with a weapon which he happens to have in his hand, the drunkenness of prisoner may be considered on the question, whether prisoner was excited by passion, or acted from malice; as, also, it may be on the question, whether expressions used by prisoner manifested a deliberate purpose,

finding of an absence of *animus furandi* & as the intent to steal was a necessary ingredient of the crime of larceny, the conviction must be quashed.—*R. v. GLEN* (1899), 9 Q. L. J. 140.—*AUS.*

**q. ———.]—**Defence of one of two prisoners jointly indicted for theft was that he was too drunk to form a criminal intent. The other admitted the theft & did not allege drunkenness. There was no evidence or plea of insanity on the part of either of the prisoners. Jury returned a verdict

"Guilty with no criminal intent. Act committed while under the influence of temporary insanity":—*Held*: verdict was ambiguous & uncertain; new trial ordered.—*R. v. ADAMS & CARR* (1916), 35 N. Z. L. R. 356.—*N.Z.*

#### PART I. SECT. 5, SUB-SECT. 4.—A.

**325 i. Whether compulsion by threats a defence—Treason—Fear of death or serious bodily harm essential—Must be**

or were merely the idle expressions of a drunken man.—*R. v. THOMAS* (1837), 7 C. & P. 817.

*Annotation*:—*Refd.* Public Prosecutions Director v. Beard, [1920] A. C. 479.

**320. ——— Less required in drunken than in sober person to reduce murder to manslaughter.]—**Provocation may be less, in order to reduce murder to manslaughter, in the case of a drunken than of a sober man.—*R. v. LETENOCK* (1917), 12 Cr. App. Rep. 221, C. C. A.

#### SUB-SECT. 4.—COERCION.

##### A. In General.

**321. Compulsion by physical force a defence.]—***R. v. STRATTON*, No. 333, post.

**322. ——— Compulsion by mob to break machinery.]—**On an indictment on 7 & 8 Geo. 4, c. 30, s. 4, for breaking a threshing machine, the judge allowed a witness to be asked whether the mob by whom the machine was broken did not compel persons to go with them, & then compel each person to give one blow to the machine, & also whether, at the time when he & prisoner were forced to join the mob, they did not agree together to run away from the mob the first opportunity.—*R. v. CRUTCHLEY* (1831), 5 C. & P. 133; 1 Nev. & M. M. C. 282.

**323. Whether compulsion by threats a defence—Apprehension of personal danger.]—***R. v. TYLER*, No. 455, post.

**324. ——— Treason—Fear of death essential.]—***OLDCASTLE'S CASE* (1419), 1 Hale, P. C. 50.

*Annotations*:—*Refd.* M'Growther's Case (1746), Fost. 13. *Mentd.* Benyon v. Evelyn (1664), O. Bridg. 324.

**325. ——— Must be a continuing fear.]—**Prisoner, a lieutenant in the Duke of Perth's regiment, was charged with high treason for joining in the rebellion & accepting a commission in the Pretender's service. Prisoner contended that he was compelled to join the rebellion through threats to burn his house & to lay waste all that belonged to him:—*Held*: prisoner was guilty of treason, the fear of having houses burnt or goods spoiled being no excuse in the eye of the law for joining & marching with rebels.

The only force that doth excuse is a force upon the person & present fear of death & this force & fear must continue all the time the party remains with the rebels. It is incumbent on every man, who makes force his defence to show an actual force & that he quitted the service as soon as he could (LEE, C.J.).—*M'GROWTHER'S CASE* (174), Fost. 13; 18 State Tr. 391.

**326. ———.]—***GORDON'S CASE* (1746), 1 East, P. C. 71.

**327. ——— Must be irresistible.]—***R. v. STRATTON*, No. 333, post.

**328. Whether superior orders a defence—Orders obviously improper & illegal.]—**A., who commanded the guards at the King's trial, & at his murder, justified that all that he did was as a soldier, by the command of his superior officer, whom he must obey or die:—*Held*: this was no

continuing fear.]—In order that the defence of compulsion may be maintained by the accused on a charge of high treason, the compulsion must have been continuous & such as to produce a reasonable & substantial fear of immediate death or serious bodily harm.—*R. v. VERMAAK* (1900), 21 N. L. R. 204.—*S. AF.*

**r. Whether superior orders a defence.]—**A private soldier is protected from liability for acts done in obedience to the orders of a superior officer, if



*Sect. 5.—Criminal capacity: Sub-sect. 4, A. & B. (a).]*

excuse, for his superior was a traitor, & all that joined in that act were traitors, & did by that approve the treason, & where the command was traitorous, there the obedience to that command was also traitorous.—*AXTELL'S CASE* (1660), Kel. 13; 5 State Tr. 1146; 84 E. R. 1060.

**329.** ———.]—On an indictment against the driver of an engine & the fireman of a railway train for the manslaughter of persons killed while travelling in a preceding train, by prisoners' train running into it, it appeared that on the day in question special instructions had been issued to them, which in some respects differed from the general rules & regulations, & altered the signal for danger, so as to make it mean not "stop," but "proceed with caution"; that the trains were started by the superior officers of the co. irregularly, at intervals of about five minutes; that the preceding train had stopped for three minutes, without any notice to prisoners except the signal for caution, that their train was being driven at an excessive rate of speed; & that then they did not slacken immediately on perceiving the signal, but almost immediately, & as soon as they saw the preceding train they did their best to stop, but without effect:—*Held*: (1) the special rules, so far as not consistent with the general rules, superseded them; (2) the construction of the rules, taken together, was for ct.; (3) if the prisoners honestly believed they were observing them, & they were not obviously illegal, they were not criminally responsible; (4) the fireman, being bound to obey the directions of the driver, & so far as appeared, having done so, there was no case against him; (5) even as against the driver, although, there being evidence of excessive speed & insufficient look-out, there was perhaps some slight evidence, it was so slight, that it would be reserved for the Ct. of Criminal Appeal whether there was any case at all.

In a criminal case an inferior officer must be held justified in obeying the directions of a superior, not obviously improper or contrary to law, that is, if an inferior officer acts honestly upon what he might not unreasonably deem to be the effect of the orders of his superior, he is not guilty of culpable negligence, those orders not appearing to him, at the time, to be improper or contrary to law (*WILLES, J.*).—*R. v. TRAINER* (1864), 4 F. & F. 105.

—.]—An inferior who takes part in transactions which he must be presumed to know to be fraudulent, is liable to conviction, even though every act he performs is done by his master's orders.

In some cases, where defts. do not give evidence, juries ought to be directed to draw an inference.—*R. v. BERNARD* (1908), 1 Cr. App. Rep. 218, C. C. A.

**331. Obedience to de facto government not necessarily a defence.**—*COOKE'S CASE* (1660), Kel. 23; 5 State Tr. 1077; 84 E. R. 1064; *sub nom. COKE'S CASE*, Kel. 12.

*Annotation*:—*Mentd.* *Crosthwaite v. Gardner* (1852), 18 Q. B. 640.

**332.** ———.]—V. was indicted for compassing the death of Charles II., & intending to change

the kingly govt. of this nation. Upon his trial he justified that what he did was by the authority of Parliament, & that the King was then out of possession of the kingdom & the Parliament was the only power regnant, & therefore no treason could be committed against the King:—*Held*: (1) Charles II. was *de facto* kept out of the exercise of the kingly office by traitors & rebels, yet he was king both *de facto* & *de jure*, & all the acts which were down to the keeping him out were high treason; (2) the treason laid being the compassing of the King's death in Middlesex, levying war in Surrey might be given as an overt act to prove it, but if an indictment were for levying war, it must be laid in the county where in truth it was.—*VANE'S CASE* (1662), Kel. 14; 6 State Tr. 120; 84 E. R. 1060.

*Annotations*:—*Generally*, *Mentd.* *Bellew's Case* (1673), 1 Vent. 254; *Sydney's Case* (1683), *Skin.* 145; *R. v. Preston-on-the-Hill* (1736), *Lee temp. Hard.* 249; *Edmonds' Case* (1821), 1 State Tr. N. S. 785; *R. v. Dowling* (1848), 3 Cox, C. C. 509.

**333. Compulsion by necessity—Must be imminent & extreme necessity to afford a defence.**—

(1) The ct. will not quash an *ex officio* information for imprisoning the governor & subverting the govt. of Madras at the instance of the prosecutor, for the A.-G., if he sees fit, may enter a *nolle prosequi* without the interference of the ct.

(2) Whenever necessity forces a man to do an illegal act it justifies him, because no man can be guilty of a crime without the will & intention of his mind. A man who is absolutely by natural necessity forced, his will does not go along with the act; & therefore in the case of natural necessity, if a man is forced to commit acts of high treason, if it appears really force, & such as human nature could not be expected to resist, & the jury are of that opinion, the man is not then guilty of high treason. In a case of homicide if a man was attacked, & in danger, & so in a variety of instances, natural necessity certainly justifies. As to civil necessity, it must be imminent extreme necessity; there must be no other remedy to apply to for redress; it must be very imminent, it must be very extreme, & in the whole they do, they must appear clearly to do it with a view of preserving the society & themselves, with a view of preserving the whole (*LORD MANSFIELD, C.J.*).

(3) The fundamental rule of criminal judicature is that the measure of punishment should be in proportion to the malignity appearing in the intention of the offender (*ASHURST, J.*).—*R. v. STRATTON* (1780), 1 Doug. K. B. 239; 99 E. R. 156; 21 State Tr. 1045.

*Annotations*:—*As to* (1) *Refd.* *R. v. Duffy* (1848), 4 Cox, C. C. 123. *As to* (2) *Distd.* *R. v. Dudley & Stephens* (1884), 14 Q. B. D. 273.

**334.** ——— Killing human being under pressure of hunger not justified.]—At the trial of an indictment for murder it appeared upon a special verdict, that prisoners D. & S., seamen, & deceased, a boy between seventeen & eighteen, were cast away in a storm on the high seas & compelled to put into an open boat; that the boat was drifting on the ocean, & was probably more than 1,000 miles from land; that on the eighteenth day, when they had been seven days without food & five without water, D. proposed to S. that lots should be cast who should be put to death to save the rest, & that they afterwards

the orders are not so manifestly illegal that the soldier must, or ought to have known them to be so, & if the soldier honestly believes that he is doing his duty in obeying them. Obedience to the orders of a superior officer whilst on active service is a complete defence to

a charge of murder by killing a person in such circumstances, provided that such orders were not manifestly illegal. The onus of proving that such orders were not manifestly illegal rests upon the accused.—*R. v. CELLIERS*, [1903] O. R. C. 1.—*S. AF.*

*s. Compulsion by necessity—Fear of damage insufficient.*—The limits of the appln. of the doctrine of necessity as an excuse for an act otherwise criminal are those prescribed in Penal Code, s. 94.—*R. v. MAGANLAL* (1889), 1 L. R. 14 Bom. 115.—*IND.*

thought it would be better to kill the boy, that their lives might be saved; that on the twentieth day D. with the assent of S., killed the boy & both D. & S. fed on his flesh for four days; that at the time of the act there was no sail in sight, nor any reasonable prospect of relief; that under these circumstances there appeared to prisoners every probability that unless they then or very soon fed upon the boy or one of themselves, they would die of starvation:—*Held*: (1) upon these facts, there was no proof of any such necessity as could justify prisoners in killing the boy, & they were guilty of murder; (2) prisoners were amenable to the jurisdiction of the Admty. of England under Merchant Shipping Act, 1854 (c. 104), s. 267.

(3) By Jud. Act, 1873 (c. 66), s. 16, the cts. of oyer & terminer & gaol delivery are now made part of the High Ct. & their jurisdiction is vested in it. An order of the ct. has been made to bring the record from one part of the ct. into this chamber, which is another part of the same ct. (LORD COLERIDGE, C.J.).—*R. v. DUDLEY & STEPHENS* (1884), 14 Q. B. D. 273; 54 L. J. M. C. 32; 52 L. T. 107; 49 J. P. 69; 33 W. R. 347; 1 T. L. R. 118; 15 Cox, C. C. 624, C. C. R.

—As to (3) *Refd.* *R. v. Steventon Parish* (1885), 15; *R. v. Brooke* (1894), 59 J. P. 6. *Generally*, *Staines L. R.* (1888), 4 T. L. R. 364; *R. v. Jameson* (1896), 60 J. P. 677; *Allen v. Flood*, [1898] A. C. 1.

**335. Mere fear of damage to property insufficient.**—*GORDON'S CASE* (1746), 1 East, P. C. 71.

**336.**—*M'GROWTHER'S CASE*, No. 325, *ante*.

#### B. Marital Coercion.

##### (a) In General.

**337. Mere fact of marriage raises no presumption.**—The circumstance that a married woman at the time of the felonious reception of stolen goods charged against her, was living with her husband, travelling with him from place to place, raises no presumption of marital coercion, though it is not shown that she received them out of his presence.

Felonies committed by a married woman in the presence of her husband are excused (WILLIAMS, J.).—*R. v. WILLIAMS & SHIPPEY* (1844), 3 L. T. O. S. 342; 8 J. P. 617.

**338.**—Coverture is no defence to a criminal charge.

A husband & wife were jointly indicted for receiving stolen goods. There was evidence that the wife had received part of the stolen property from one of the thieves, but there was no evidence that the husband was present at the time, & there was no evidence that the wife was acting under his compulsion:—*Held*: the wife was properly convicted of receiving stolen goods.—*R. v. BAINES* (1900), 69 L. J. Q. B. 681; 82 L. T. 724; 64 J. P. 408; 16 T. L. R. 413; 19 Cox, C. C. 524, C. C. R.

*Annotation*:—*Refd.* *R. v. Orris* (1908), 1 Cr. App. Rep. 190.

**339. No presumption in absence of husband.**—(1) The law, out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption *prima facie* & *prima*

*facie* only, that it was done under his coercion; but it is absolutely necessary that the husband should be actually present & taking a part in the transaction.

H., wife of P., was indicted for forging & uttering three £2 Bank of England notes. A witness proved that in consequence of a previous conversation with the husband he went to the shop of prisoner's husband, who however was not present, when prisoner beckoned him into an inner room where the transaction then took place. As he was putting the notes into his pocket-book, prisoner's husband put his head in but did not interfere beyond saying "Get on with you." When witness & prisoner returned into the shop, the husband was there & prisoner gave him the change she had received, & both prisoner & her husband cautioned her to be careful:—*Held*: this was entirely the act of the wife.

(2) *Qu.*: if in all misdemeanours the wife may not properly be tried & convicted with her husband.—*HUGHES'S CASE* (1813), 2 Lew. C. C. 229.

*Annotation*:—As to (1) *Refd.* *R. v. Cruse* (1838), 8 C. & P. 541.

**340.**—A wife, by her husband's order & procuration, but in his absence, knowingly uttered a forged order & certificate for the payment of prize money:—*Held*: the presumption of coercion at the time of uttering did not arise, as the husband was absent, & the wife was properly convicted of the uttering, & the husband of procuring.—*R. v. MORRIS* (1814), Russ. & Ry. 270; 2 Leach, 1096.

**341.**—On joint indictment against C. & wife for stealing, it is for the jury on the evidence to say whether C.'s wife was acting independently of her husband, & if they find she was, then she may be found guilty.—*R. v. COHEN* (1868), 18 L. T. 489; 32 J. P. 565; 16 W. R. 941; 11 Cox, C. C. 99, C. C. R.

**342.**—Defts., husband & wife, were indicted for having by threats of violence & restraint induced prosecutor to write & affix his name to the following document: London, July 19, 1875. I hereby agree to pay you £100 on July 27, to prevent any action against me:—*Held*: a wife who took an independent part in the commission of a crime when her husband was not present was not protected by her coverture.—*R. v. JOHN* (1875), 13 Cox, C. C. 100.

**343.**—*R. v. BAINES*, No. 338, *ante*.

**344. General presumption when husband present.**—*HUGHES CASE*, No. 339, *ante*.

**345.**—*R. v. WILLIAMS & SHIPPEY*, No. 337, *ante*.

**346.**—The doctrine of coercion as applicable to a crime committed by a married woman in the presence of her husband, only raises a disputable presumption of law in her favour, which is in all cases capable of being rebutted by the evidence.

This disputable presumption of law exists in misdemeanours as well as in felonies, & the question for the jury is the same in both cases.

The doctrine in question applies to the crime of robbery with violence.

*Semble*: where a man & woman are indicted

#### PART I. SECT. 5, SUB-SECT. 4.—B. (a).

No presumption arises in husband.—The fact that a wife was absent when his wife committed the offence charged may be sufficient to rebut the presumption that she

indictment for uttering base coin, it appeared that the prisoner was a married woman, & that she uttered the base coin in a shop, while her husband stood outside the door:—*Held*: in these circumstances, the prisoner was entitled to be acquitted, as it must be presumed that, when committing the crime, she was acting under the control of her husband.—*ANON.* (1841), 1 R. Cr. Rep. 374.—*IR.*

*Rebutted*—Sufficiency of evi-

dence.—*R. v. JACKSON* (1904), 4 S. R. N. S. W. 732; 21 N. S. W. N. 241.—*AUS.*

b. — By evidence that the wife acted as free agent.—Where an act of dishonesty has been committed by a wife in the presence of her husband, there is a presumption of law that the wife acted under the coercion & control of her husband. This presumption, however, may be rebutted by evidence that the wife acted as a free agent.—

*Sect. 5.—Criminal capacity: Sub-sect. 4, B. (a)*

together for a joint crime & it appears they had lived together for some months as husband & wife, having with them an infant who passed as their child, it is not necessary for the woman to give evidence of her marriage in order to entitle her to the benefit of the doctrine of coercion, although the indictment does not describe her as a married woman.—*R. v. TORPEY* (1871), 12 Cox, C. C. 45.

347. —[Applt. was convicted of stealing money. The stealing took place in the presence of applt.'s husband. The jury were told that although there was a presumption that the wife was acting under the coercion of her husband, that presumption might be negatived if they thought that the husband & wife were acting in collusion:—*Held*: the evidence of collusion might be evidence of coercion, & as this was not explained to the jury, the conviction would be set aside.—*R. v. CAROUBI* (1912), 107 L. T. 415; 76 J. P. 262; 23 Cox, C. C. 177; 7 Cr. App. Rep. 149, C. C. A.

348. —[Applt., a woman, & a man named R., were indicted together with stealing two suits of clothes at a pawnbroker's shop. It appeared that all the acts proved against applt. upon which the prosecution relied were done in the presence of R. Both prisoners were convicted. During the trial a detective was stating that he thought there was some connection between prisoners, but R. objected to this evidence, & the matter was not then pursued. Subsequent inquiry showed that prisoners were married to each other. The woman appealed. Applt. by her counsel on the appeal claimed the benefit of the presumption that where a wife commits a crime wholly in the presence of her husband she is deemed to be acting under his coercion & should be acquitted although she had not raised this point either at the trial or by her notice of appeal. The Crown did not suggest that the non-disclosure of the relationship at the trial was done in order to take advantage of this point on appeal, the presumption being rebuttable. The ct. gave effect to the contention of applt., & quashed the conviction.

It is only a *prima facie* presumption, & we are of opinion that it ought not to be extended (*ISAACS, C.J.*).—*R. v. GREEN* (1913), 110 L. T. 240; 78 J. P. 224; 30 T. L. R. 170; 24 Cox, C. C. 41; 9 Cr. App. Rep. 228, C. C. A.

349. —[Applt. was convicted of conversion of money entrusted her for a certain purpose, & of falsification of accounts, which she kept as servant of the Post Office. Her husband was the postmaster, & he was convicted with her. It was proved that she was acting independently, & not under her husband's coercion:—*Held*: she was rightly convicted; the omission by counsel of taking a point of law does not affect the duty of the judge to call the attention of the jury to it.

*Semle*: the presumption of coercion in the case of joint crimes committed by a wife in the presence of her husband extends to misdemeanours.

A married woman who is alleged to have com-

mitted an offence in the presence of her husband is presumed to have acted under his coercion. The principle is that though the mere fact that two persons jointly charged with a crime are married, creates no presumption of coercion, yet as a general rule, the husband's presence does raise a presumption of his coercion, & excuses the wife. This presumption may be rebutted. If it appear that she was principally instrumental, acting voluntarily, & not by coercion, even though the husband was present & concurred, she will be guilty (*AVORY, J.*).—*R. v. SMITH* (1916), 12 Cr. App. Rep. 42, C. C. A.

350. — *Rebuttal—By independent act of wife—Husband innocent agent.*—*HAMMOND'S CASE* (1787), 1 Leach, 444.

351. —[—]—[—]—*R. v. BOOBER*, No. 200, *ante*.

352. —[—]—[—]—*R. v. COHEN*, No. 341, *ante*.

353. —[—]—[—]—*R. v. TORPEY*, No. 346, *ante*.

354. —[—]—[—]— *Wife principally instrumental.*—*R. v. SMITH*, No. 349, *ante*.

355. —[—]—[—]— *Husband a cripple & bed-ridden.*—*R. v. POLLARD* (1838), 8 C. & P. 553, n.

*Annotation*:—*Reld. R. v. Cruise* (1838), 8 C. & P. 541.

356. —[—]—[—]— *Incriminating statement by wife.*—Where goods are found in the house of a married man, & such possession is proved as evidence of a larceny, they must be considered as in his possession, & not in possession of his wife, unless she says something that implicates herself, in which case it must be left to the jury to decide in whose possession they were.—*R. v. BANKS* (1845), 5 L. T. O. S. 434; 1 Cox, C. C. 238.

357. —[—]—[—]— *Subsequent act of wife.*—Where a wife was indicted with her husband for receiving stolen property, & the evidence was, that although not present when her husband received the property, she had subsequently dealt with it, & ultimately destroyed it:—*Held*: it was a question for the jury whether, in receiving it & taking an active part in dealing with it afterwards, she did so with the purpose of aiding her husband in the object he had in view of turning it to profit, or whether what she did was merely for the purpose of concealing her husband's guilt, or screening him from the consequences; & in the first case she might be found guilty; in the second she ought to be acquitted.—*R. v. McCLARENS* (1849), 3 Cox, C. C. 425.

358. —[—]—[—]—*R. v. BOOBER*, No. 200, *ante*.

359. — *Husband & wife acting in collusion.*—*R. v. CAROUBI*, No. 347, *ante*.

360. *Man & woman not married.*—(1) Where a summing up contained a misdirection the question arose whether the ct. should dismiss an appeal under the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1). Before doing so, the ct. ought to be satisfied that the jury would have convicted prisoners supposing that there had been no misdirection.

(2) The rule that a wife committing a crime in

*R. v. ADAMS* (1883), 3 E. D. C. 216.—*S. AF.*

c. —[—]—[—]—*R. v. FEZE & JOHN* (1884), 3 E. D. C. 336.—*S. AF.*

d. — *Effect of statutory limitation.*—The effect of Criminal Code Act, 1893, s. 24 (2), providing that no presumption shall be made that a married woman committing an offence does so under compulsion only because she commits it in the presence of her husband,

is to wholly deprive a married woman of the defence of coercion by her husband where such coercion does not amount to compulsion by threats within the meaning of sub-sect. 1 of the same section; the defence of marital coercion, as it existed before the code, having depended wholly upon the presumption from the presence of the husband, & not having been available in the case of an offence committed by a married woman by the command of

her husband, but in his absence. Notwithstanding that husband & wife are for some purposes one person only in law, they are legally capable of acting a crime, so as to make the acts & declarations of each, where the crime has been committed in pursuance of the concert, evidence against the other to the same extent as in the case of a crime concerted between other persons.—*R. v. BROWN* (1896), 15 N. Z. L. R. 18.—*N.Z.*

the presence of her husband is presumed to have acted under his coercion, ought not to be extended to the case of a woman who was living with a man as his wife but was not married to him.—*R. v. COURT* (1912), 7 Cr. App. Rep. 127, C. C. A.

(b) *Felonies.*

i. *Offences against the Person.*

**361. Murder—Agreement to commit suicide—Survival of wife.]**—ANON. (1604), Moore, K. B. 754; 72 E. R. 884.

**362. — Husband & wife both convicted.]**—SOMERSET'S (COUNTESS) CASE (1616), 2 State Tr. 951.

*Annotations:*—*Refd.* ANON. (1664), Kel. 31; *R. v. Manning* (1849), 14 J. P. 355.

**363. — Presumption not applied.]**—ANON. (1664), Kel. 31; 84 E. R. 1068.

**364. — Failure to provide food for dependent—Duty on husband—Wife not liable.]**—*R. v. SQUIRE* (1799), 1 Russell on Crimes & Misdemeanours, 8th ed., 96, 627.

*Annotations:*—*Consd.* *R. v. Smith* (1826), 2 C. & P. 449. *Refd.* *R. v. Saunders* (1836), 7 C. & P. 277.

**365. — — — — —.]**—A married woman cannot be convicted of the murder of her illegitimate child three years old, by the omitting to supply it with proper food, unless it is shown that her husband supplied her with food to give to the child, & that she wilfully neglected to give it.

A count charged a married woman with the murder of her illegitimate child of three years old, by omitting to supply it with sufficient food, & also by beating. It was not shown that her husband had supplied her with food to give to the child:—*Held*: this count could not be supported.—*R. v. SAUNDERS* (1836), 7 C. & P. 277.

**366. — Accessory after fact to husband—Wife not liable.]**—Where a woman is charged with comforting, harbouring & assisting a man who had committed a murder, if the counsel for the prosecution has reason to believe that the woman was married to the man & it appears clearly that she considered herself as his wife & lived with him as such for years he will be justified in not offering any evidence against her, even though he have also reason to believe that the marriage was in some respects irregular & probably invalid.—*R. v. GOOD* (1842), 1 Car. & Kir. 185.

**367. Wounding with intent to murder—Question of presumption undecided.]**—*R. v. CRUSE*, No. 301, *ante*.

**368. Wounding with intent to do grievous bodily harm—No personal violence by wife—Presumption applied.]**—A man & his wife were found guilty of wounding a person with intent to disfigure him & do him grievous bodily harm, but the jury also found that the wife acted under the coercion of the husband & did not personally inflict any violence on prosecutor:—*Held*: the conviction against the wife could not be supported.—*R. v. SMITH* (1858), Dears. & B. 553; 27 L. J. M. C. 204; 31 L. T. O. S. 121; 22 J. P. 274; 4 Jur. N. S. 395; 6 W. R. 471; 8 Cox, C. C. 27, C. C. R.

ii. *Offences against Property.*

**369. Robbery with violence—Question of presumption undecided.]**—*R. v. BUNCOMBE* (1845), 5 L. T. O. S. 22; 1 Cox, C. C. 183.

PART I. SECT. 5, SUB-SECT. 4.—  
B. (b) ii.

**373 i. Larceny—Presumption applied.]**—An indictment charged a husband & wife jointly with larceny. The wife acquitted, as under the control of the husband.—*R. v. COLLINS* (1841), 2 Crow. & D. 138.—*IR.*

**373 ii. — — — — —.]**—M. & his wife were indicted along with S. for robbery & receiving. The prosecutor gave evidence against M. & S., & M.'s daughter swore that her father was in another room when S. committed the robbery, & gave M.'s wife money which he had stolen. The jury con-

**370. — Presumption applied.]**—*R. v. TORPEY*, No. 346, *ante*.

**371. — Coercion by husband a defence.]**—Upon an indictment for highway robbery with violence, D. & his wife were found guilty, the jury finding as to the wife that she had acted under the compulsion of her husband:—*Held*: as to the wife the verdict amounted to one of not guilty.—*R. v. DYKES* (1885), 15 Cox, C. C. 771.

**372. Sending threatening letter—Presumption applied but rebutted.]**—HAMMOND'S CASE (1787), 1 Leach, 444; 2 East, P. C. 1119.

**373. Larceny—Presumption applied.]**—ANON. (1853), 27 Lib. Ass., fo. 137, pl. 40; cited 1 Hale, P. C. at p. 45; 2 East, P. C. 559.

**374. — — — — —.]**—ANON. (1664), Kel. 31; 84 E. R. 1068.

**375. — — — — —.]**—If larceny be jointly committed by husband & wife, the wife is entitled to be acquitted, as under coercion.

The woman being indicted as "the wife of A." is sufficient proof that she is so, for this purpose.—*R. v. KNIGHT* (1823), 1 C. & P. 116.

**376. — — — — —.]**—Effect of evidence of collusion.]—*R. v. CAROUBI*, No. 347, *ante*.

**377. — — — — —.]**—*R. v. GREEN*, No. 348, *ante*.

**378. Burglary—Presumption applied.]**—*R. v. JONES* (1664), Kel. 37; 84 E. R. 1071.

**379. Housebreaking—Presumption applied.]**—Where prisoner & his wife were indicted for breaking & entering a house in the day time:—*Held*: the wife must be acquitted as she appeared to have acted under her husband's influence.—HAMILTON'S CASE (1784), 1 Leach, 348.

**380. Receiving stolen property—Presumption applied—Wife more active than husband.]**—Upon a joint charge against husband & wife, of receiving stolen goods, the wife cannot properly be convicted if the husband is, where it has not been left to the jury to say whether she received the goods in the absence of the husband, though she had been more active than her husband.—*R. v. ARCHER* (1826), 1 Mood. C. C. 143.

**381. — — — — —.]**—*R. v. BANKS*, No. 356, *ante*.

**382. — — — — —.]**—*R. v. MCCLARENS*, No. 357, *ante*.

**383. — — — — —.]**—A. & his wife were jointly indicted for receiving, & a general verdict of guilty was given against both. The evidence showed either one joint receiving, in which case the wife could not be convicted, as the offence was committed in her husband's presence; or two several acts of receiving in which case as against the wife, the crime would not be proved as laid:—*Held*: the husband was rightly convicted, & the wife not; & the verdict was taken to be several as regarded each.—*R. v. MATTHEWS* (1850), 1 Den. 596; T. & M. 337; 14 J. P. 399; 4 Cox, C. C. 214, C. C. R.

**384. — Wife receiving property from husband—Wife not liable.]**—Prisoner, a married woman, was indicted for receiving stolen goods. The evidence showed that the property had been stolen by the husband from his employer where he worked, & afterwards taken home & given to his wife:—*Held*: prisoner could not be convicted, under the circumstances, of this offence.—*R. v. BROOKS* (1853), Dears. C. C. 184; 22 L. J. M. C. 121; 21 L. T. O. S. 80; 17 J. P. 297; 17 Jur.

victed M. & S. of robbery, & M.'s wife of receiving:—*Held*: the verdict was inconsistent, & that, M. having taken part in the transaction, there was no evidence against his wife to rebut the presumption of coercion.—*R. v. MCSHANE* (1877), 3 C. A. 314.—*N.Z.*

*Sect. 5.—Criminal capacity: Sub-sect. 4, B. (b) ii., (c) & (d).]*

400; 1 W. R. 313; 1 C. L. R. 184; 6 Cox, C. C. 148, C. C. R.

*Annotation:—Refd. R. v. Wardroper (1860), 8 W. R. 217.*

**385.** ————.]—A., B. & B.'s wife were indicted jointly for burglary & receiving. The jury found A. guilty of burglary, & B. & his wife of receiving. Part of the property was found in B.'s house, & from that fact & others, the jury were warranted in finding B. guilty of receiving. To connect the wife with the matter, it was proved that some time after the burglary the wife was seen dealing with part of the stolen things, when she made a statement importing a knowledge that the things had been stolen, & that they were to be made away with. The judge at the trial declined to leave to the jury the question whether B.'s wife received the things from her husband or in his absence, & the jury found B.'s wife guilty of receiving:—*Held*: the questions were proper for the consideration of the jury, & the conviction could not be supported.—*R. v. WARDROPER* (1860), Bell, C. C. 249; 29 L. J. M. C. 116; 1 L. T. 416; 24 J. P. 117; 6 Jur. N. S. 232; 8 W. R. 217; 8 Cox, C. C. 284, C. C. R.

*Annotation:—Refd. R. v. M'Athey (1862), 7 L. T. 433.*

*See, also, Part XXXIV., Sect. 14, sub-sect. 7, A.*

**386. Forgery—Presumption applied but rebutted.**—*HUGHES' CASE*, No. 339, *ante*.

**387. Uttering forged notes—Presumption applied.**—*R. v. ATKINSON* (1814), 1 Russell on Crimes & Misdemeanours, 8th ed., 96, 103.

**388. Uttering base coin—Presumption applied.**—*CONNOLLY'S CASE*, No. 392, *post*.

**389. Arson—Presumption applied but rebutted.**—*R. v. POLLARD* (1838), 8 C. & P. 553, n.

*Annotation:—Refd. R. v. Cruse (1838), 8 C. & P. 541.*

#### (c) Misdemeanours.

**390. Assault—Husband & wife both convicted.**—*R. v. INGRAM* (1712), 1 Salk. 384; 91 E. R. 335.

*Annotations:—Consd. O'Connell v. R. (1844), 11 Cl. & Fin. 155. Refd. R. v. Cruse (1838), 8 C. & P. 541; R. v. Guthrie (1870), L. R. 1 C. C. R. 241.*

*i. Arson—Presumption applied & rebutted.*—Where there is evidence to show that a married woman acted voluntarily in the commission of a felony, she may be found guilty, although the felony was committed in her husband's presence.—*SMITH'S CASE* (1842), Ir. Cir. Rep. 459.—*IR.*

*sumption applies.*—When husband & wife are both concerned in a highway robbery, the presence of the husband at the commission of the offence is only presumptive evidence of coercion exercised by him over the wife:—*Semble*: in a case of highway robbery, coercion by the husband is not a defence for the wife.—*R. v. STAPLETON* (1844), 10 Cr. & Pr. Cas. 93.—*IR.*

*f. Burglary—Presumption not applied.*—A prisoner & his wife were presented together on a charge of burglary. Both pleaded guilty & were convicted. On the question being afterwards raised whether the wife, as being presumed to have acted under the coercion of her husband was rightly convicted:—*Held*: conviction was right. The presumption which excuses a wife in criminal cases on the

the husband receiving & on their trial the wife was acquitted of the stealing because of the presumption that she had acted under her husband's coercion but yet the husband was convicted of the receiving from his wife:—*Held*: there was a stealing by the wife in fact & the presumption of law by which

ment was not a conviction affirmed.

*Semble*: where a wife steals goods at the instigation of her husband, he is himself guilty of stealing.—*R. v. BAILEY* (1864), 1 W. W. & A'B. 20.—*AUS.*

*h. Receiving stolen property—Presumption applied—Whether rebuttable.*—Subsequent acts of a woman who receives stolen goods from her husband are not evidence to show such independent activity on her part at the time of receiving the goods as will rebut the presumption that she was acting under the coercion of her husband.

*Qu.*: whether the presumption is conclusive.—*R. v. JOURDAIN & CROTTI* (1877), Knox, 465.—*AUS.*

*i. Each prisoner had been found in possession of a portion of the stolen property under circumstances from which the jury might infer that when the property was first received each prisoner knew that it was stolen. The question of coercion*

**391. — Wife punishable as well as husband.**—*R. v. CRUSE*, No. 301, *ante*.

**392. Uttering counterfeit coin—Presumption applied.**—A wife went from house to house uttering base coin. Her husband accompanied her, but remained outside:—*Held*: the wife acted under the husband's coercion.—*CONNOLLY'S CASE* (1820), 2 Lew. C. C. 229.

**393. ————.]—Husband & wife were jointly indicted for a misdemeanour in uttering counterfeit coin:—Held: the wife was entitled to an acquittal, as it appeared that she uttered the money in the presence of her husband.**

*Qu.*: whether there is any sound distinction in the rule as to coercion between felonies & misdemeanours.—*R. v. PRICE* (1837), 8 C. & P. 19.

**394. ————.]—M. was indicted for uttering counterfeit coin. It appeared that at the time of the commission of the offence she was in company with a man who went by the same name, & who was convicted at the last assizes of the offence. When prisoners were taken into custody the police constable addressed the female prisoner as the male prisoner's wife. The male prisoner denied the fact in the hearing & presence of the woman. M. since her committal had been confined of a child:—Held: under the circumstances, although the woman had not pleaded her coverture, & even although she had not asserted that she was married to the male prisoner when he stated she was not his wife, it was a question for the jury whether, taking the birth of the child & the whole circumstances, there was no evidence of the marriage, & as the jury thought there was, she would be acquitted.—*R. v. MCGINNES* (1870), 11 Cox, C. C. 391.**

**395. Possession of coining implements—Found in house occupied by husband & wife—Possession of husband presumed.**—*R. v. BOOBER*, No. 200, *ante*.

**396. Fraudulent conversion—Presumption applied.**—*R. v. SMITH*, No. 349, *ante*.

**397. Falsification of accounts—Presumption applied.**—*R. v. SMITH*, No. 349, *ante*.

**398. Perjury—No presumption.**—*R. v. DICKS*

of the wife by her husband was not left to the jury:—*Held*: the question of coercion should have been left to the jury, & they should have been told that they ought to acquit the wife if they found that she received the stolen property at the same time as her husband, unless they were satisfied that she did so voluntarily. The jury should have been told to acquit the wife if they found that she received the stolen property from her husband, even though she had at the time of receiving a guilty knowledge.—*R. v. MORTON* (1895), 21 V. L. R. 387.—*AUS.*

#### PART I. SECT. 5, SUB-SECT. 4.—B. (o).

*1. Whether presumption applicable to misdemeanours.*—When a husband & wife are jointly charged with the commission of an offence:—*Semble*: there is no presumption of compulsion on the husband's part in the case of a misdemeanour. In any case such presumption only arises in the case of the wife's acting in the husband's presence; & it is a question for the jury in each case whether compulsion was exercised or not.—*R. v. HALLITT* (1911), 45 L. T. 84.—*IR.*

*m. ————.]—The doctrine of coercion of married women in criminal cases applies equally to misdemeanours.*—*ANON.* (1841), Ir. Cir. Rep. 374.—*IR.*

**392 i. Uttering counterfeit coin—Presumption applied.**—*ANON.* (1841), Ir. Cir. Rep. 374.—*IR.*

*11 V. L. R. 776.—AUS.*

*g. Wife stealing—Husband receiving—How presumption applies.*—Where a wife & husband acted in concert for a theft the wife taking &

(1817), 1 Russell on Crimes & Misdemeanours, 8th ed., 100.

**399. Libel—Coercion no defence.]—R. v. LAWLEY (LADY) (1732), 2 Barn. K. B. 147; 94 E. R. 412.**

**Conspiracy—Husband & wife.]—See Nos. 835, 836, *post*.**

**400. — Husband & wife conspiring with others—Conspiracy to ruin trade—Presumption not applied.]—**The husband & wife & servants were indicted for a conspiracy to ruin the trade of prosecutor, who was the King's card-maker. The evidence against them was, that they had at several times given money to prosecutor's apprentices to put grease into the paste, which had spoiled the cards. But there was no account given, that ever more than one at a time were present, though it was proved they had all given money in their turns. It was objected, that this could not be a conspiracy, for two men might do the same thing without having any previous communication with one another:—*Held*: defts. being all of a family, & concerned in making of cards, it would amount to evidence of a conspiracy.—*R. v. COPE* (1719), 1 Stra. 144; 93 E. R. 438.

**401. — Conspiracy to defraud—Presumption applied.]—**A. & B., his wife, were indicted with C., for conspiring to defraud a railway co. An accident occurred upon the railway. A. wrote to the co. saying that B. & C. were injured by the accident, & demanding compensation. A surgeon went on behalf of the co. & found B. & C. in bed in separate rooms in the same house. A. was in the next room to that in which B. was lying. He received the surgeon & introduced him to B. B. detailed her injuries to the surgeon, & ascribed them to the accident. Neither B. nor C. was injured:—*Held*: B. must be presumed to have acted under the coercion of her husband, & was therefore entitled to an acquittal.—*R. v. DUNCAN* (1840), 13 J. P. 220.

**402. Keeping brothel—Husband & wife jointly indicted.]—**A husband & wife may be indicted jointly for keeping a brothel.—*R. v. WILLIAMS* (1711), 10 Mod. Rep. 63; 1 Salk. 384; 88 E. R. 626.

*Annotations:—Folld. R. v. Dixon* (1715), 10 Mod. Rep. 335. *Refd. R. v. Crofts* (1739), 2 Stra. 1120. *Mentd. R. v. Harvey* (1731), Sess. Cas. K. B. 122.

**403. Keeping gaming-house—Husband & wife jointly indicted.]—**An indictment will lie against a man & his wife jointly for keeping a gaming-

house.—*R. v. DIXON* (1716), 10 Mod. Rep. 335; 88 E. R. 753.

*Annotation:—Refd. R. v. Crofts* (1739), 7 Mod. Rep. 397.

**404. Selling gin—Married woman convicted.]—***R. v. CROFTS* (1739), 2 Stra. 1120; 7 Mod. Rep. 397; 93 E. R. 1071.

**405. Common scold—Married woman may be indicted.]—***R. v. FOXBY* (1704), 6 Mod. Rep. 178, 213; 1 Salk. 266; 87 E. R. 933, 965.

**406. Maintaining previous bastard—Order of justices—Married woman liable for failure to maintain.]—**A married woman may be committed for not maintaining her previous bastard, pursuant to an order of two justices.—*R. v. TAYLOR (LATE BENT)* (1765), 3 Burr. 1679; 97 E. R. 1043. *Annotation:—Refd. R. v. Bowen* (1793), Nolan, 186.

#### (d) Proof of Marriage.

**407. Indictment as wife sufficient.]—***R. v. KNIGHT*, No. 375, *ante*.

**408. Cohabitation & reputation may be sufficient.]—***R. v. ATKINSON*, No. 387, *ante*.

**409. —.]—**QUINN'S CASE (1825), 1 Lew. C. C. 1.

**410. —.]—**Where on the trial of a man & woman for larceny it appears by the evidence that they addressed each other as husband & wife, & passed & appeared as such, & were so spoken of by witnesses for the prosecution, it will be for the jury to say whether they are satisfied that they are in fact husband & wife, even though the woman pleaded to the indictment which described her as a "single woman."

In such a case a female prisoner ought not to be indicted as a single woman.—*R. v. WOODWARD* (1838), 8 C. & P. 561.

**411. — Even though marriage probably invalid.]—***R. v. GOOD*, No. 366, *ante*.

**412. —.]—***R. v. MCGINNIS*, No. 394, *ante*.

**413. — Evidence of actual marriage not essential.]—***R. v. TORPEY*, No. 346, *ante*.

**414. Cohabitation & reputation not sufficient—Evidence must be given to satisfy jury of marriage—Evidence of actual marriage not essential.]—**If a man & woman be jointly indicted for a larceny, the latter as a single woman, it is not sufficient to entitle her to an acquittal on the ground of coercion, to prove both jointly committed the offence, & that she had lived with the man for two years, & was reputed his wife; but such evidence must be given as to satisfy the jury that prisoners are in fact married persons, although it is not absolutely

**402 i. Keeping brothel—Husband & wife jointly indicted.]—**There may be joint conviction against husband & wife for keeping a house of ill-fame; the keeping has nothing to do with the ownership of the house, but with the management of it.—*R. v. WARREN* (1888), 16 O. R. 590.—**CAN.**

**n. — Wife only indicted—Effect of statute on presumption.]—**A married woman was indicted before the District Ct. for that she, "appearing, acting & behaving as the mistress of a certain house," unlawfully did keep, maintain, & use the said house as a common bawdy-house." The evidence showed that accused lived with her husband & three children in a certain dwelling-house, & used a room in an outhouse at the rear of the dwelling-house for purposes of prostitution, inviting men into it at night during a period of several months. The dwelling & outhouse were both the property of the husband. Beyond the fact that the husband lived with her in the dwelling, & was generally at home, there was no evidence that he knew of his wife's misconduct, & there was no evidence whatever that

the husband had by threats, or by personal violence, or in any other way coerced the accused into leading a life of prostitution. The District Judge, in summing up, told the jury that there was no evidence whatever that the accused was acting under the compulsion or coercion of her husband. The jury brought in a special verdict, viz.: (1) That the accused kept the room referred to for the purpose of prostitution; (2) that she was acting under the coercion of her husband; & (3) that she kept the room for the purpose aforesaid with the knowledge & consent of her husband. The Crown Prosecutor contended that the second finding was perverse, & the third not only perverse, but also no answer to the charge, & that a verdict of "Guilty" should be entered. The District Judge held that he was bound to accept the findings, & directed a verdict of "Not guilty" to be recorded, & discharged the accused:—*Held*: it appeared from the case that the jury, by the word "coercion," in the second finding, meant "compulsion" within the meaning of Criminal Code, s. 24, & in that finding they had disregarded the direction of the judge, & also the

want of evidence of such compulsion; but that, as the jury had found the legal excuse, & the special verdict was not insensible, judgment of acquittal had been rightly entered. The effect of Criminal Code, s. 24, was to put an end altogether to the doctrine of excuse on the ground of coercion by a husband; the jury had not found that the act was done under "compulsion" as defined by sect. 24; the second & third findings were therefore insensible & irrelevant.—*R. v. HOWARD* (1894), 13 N. Z. L. R. 619.—**N.Z.**

**o. Selling intoxicating liquor—Presumption applied.]—**Deft. was a married woman, & the sale of the liquor took place in the presence of her husband; but the evidence showed that she was the more active party, & she was the occupant of the house, in which the sale took place:—*Held*: having regard to R. S. O. 1887 (c. 194), s. 112 (2), even if the presumption that the sale was made through the compulsion of the husband had not been removed by the Code, s. 13, it would have been rebutted by the circumstances.—*R. v. MCGREGOR* (1895), 26 O. R. 115.—**CAN.**



*Sect. 5.—Criminal capacity: Sub-sect. 4, B. (d); sub-sect. 5. Sect. 6: Sub-sect. 1, A. (a) & (b).]* necessary to prove the actual marriage of the parties.—*R. v. HASSALL* (1826), 2 C. & P. 434.

**415. Mere cohabitation not sufficient.]**—*R. v. COURT*, No. 360, *ante*.

#### SUB-SECT. 5.—PRIVILEGED PERSONS.

**416. The Crown—Not subject to coercive power of court.]**—*COOKE'S CASE* (1660), 5 State Tr. 1077.

*Annotation:—Mentd. Crosthwaite v. Gardner* (1852), 18 Q. B. 640.

**417. —“The King can do no wrong.”]**—The maxim that “the King can do no wrong” is true in the sense that he cannot be sued civilly or criminally for a supposed wrong; that which the Sovereign does personally the law presumes will not be wrong (*ERLE, C.J.*).—*TOBIN v. R.* (1864), 16 C. B. N. S. 310; 4 New Rep. 274; 33 L. J. C. P. 199; 10 L. T. 762; 10 Jur. N. S. 1029; 12 W. R. 838; 2 Mar. L. C. 45; 143 E. R. 1148.

*Annotations:—Consd. Windsor & Annapolis Ry. v. R. & Western Counties Ry.* (1886), 11 App. Cas. 607. *Refd. Feather v. R.* (1865), 6 B. & S. 257; *Thomas v. R.* (1874), L. R. 10 Q. B. 31; *Nireaha Tamaki v. Baker*, [1901] A. C. 561; *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508; *Johnstone v. Pedlar*, [1921] 2 A. C. 262. *Mentd. Jamieson v. Downie*, [1923] A. C. 691.

*See, generally, CONSTITUTIONAL LAW, Vol. XI., pp. 518 et seq.*

**418. Foreign Sovereigns—Deposed, exiled, or fugitive in England.]**—*R. v. MARY, QUEEN OF SCOTS* (1586), 1 State Tr. 1161.

*See, also, ACTION, Vol. I., p. 48, Nos. 384-395.*

**Parliament.]**—*See PARLIAMENT.*

**Ambassadors.]**—*See CONSTITUTIONAL LAW, Vol. XI., pp. 536-539, Nos. 390-421.*

### SECT. 6.—DEGREES OF CRIMINAL LIABILITY.

#### SUB-SECT. 1.—PRINCIPALS AND ACCESSORIES.

##### A. When all are Principals.

##### (a) In General.

**419. Treason.]**—At common law where two conspire to commit treason, & one only executes it, both are traitors.—*THROGMORTON'S CASE* (1554), 1 Dyer, 98 b; 1 State Tr. 869; 73 E. R. 215.

*Annotation:—Refd. Williams' Case* (1819), 2 State Tr. 1085.

**420. —.]**—*ANON.* (1553), Ben. 14; 123 E. R. 236.

**421. —.]**—*REGICIDE'S CASE* (1660), 5 State Tr. 983; Kel. 12; 84 E. R. 1059.

**422. —.]**—If any person be in actual rebellion against the King, & another person, who really & actually was not in rebellion, does receive, harbour, comfort & conceal him that was such, a receiver is as much a traitor as he who indeed bore arms (*JEFFERIES, C.J.*).—*LISLE'S (LADY ALICE) CASE* (1685), 11 State Tr. 297; Post. 346.

*See, also, No. 431, post.*

#### PART I. SECT. 6, SUB-SECT. 1.—

##### A. (a).

**419 i. Treason.]**—A person who, at a meeting, seconds a resolution which contains such a statement as is provided in War Precaution Regs. 1915, Reg. 28, “likely to prejudice recruiting of any of H.M. Forces” is equally guilty of the offence with the mover, but that the chairman of a meeting who merely puts such a resolution to the vote of the meeting is not guilty of the offence.—*PEARCE v. JONES, SMITH v. JONES* (1917), 23 C. L. R. 438.—*AUS.*

**419 ii. —.]**—If men are engaged in a treasonable purpose, & other men act with them & forward that purpose, though they may not be acquainted with the treasonable intentions of the party whose acts they are furthering, they will be traitors in the contemplation of the law, though they be ignorant of the treasonable intent. So that if a man, or body of men, be engaged in a treasonable purpose, any man who associates himself with them, who affords them his assistance & aid, though he may be ignorant of the treasonable intent, he would be guilty

**423. — & trespass.]**—In trespass & treason, the highest & the lowest offences, there are not any accessories, but all are principals, but in case of felony & in case of death, etc., there may be accessories.—*ACCESSORY (NONE IN TREASON, ETC.)* (1612), 12 Co. Rep. 81; 77 E. R. 1359.

**424. —.]**—(1) On an indictment for falsely arresting a man by a certain warrant, & thereby extorting divers sums of money, knowing the said warrant to be forged:—*Qu.*: whether the forgery be matter of description or of aggravation only.

(2) A fact which would make one accessory in felony, in treason & in trespass makes him a principal (*HOLT, C.J.*).—*R. v. TRACY* (1703), 6 Mod. Rep. 30; 87 E. R. 795.

*Annotation:—Generally, Mentd. R. v. Daniell* (1704), 6 Mod. Rep. 99.

**Forgery.]**—*See Forgery Act, 1913 (c. 27), s. 11.*

**425. Misdemeanour.]**—*ACCESSORY (NONE IN TREASON, ETC.), No. 423, ante.*

**426. —.]**—*R. v. TRACY, No. 424, ante.*

**427. —.]**—If A. counsel & encourage B. to set fire to a malt-house, & B. attempt to set it on fire, both may be jointly indicted as principals for the misdemeanour of attempting to set the malt-house on fire, although A. was not present at the time of the attempt.—*R. v. CLAYTON* (1843), 1 Car. & Kir. 128.

*Annotation:—Apld. Gould v. Houghton*, [1921] 1 K. B. 509.

**428. —.]**—On an indictment for obtaining money, etc., under false pretences, a party who has concurred & assisted in the fraud may be convicted as principal, though not present at the time of making the pretence & obtaining the money.

In misdemeanours all parties are principals, whether present or not (*per CUR.*).—*MOLAND'S CASE* (1843), 2 Mood. C. C. 276, C. C. R.

*Annotation:—Apld. Gould v. Houghton*, [1921] 1 K. B. 509.

**429. —.]**—Prisoner & one J. were indicted for a misdemeanour in uttering a counterfeit coin. The uttering was effected by J. in the absence of prisoner, but the jury found that they were both engaged, on the evening on which the uttering took place, in the common purpose of uttering counterfeit shillings, & that, in pursuance of that common purpose J. uttered the coin specified in the indictment:—*Held*: prisoner was rightly convicted as a principal, there being no accessories in misdemeanour.—*GREENWOOD'S CASE* (1852), 2 Den. 453; 21 L. J. M. C. 127; 19 L. T. O. S. 191; 16 J. P. 356; 16 Jur. 390; 5 Cox, C. C. 521, C. C. R.

*Annotations:—Consd. Gould v. Houghton*, [1921] 1 K. B. 509. *Refd. R. v. Coney* (1882), 8 Q. B. D. 534.

**430. —.]**—B. was summoned before justices for aiding & abetting S. to obtain money by false pretences, & both S. & B. were committed to take their trial, S. on the charge of attempting to obtain money by false pretences, & B. on the charge of aiding & abetting S. to commit that offence. At sessions, an indictment against S. & B. for jointly attempting to obtain money by false pretences was preferred, without the leave required by Vexatious Indictments Act, 1859 (c. 17), & found

of high treason.—*R. v. O'DONOHUE* (1848), 7 State Tr. N. S. 1091.—*IR.*

**419 iii. —.]**—But in high treason all are principals; the man who incites to the commission of war, or any other species of treason, is held to be himself guilty & to stand in the same degree of guilt with the person who actually commits the crime of treason. He who incites to war, if war be levied, himself levies war within the meaning of the phrase, & according to the authority of the law.—*R. v. MEAGHER* (1848), 7 State Tr. N. S. 1091.—*IR.*

by the grand jury, upon which S. & B. were tried jointly, & S. acquitted & B. found guilty. At the trial the objection was taken, & overruled, that the indictment, having been preferred against B. for an offence upon which he had not been committed for trial, should be quashed; & after verdict another objection was taken & overruled, that S., the principal, having been acquitted, B., an aider & abettor, could not be found guilty:—*Held*: (1) sect. 1 of the Act was inapplicable, as that applied only to the offence of "obtaining money or other property by false pretences," & not to the offence of "attempting to obtain money or other property by false pretences"; (2) the second objection was untenable, as in misdemeanour all were principals.—*R. v. BURTON* (1875), 32 L. T. 539; 39 J. P. 532; 13 Cox, C. C. 71, C. C. R.

*Annotations*:—*As to* (2) *Consd.* *Gould v. Houghton*, [1921] 1 K. B. 509. *Refd.* *R. v. De Marney* (1906), 71 J. P. 14; *Du Cros v. Lambourne*, [1907] 1 K. B. 40; *Morris v. Tolman*, [1923] 1 K. B. 166.

**431.** —[—]—An accessory before the fact to a misdemeanour, which includes offences punishable on summary conviction, is for the purpose of conviction to be regarded as a principal offender.

Applts., wholesale dealers, were charged with aiding & abetting G., a customer whom they had supplied with an article of food, in the offence, under Sale of Food & Drugs Acts, to which the latter pleaded guilty, of selling that article to resp., it being adulterated, but sold by G. as received from applts. It had been purchased by resp. from G. for test purposes, & by Sale of Food & Drugs Act, 1899 (c. 51), s. 19, a "prosecution under" those Acts in the above circumstances could not be instituted after the expiration of 28 days after the purchase. The proceedings against applts. had been instituted more than 28 days after:—*Held*: as applts. were accessories to G.'s offence, which was a misdemeanour, they were to be regarded as principals, & as such were entitled to the benefit of sect. 19 of the Act of 1899, & accordingly the proceedings against them were out of time.

For some purposes of indictment & procedure the law recognises accessories as such, in cases of high treason even, & I am of opinion that for similar purposes they are to be recognised in cases of misdemeanour (*DARLING, J.*).—*GOULD & Co. v. HOUGHTON*, [1921] 1 K. B. 509; 90 L. J. K. B. 369; 124 L. T. 566; 85 J. P. 93; 37 T. L. R. 291; 65 Sol. Jo. 344; 26 Cox, C. C. 693; 19 L. G. R. 85, D. C.

#### (b) Partial Presence.

**432. Presence during whole transaction not essential—Forgery.**—If several combine to forge an instrument, & each executes by himself a distinct part of the forgery, & they are not together when the instrument is completed, they are nevertheless all guilty as principals.—*BINGLEY'S CASE* (1821), Russ. & Ry. 446, C. C. R.

*Annotations*:—*Apprvd.* *Kirkwood's Case* (1831), 1 Mood. C. C. 304. *Refd.* *Dade's Case* (1831), 1 Mood. C. C. 307.

**433.** —[—]—**Ignorance as to other persons engaged in the enterprise.**—If several make distinct parts of a forged instrument, each is a principal, though he does not know by whom the other parts are executed, & though it is finished

by one alone, in the absence of the others.—*KIRKWOOD'S CASE* (1831), 1 Mood. C. C. 304, C. C. R.

**434.** —[—]—[—]—The makers of the paper & plate respectively for the purpose of forging a note, afterwards filled up by a third person, are principals in the forgery with that person, though each executed his part in the absence of the others, & without knowing by whom the other parts are executed.—*DADE'S CASE* (1831), 1 Mood. C. C. 307, C. C. R.

**435.** —[—]—**Larceny.**—A., who intended to sell his mare, sent his servant with her to M. fair, the servant having no authority either to sell the mare or deal with her in any way. Prisoner asked the servant the price, & desired the servant to trot her out, & prisoner then went to two men, & having talked to them went away. These two men then came up & persuaded the servant to exchange the mare for a horse they had, & they would give £24 for the chop. They changed the saddles, & without giving any money rode away with the mare, leaving the servant with a horse of little value. Four days after prisoner sold the mare at B. stating that he had got her in a chop at M. fair:—*Held*: as the servant had the mere charge of the mare, & had no right to deal with the property in her, prisoner ought to be convicted of stealing her, provided that the jury were satisfied that prisoner was in league with the two other men, & that the three, by a fraud in which each of them was to take his part, & did take his part, induced the servant to part with the possession of the mare under colour of an exchange, but they intending all the while to steal the mare.—*R. v. SHEPPARD* (1830), 9 C. & P. 121.

*Annotation*:—*Refd.* *R. v. Middleton* (1873), L. R. 2 C. C. R. 38.

**436.** —[—]—[—]—Where the evidence against two prisoners indicted for stealing oats was that A. took the oats from prosecutor's sacks & placed them under a cart, & B. came up a few minutes after & said "It is all right," & put the oats in a cart & took them to his house; on the objection that there was no evidence to connect the latter with the original taking:—*Held*: (1) both were principals in the larceny, & B. was not a receiver; (2) as the evidence showed one transaction in which both prisoners concurred, & both had been present at some parts of the transaction, both could be convicted as principals in the larceny.—*R. v. KELLY & M'CARTHY* (1847), 2 Car. & Kir. 379; 2 Cox, C. C. 171.

**437.** —[—]—**Burglary.**—(1) A room door was latched, & one person lifted the latch & entered the room & concealed himself for the purpose of committing a robbery there, which he afterwards accomplished. Two other persons were present with him at the time he lifted the latch, for the purpose of assisting him to enter, & screened him from observation by opening an umbrella:—*Held*: the two were in law parties to the breaking & entering, & were answerable for the robbery which took place afterwards, though they were not near the spot at the time when it was perpetrated.

(2) In burglary, where the breaking is one night, & the entry the night after, a person present at the breaking, though not present at the entering, is in law guilty of the whole offence.—*R. v. JORDAN* (1836), 7 C. & P. 432; 3 Nev. & M. M. C. 443.

*Annotations*:—*Distd.* *R. v. Tuckwell* (1841), Car. & M. 215. *Refd.* *Saqui & Lawrence v. Stearns* (1910), 103 L. T. 583.

#### PART I. SECT. 6, SUB-SECT. 1.— A. (b).

p. *Presence during whole transaction not essential—False pretences.*—A. & B. go together to C. A., in the presence of B., says to C., "We have a

bit of gold for sale." Shortly afterwards, both being together, A. produced a bag of metal resembling gold & B. cleaned it, taking away some sand, etc., from the metal. C. then bought the whole supposing it to be gold &

paid for it as such. One-third of the metal was brass:—*Held*: A. & B. were guilty of obtaining money under false pretences.—*R. v. ENSWORTH & COCORAN* (1854), 1 N. S. W. S. C. R. 25.—*AUS.*



*Sect. 6.—Degrees of criminal liability: Sub-sect. 2, A.]*

**SUB-SECT. 2.—PRINCIPALS IN THE FIRST DEGREE.**

**A. Liability for Acts done by Agents.**

*See Sect. 3, ante.*

**438. When agent is innocent—Larceny.]—**

(1) If a man does, by means of an innocent agent, an act which amounts to a felony, the employer, & not the agent, is accountable for the act.

Where a prisoner was indicted in one count, for stealing from the mine of one H. coal, the property of H., & in the same count, for stealing from the mines of thirty other proprietors coal, the property of each of such other proprietors, & it appeared that all the coal so alleged to have been stolen had been raised at one shaft:—*Held*: (2) prosecutor could not be called upon to elect on which charge he would go to the jury; (3) although, for the sake of convenience in trying prisoner, the judge might direct the jury to confine their attention to one particular charge, yet prosecutor was entitled to give evidence in support of all the charges laid in the indictment; (4) proof of such charges might be relied on, in order to show a felonious intent, as long as coal was gotten from one shaft, it was continuous taking, though the working was carried on by means of different levels & cuttings, & into the lands of different people.—*R. v. BLEASDALE* (1848), 2 Car. & Kir. 765.

*Annotations:—As to (2) Refd. R. v. Rearden* (1864), 4 F. & F. 76; *R. v. Henwood* (1870), 22 L. T. 486. *As to (4) Refd. R. v. Firth* (1869), L. R. 1 C. C. R. 172.

**439. ———.]—**(1) If A., by letter, desire B. an innocent agent, to write the name of "W." to a receipt of a Post Office order, & the innocent agent do it, believing that he is authorised to do it, A. is a principal in this forgery, & it makes no difference that by the letter A. says to B. that he is "at liberty" to sign the name of W. & does not in express words direct him to do so.

(2) If A. before the date of the letter sent to B. received by post a letter of an earlier date purporting to have come from W. & bearing postmarks of earlier date, from which it may be inferred that he was authorised to make use of the name of W., A.'s counsel, on his trial for the forgery, is entitled to state the contents of that letter, & to give it in evidence, with a view of showing that A. *bonâ fide* believed that he had the authority of W. for directing B. to sign the name of W. to the receipt.—*R. v. CLIFFORD* (1845), 2 Car. & Kir. 202.

**440. ——— State of mind of agent question for jury.]—**Prisoner induced a child, of the age of nine years, to rob his father's till, & give him the money. On an indictment as principal for this offence, it is a question for the jury whether the child was an innocent agent, or *particeps criminis*, & if the latter, prisoner must be acquitted.—*R. v. MANLEY* (1844), 3 L. T. O. S. 22; 1 Cox, C. C. 104.

**441. ——— Forgery.]—**Where prisoner utters an instrument with a forged indorsement or other writing, & a short time previously the instrument is shown to have been in his possession without such indorsement, etc., there is some evidence of forgery, although there be no proof of the indorsement being in prisoner's handwriting, or even though it be shown that he is unable to write.

Although prisoner might not be able to write

himself, yet if he got any one in the street to write his name, he is as much guilty of forgery as if he wrote it himself (*ERLE, J.*).—*R. v. JAMES* (1849), 4 Cox, C. C. 90.

**442. ——— Agent to more than one principal.]—**(1) Three prisoners were indicted for feloniously engraving & making two parts of a promissory note. The indictment was framed on Forgery Act, 1830 (c. 66), s. 19. The plates were engraved by one who was an innocent agent in the transaction. It appeared that two of the prisoners only were present at the time when the order was given for the engraving of the plates, but they said they were employed to get it done by a third person, & there was some evidence to connect the third prisoner with the other two in subsequent parts of the transaction:—*Held*: in order to find all three guilty, the jury must be satisfied that they jointly employed the engraver, but it was not necessary that they should all be present when the order was given, as it would be sufficient if one first communicated with the other two, & that all three concurred in the employment of the engraver.

(2) *Seemle*: if prisoners, by means of the engraver, caused the plates to be engraved, they would be within the provisions of the statute, whether they knew the nature of the instrument engraved or not.—*R. v. MAZEAU* (1840), 9 C. & P. 676.

*Annotation:—As to (1) Refd. R. v. Banner* (1844), 1 Car. & Kir. 295.

**443. ———.]—**Where two persons, one of whom was resident in England & the other abroad, were indicted for making & engraving a plate for the purposes of forgery, & it was proved that the one resident in England gave the order for the manufacture of the plate to an innocent agent, resident in England, who never saw the other until it was completed:—*Held*: they were both correctly charged as principals.

If a person does an act with a guilty intent, he is not the agent of any one. If he does it innocently, he is the agent of some person or persons, & if two have agreed to employ him, he is the agent of both. It makes no difference whether they were in England or elsewhere. When they have once agreed to do the thing, the act of one is the act of all, although the rest be absent at the time (*ALDERSON, B.*).—*R. v. BULL & SCHMIDT* (1845), 7 L. T. O. S. 7; 1 Cox, C. C. 281.

**444. ——— Uttering forged note.]—**(1) If A. knowingly delivers a forged bank note to B., who knowingly utters it accordingly, prisoner who delivered such note to be put off may be convicted of having disposed & put away the same on Bank of England Act, 1741 (c. 13), s. 11.

(2) If B. had been innocent & had not known that the note was forged the delivery of it by A. to B. would have been a guilty uttering of it by A. according to the doctrine that when an innocent person is employed for a criminal purpose the employer must be answerable (*ROOKE, J.*).—*R. v. PALMER & HUDSON* (1804), 1 Bos. & P. N. R. 96; *Russ. & Ry.* 72; 2 Leach, 978; 127 E. R. 395, C. C. R.

**445. ———.]—**Giving a forged note to an innocent agent, or an accomplice, that he may pass it, is a disposing of, & putting it away by prisoner, although not present at the time of the actual passing.

**PART I. SECT. 6, SUB-SECT. 2.—A.**

**438 i. When agent is innocent—Larceny.]—**Prisoner having been indicted for stealing a cow it appeared

that he sold her while in the public pound to A., & gave him a receipt for the purchase-money to show the pound-keeper. A. thereupon in pursuance of such sale took the animal

away:—*Held*: the taking by A. was in effect the taking by the prisoner.—*R. v. RYAN* (1868), 8 N. S. W. S. C. R. 22.—**AUS.**

If the agent knew when he offered the note to a third person that it was a forged note, prisoner can not be considered as principal, but if the agent was employed by prisoner as an innocent instrument, being ignorant that the note was a forged one, it will then be the act of prisoner, & he may properly be convicted (VAUGHAN, B.).—GILES'S CASE (1827), 1 Mood. C. C. 166, C. C. R.

See Forgery Act, 1913 (c. 27).

**446. — Obtaining by false pretences.]**—Deft., knowing that certain moneys were due to B., fraudulently induced a boy, by the promise of a penny, to fetch it, saying, "Go to the payable & fetch B.'s money." The boy innocently went, & having asked for B.'s payable money, obtained it, & afterwards handed it over to deft. The person paying the money would not have parted with it if the boy had not said he was sent for it, & if he had not believed that the boy was authorised by B. to receive it:—*Held*: (1) deft. was indictable for obtaining the money by the false pretence that the boy was authorised to receive it; (2) the conviction would be quashed upon the ground that such pretence was not alleged in the indictment.

A person putting in motion an innocent agent is responsible for his representations (COCKBURN, C.J.).—*R. v. BUTCHER* (1858), Bell, C. C. 6; 28 L. J. M. C. 14; 32 L. T. O. S. 110; 22 J. P. 739; 4 Jur. N. S. 1155; 7 W. R. 38; 8 Cox, C. C. 77, C. C. R.

**447. — Falsification of accounts.]**—B., a collector in the employment of N., collected on Feb. 22 from S. £8 14s. 10d. due to N. The ordinary course of business was for B., at the end of each day, to account to E., N.'s cash clerk, for money collected during the day, E.'s duty being to enter payments accounted for by B. in the cash book. On the evening of Feb. 22, B. gave E. a slip of paper on which he had written "S. on account £5," which E. copied into the cash book, believing it represented the whole amount collected by B. from S.:—*Held*: B. was rightly convicted under Falsification of Accounts Act, 1875 (c. 24), s. 1.—*R. v. BUTT* (1884), 51 L. T. 607; 49 J. P. 233; 1 T. L. R. 103; 15 Cox, C. C. 564, C. C. R.

Annotation:—*Consd. R. v. Olphant*, [1905] 2 K. B. 67.

**448. — Inciting to arson.]**—C. incited H., a girl of fourteen of sufficient understanding for her years, to set fire to a dwelling-house, which C., on behalf of his son, the owner, had let to S. C. was entitled to dower out of the house but no dower was assigned. H. was indicted for maliciously setting fire to a dwelling-house in the possession of S., & C. as an accessory before the fact:—*Held*: (1) C. had no such interest in the house as would have cleared her of the felony; (2) if she had had such an interest, H., who acted by her directions, could not have been guilty of felony.

(3) *Semble*: if C. had employed a child not at years of discretion so that the child was necessarily

innocent C. must have been indicted as the principal.—*HARRIS'S CASE* (1753), Fost. 113.

**449. — Murder by poisoning.]**—A woman after she had two daughters by her husband, eloped from him & lived with another man; & afterwards one of her daughters came to her, & she asked her how her father was, to which her daughter answered that he had a cold. The wife replied, "Here is a good powder for him, give it him in his posset," & on this the daughter carried home the powder, & told all this that her mother had said to her to her other sister, who in her absence gave the powder to her father in his posset, of which he died:—*Held*: the wife was principal in the murder, & also the man with whom she ran away, he being proved to be advising in the poison; but the two daughters were in no fault, they both being ignorant of the poison.—*ANON.* (circa 1634), Kel. 53; 84 E. R. 1079.

**450. — Poison administered by unauthorised agent.]**—Prisoner was indicted for the murder of her infant child by poison. It appeared that she purchased a bottle of laudanum, & directed the person who had the care of the child to give it a teaspoonful every night. That person did not do so, but put the bottle on the mantelpiece, where another little child found it, & gave part of the contents to prisoner's child, who, soon after, died:—*Held*: the administering of the laudanum by the child was, under all the circumstances of the case, as much, in point of law, an administering by prisoner as if she had herself actually administered it with her own hand.—*R. v. MICHAEL* (1840), 9 C. & P. 356; 2 Mood. C. C. 120, C. C. R.

**451. — Poison administered to unintended person.]**—(1) If A. intending to kill his wife gives her a poisoned apple, & she, being ignorant of it, gives it to a child against whom A. never meant any harm, & against his will & persuasion, & the child eats it & dies, this is murder in A. & a poisoning by him, but the wife, because ignorant, is not guilty.

(2) If A. persuades B. to poison C., & B. accordingly gives poison to C. who eats part of it, & gives the rest to D. who is killed by it, A. is not accessory to the murder of D. because it was not the direct & immediate effect of the act done in pursuance of A.'s command, but happened accidentally through the act of C. to which A. was no way privy, & his command shall not be carried over to any other than to the person intended by him.—*R. v. SAUNDERS & ARCHER* (1575), 2 Plowd. 473; Fost. 371; 75 E. R. 706.

**452. When agent acts for the purpose of detection of principal—Making die—For counterfeit money.]**—A. was indicted as a principal for feloniously making a die which would impress the resemblance of the obverse side of a shilling. A. had gone to a die-sinker & ordered four dies of the size of a shilling to be made, stating them to be for two whist clubs. One die was to be exactly like

**446 i. — Obtaining by false pretences.]**—A. who knowingly employs an innocent agent to obtain money for a spurious note is guilty of obtaining money under false pretences, & the information may charge the false pretences to have been made by A.—*R. v. N. S. W. S. C. R.*

**g. — Posting obscene letters.]**—By Act No. 1128 (Post Office Act), s. 118, it is provided that "If any person knowingly puts into any post office in V. any letter packet parcel or newspaper bearing any indecent obscene profane or libellous address signature marks words or designs or

containing any indecent or obscene print photograph lithograph writing engraving book or card or other indecent or obscene article he shall be liable to a penalty not less than five nor exceeding fifty pounds":—*Held*: a person may be convicted under this sect. for causing another person to put an indecent letter into the post office.—*LOMAX v. WILSON* (1893), 19 V. L. R. 404.—*AUS.*

**r. — Gambling transactions in stocks.]**—A broker who merely acts as such for two parties, one a buyer & the other a seller, without having any pecuniary interest in the transaction beyond his fixed commission, &

without any guilty knowledge on his part of the intention of the contracting parties to gamble in stocks or merchandise, is not liable to prosecution under the criminal code of Canada, s. 201 (a) & (b), nor as accessory under sect. 61.—*R. v. DOWN* (1899), Q. R. 17 S. C. 67.—*CAN.*

**s. Instigation of principal.]**—Applt. was tried for murder & found guilty. The victim had been killed by applt.'s son at the instigation of his father. The son, having had his trial previously, had been found guilty of manslaughter:—*Held*: applt. could be convicted of murder.—*MILLARD v. R.*, [1921] 62 S. C. R. 21; 59 D. L. R. 34.—*CAN.*

*Sect. 6.—Degrees of criminal liability: Sub-sect. 2, A., B. & C.; sub-sect. 3, A. (a) i.]*

the obverse side of a shilling, another with an inscription, a third exactly like the reverse side of a shilling, & the fourth with an inscription. Before making them, the die-sinker communicated with the officers of the Mint, who directed him to execute prisoner's order, which he did, & from these counterfeit shillings could be coined:—*Held*: A. was rightly indicted for the felony as a principal.—*R. v. BANNEN* (1844), 1 Car. & Kir. 295; 2 Mood. C. C. 309; 8 J. P. 628, C. C. R.

*Annotation*:—*Consd. R. v. Valler, Eurico, & Harrison* (1844), 1 Cox, C. C. 84.

**453.** ————*]*—A party employed to engrave a plate for the purpose of forgery on a foreign Govt. communicated with the consul of

persons to make the plate:—*Held*: those who actually engraved it were to be assumed, in the absence of evidence to the contrary, to be innocent agents, & the parties who had originally given the order were correctly indicted as principals in the forgery.—*R. v. VALLER, EURICO & HARRISON* (1844), 4 L. T. O. S. 35; 1 Cox, C. C. 84.

*See Forgery Act, 1913 (c. 24).*

**454. When agent is insane—Murder—Act done at instigation of procurer of act.]**—If A. puts a sword into the hand of a madman & bids him kill B. with it, & then A. goeth away, & the madman kills B. with the sword as A. commanded him, this is murder in A. though absent, & he is principal.—*ANON. (circa 1634)*, Kel. 53; 84 E. R. 1079.

**455.** ————*]*—**Act done with concurrence of principal.]**—A. count in an indictment charged A. with the murder of B., & also charged C. & D. with being present, aiding & abetting A. in the commission of the murder. It appeared that A. was an insane person:—*Held*: (1) C. & D. could not be convicted on this count.

A., who was insane, collected a number of persons together who armed themselves, having a common purpose of resisting the lawfully constituted authorities, A. having declared that he would cut down any constables who came against him. A., in the presence of C. & D., two of the persons of his party, afterwards shot an assistant of a constable who came to apprehend A. under a warrant:—*Held*: C. & D. were guilty of murder as principals in the first degree, & any apprehension that C. & D. had of personal danger to themselves from A. was no ground of defence for continuing with him after he had so declared his purpose; (3) it was no ground of defence, that A. & his party had no distinct or particular object in view

when they assembled together & armed themselves.

—*R. v. TYLER* (1838), 8 C. & P. 616.

*Annotation*:—*As to* (1) *Reid. R. v. Downing & Powys* (1845), 1 Cox, C. C. 156.

**Acts done through guilty agent.]**—*See Sub-sect. 4, E., post.*

—**Concealment of birth.]**—*See Part XXXIII., Sect. 12, post.*

*B. When actual Perpetrator of Act is uncertain.*

**456. All are guilty as principals in first degree—Murder.]**—*SISSINGHURST HOUSE CASE* (1673), 1 Hale, P. C. 462.

**457.** ————*]*—A. & B. indicted for the murder of C. by shooting. In the first count A. was charged as principal in the first degree, B. as present, aiding & abetting him. In the second count B. as principal in the first degree, A. as aiding & abetting. The jury convicted both, but said, that they were not satisfied as to which fired:—*Held*: (1) the jury were not bound to find prisoners guilty of one or other of the counts only; (2) notwithstanding the word "afterwards" in the second count both the counts related substantially to the same person killed & to one killing, & might have been transposed without any alteration of time or meaning.—*R. v. DOWNING* (1845), 1 Den. 52; 2 Car. & Kir. 382; 9 J. P. 166; 1 Cox, C. C. 156, C. C. R.

*Annotation*:—*As to* (1) *Reid. Campbell & Haynes v. R.* (1847), 2 Cox, C. C. 463.

**458.** ————**Manslaughter.]**—When two or more are charged with murder, & one of them has received provocation, as a blow, which would reduce homicide to manslaughter, & it cannot be proved which of them inflicted the fatal blow, neither of them can be convicted of murder, without proof of a common design to inflict the homicidal act; nor of manslaughter without proof of a common design to inflict unlawful violence.

One of two men being struck by a third, the other incited him to strike in return; & after the lapse of several minutes, the assailant having gone away, both pursued him with that purpose, & it appeared that, without any previous fighting, he was knocked down, & that then one or other of them, it could not be proved which, kicked him in the eye with a heavy iron shod boot, causing his death:—*Held*: neither of them was guilty of murder, there being no evidence of a common design to kill, or to inflict murderous or felonious violence, but both were guilty of manslaughter.—*R. v. TURNER* (1864), 4 F. & F. 339.

**459.** ————**By negligence.]**—A., B. & C. went into a field in proximity to certain roads & houses, taking with them a rifle which would be

#### PART I. SECT. 6, SUB-SECT. 2.—B.

**456 i. All are guilty as principals in first degree—Murder.]**—The prisoner was rightly convicted of murder, as he & the others were engaged in the commission of a felony, & evidently determined to affect their object at all hazards, & although the prisoner personally might not have inflicted the fatal wound.—*R. v. MOGAR* (1850), 1 Legge, 655.—**AUS.**

**456 ii.** ————*]*—Where several accused persons struck the deceased several blows, one of which only was fatal, & it was not found who struck the fatal blow:—*Held*: in the circumstances, it could not be said that those who did not strike the fatal blow contemplated the likelihood of such a blow being struck by the others in prosecution of the common object, & they were all guilty under Penal Code, s. 326, & not under sect. 302.—*GOURIDAS NAMASUDRA v. R.* (1908), 1 L. R. 36 Calc. 659.—**IND.**

**456 iii.** ————*]*—In a trial of husband & wife for murder of their infant son, the medical evidence was that death had been caused by the infliction of external violence causing fracture of the skull. The jury were charged, (1) if they were satisfied that the violence had been the criminal act of one of the prisoners, that was not sufficient to enable them to bring in a verdict of guilty against both, unless they found more evidence of concurrence on the part of the other spouse than mere presence or subsequent silence; (2) if there were no such evidence of concurrence, & there was no satisfactory evidence to prove which of the panels inflicted the violence, then the jury must find the charge not proven against either.—*H.M. ADVOCATE v. ROBERTSON* (1896), 2 Adam, 92.—**SCOT.**

**458 i.** ————**Manslaughter.]**—In an indictment against three persons for culpable homicide of a girl killed by a

single rifle shot, & for culpable & reckless discharge of loaded firearms in the direction of a public place to the alarm & danger of the lieges—objections repelled (1) as the alleged culpability consisted in reckless firing, & it was not stated by whom the shot was fired, there could not be responsibility on the part of any one of the panels for the recklessness of another:—*Held*: if two or more persons join in reckless firing in the direction of a public place & one of the lieges is killed, although it is not proved by which of the party shot was fired, all are guilty of culpable homicide.—*H.M. ADVOCATE v. BARBIER CAMPBELL & DUNN* (1907), 5 Irv. 482; 40 Sc. Jur.

**t.** ————**Unlawful wounding.]**—Two persons were indicted for assaulting & putting the prosecutor in bodily fear, & stealing money from his person, & immediately afterwards feloniously wounding him:—*Held*: there being

deadly at a mile, for the purpose of practising firing with it. B. placed a board, which was handed to him by A., in the presence of C., in a tree in the field as a target. All three fired shots directed at the board so placed, from a distance of about 100 yds. No precautions of any kind were taken to prevent danger from such firing. One of the shots thus fired by one, though it was not proved by which one of them, killed a boy in a tree in a garden near the field, at a spot distant 393 yds. from the firing point. A., B. & C., were all found guilty by a jury of manslaughter:—*Held*: A., B. & C., had been guilty of a breach of duty in firing at the spot in question, without taking proper precautions to prevent injury to others, & were rightly convicted of manslaughter.—*R. v. SALMON* (1880), 6 Q. B. D. 79; 50 L. J. M. C. 25; 43 L. T. 573; 45 J. P. 270; 29 W. R. 246; 14 Cox, C. C. 494, C. C. R.

**460. — Robbery with violence.**—On an indictment for wounding with intent to do grievous bodily harm, it appeared that two persons, one of whom was prisoner, attacked & wounded prosecutor, & robbed him; it was not proved which of the two persons inflicted the wound:—*Held*: (1) if prisoner inflicted the wound on prosecutor with intent to rob him, he having at the same time an intent to do him grievous bodily harm to effectuate his intention of robbing, he ought to be convicted on this indictment; (2) even if prisoner's was not the hand that inflicted the wound, he ought to be convicted on this indictment, if the jury were satisfied that the two persons were engaged in the common purpose of robbing prosecutor, & that the other person's was the hand which inflicted the wound.—*R. v. BOWEN* (1841), Car. & M. 149.

**461. — Trespass in pursuit of game.**—Where applt. & another man were seen standing on a highway & looking through a hole in a hedge, no one else being near, & a gun was heard to be fired, & a dead partridge recently killed was found in the adjoining field within eighteen yards of the fence:—*Held*: the magistrates were right in convicting him for unlawfully committing a trespass on the highway in pursuit of game.

There was evidence that applt. was with others with the joint & common purpose of killing game, & that game was killed, & that being so, he is liable (ERLE, C.J.).—*MAYHEW v. WARDLEY* (1863),

evidence that both prisoners took part in the transaction, although the evidence of wounding was stronger against one prisoner than the other, yet both might be found guilty of unlawfully wounding upon the indictment.—*It. v. WILLIAMS & FERGUSON* (1877), 3 C. A. 370; 2 J. R. N. S. 42.—N.Z.

**a. — Affray.**—In an affray specific evidence as to the acts of each fighter cannot be expected, but only general evidence as to the accused taking part in it, & persons who, as in this case, punted the boats on which the fight took place, & in whose interests the fight on the boats took place, were held to be just as blame-worthy as the men who struck the blows.—*MOHER (SHEIKH) v. R.* (1893), 1 L. R. 21 Cal. 392.—IND.

**b. — Selling intoxicating liquor.**—The principal may be convicted under Canada Temperance Act for selling liquor, although his agent who actually made the sale is unknown, & therefore cannot be convicted.—*Ex p. JOHNSON* (1908), 39 N. B. R. 73.—CAN.

**c. — Trespass in pursuit of game.**—Four panels, convicted of aggravated assault on a gamekeeper. Judge directed jury that all had gone out for a night's sport, all are present

14 C. B. N. S. 550; 2 New Rep. 325; 8 L. T. 504; 143 E. R. 561.

*Annotations*:—*Reid. R. v. Littlechild* (1871), L. R. 6 Q. B. 293; *Pratt v. Martin* (1911), 27 T. L. R. 377.

**C. When Actual Perpetrator of Act is not present.**

**462. Poison procured by accused—Poison taken in absence of accused.**—(1) He who maliciously & with intent to kill procures another to drink poison, is a principal murderer, although he is not present at the time of the taking the poison.

(2) The plea *auterfois acquit* is a good plea only when the acquittal is upon an indictment sufficient in law.

(3) If a man be convicted either by verdict or by confession upon an insufficient indictment, & no judgment is given thereon, he may be again indicted & arraigned.—*VAUX'S CASE* (1591), 4 Co. Rep. 44 a; 2 Hale, P. C. 248; 76 E. R. 992.

*Annotations*:—*As to* (2) *Consd. R. v. Drury* (1849), 3 Cox, C. C. 544. *Reid. Jones v. Glvin* (1713), Gilb. 185; *R. v. Wildey* (1813), 1 M. & S. 183; *Gray v. R.* (1844), 6 State Tr. N. S. 117. *As to* (3) *Consd. Willmott v. Tiler* (1701), 12 Mod. Rep. 448; *R. v. Wildey* (1813), 1 M. & S. 183. *Reid. Wrote v. Wiggles* (1591), 4 Co. Rep. 45 b; *R. v. Aylett* (1785), 1 Term Rep. 63; *R. v. Drury* (1849), 18 L. J. M. C. 189. *Generally, Mentd. Gardiner v. Spurdant* (1617), Cro. Jac. 438; *R. v. Rhodes & Cole* (1703), Ld. Raym. 886; *Conway & Lynch v. R.* (1845), 5 L. T. O. S. 458.

### SUB-SECT. 3.—PRINCIPALS IN THE SECOND DEGREE.

#### A. Presence.

##### (a) Actual Presence.

##### i. Assistance before Act.

**463. Uttering forged order—Absence of confederate at time of uttering.**—If several plan the uttering of a forged order for payment of money, & it is uttered accordingly by one in the absence of the others, the actual utterer is alone the principal.—*BADCOCK & BRADY'S CASE* (1813), Russ. & Ry. 249, C. C. R.

**464. Admission of thief to house by servant—Absence of servant at time of theft.**—A servant let a person into his master's house on a Saturday afternoon, & concealed him there all night, in order that he might rob the house; & on the Sunday morning left the premises in pursuance of the previous arrangement. The man in the servant's absence broke into the bedroom of the

—*Supplying food.*—The supplying of food to a person about to commit a crime is not necessarily an abetment of the crime; but if food were supplied in order that the criminal might go on a journey to the intended scene of the crime, or conceal himself while waiting for an opportunity to commit the crime, the supplying of food would be in order to facilitate the commission of the crime & might facilitate it.—*Re LINGAM RAMANNA* (1880), 1 L. R. 2 Mad. 137.—IND.

**f. — Forgery.**—To prepare, in conjunction with others, a copy of an intended false document, & to buy a stamped paper for the purpose of writing such false document, & to ask for information as to a fact to be inserted in such false document, do not constitute forgery nor an attempt to commit forgery under the Penal Code, but are facts which would support a conviction for abetment of forgery as being acts done to facilitate the commission of the offence.—*R. v. PADALA VENKATASAMI* (1881), 1 L. R. 3 Mad. 4.—IND.

**g. Attempt to steal—Absent at time of attempt.**—Prisoner was convicted of unlawfully attempting to steal the goods of one G. It appeared

when the first violence is committed & where one is seized, the others come to his assistance, & all are apprehended together. Where all persons are similarly armed & it is not proved by whose hand the most severe injury was inflicted, three cannot be acquitted because another & different injury is done by the fourth. This is an assault, committed in prosecution of an unlawful purpose in which all were engaged & therefore all are guilty, though it is for jury to say if they are so in equal degree.—*H.M. ADVOCATE v. SWANSTON* (1836), 1 Swin. 54 at p. 60.—SCOT.

### PART I. SECT. 6, SUB-SECT. 2.—C.

**d. Trespass—Causing others to build on land.**—A man may be guilty of criminal trespass on the land of another without ever personally setting foot on the land, if, for example, he causes others to build on the land against the wishes & in spite of the protest of the owner of the land.—*R. v. GHASI* (1917), 1 L. R. 39 All. 722.—IND.

### PART I. SECT. 6, SUB-SECT. 3.—

#### A. (a) i.

##### e. Facilitating commission of crime

*Sect. 6.—Degrees of criminal liability: Sub-sect. 3, A. (a) i. & ii. & (b).]*

master & stole the contents of his cash-box:—*Held*: the man who took the property from the cash-box was rightly charged as a thief, & the servant who let him into the house as an accessory before the fact.—*R. v. TUCKWELL* (1841), *Car. & M.* 215.

465. ———.]—If A. unlocks a door of a room of which he has the key, in order to allow B. to commit a larceny in it, & A. then goes away, & B. in his absence, enters the room & removes articles out of it, A. is not a principal in the larceny.—*R. v. JEFFRIES & BRYANT* (1848), 3 *Cox, C. C.* 85.

466. ———.]—A policy of insurance upon goods in business premises against loss by theft or burglary contained a proviso excepting loss by theft by members of the assured's business staff. A porter on the business staff of the assured, in pursuance of a preconceived scheme, admitted a member of a gang of thieves into the premises to enable him to commit a theft therein. The theft was committed in the porter's absence:—*Held*: the case fell within the proviso & the underwriters were not liable because the porter was a principal in the second degree.—*SAQUI & LAWRENCE v. STEARNS*, [1911] 1 *K. B.* 426; 80 *L. J. K. B.* 451; 103 *L. T.* 583; 27 *T. L. R.* 105; 55 *Sol. Jo.* 91; 16 *Com. Cas.* 32, *C. A.*

467. **Murder—Result of common design—Some confederates at a distance.**—All those who assemble themselves together with intent to commit even a trespass, the execution whereof causes a felony to be committed, & continue together abetting one another till they have actually put their design into execution & also those who are present when a felony is committed, & abet the doing of it, are principals in the felony.

Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, & in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the fact some of them were at such a distance as to be out of view.

A. & others were indicted for feloniously demolishing the house of B. It was proved that A. & a mob of persons assembled at H. A. there addressed the mob in violent language & led them in a direction towards a police office about a mile from H., some of the mob from time to time leaving & others joining. At the police office, the mob broke the windows & then went & attacked the house of B. & set it on fire, A. not being present at the attack on the house or at the fire:—*Held*: A. ought not to be convicted of the demolition, as it did not sufficiently appear what the original design of the mob at H. was, nor whether any of the mob who were at H. were the persons who demolished B.'s house.

If rioters attack a house & have begun to demolish it, but leave of their own accord after having gone a certain length, & before the act of demolition is completed, this is evidence from which a jury might infer that they did not intend to demolish the house; but if the mob were prevented from going on by the interference of the police or any other force, that would be evidence to show that they were compelled to desist from

that which they had designed, & it would be for the jury to infer that they had begun to demolish within 7 & 8 Geo. 4, c. 30, s. 8.

Destroying moveable shop shutters is not a beginning to demolish within the statute, as they are not part of the freehold.

If rioters destroy a house by fire, that is as much a demolition within 7 & 8 Geo. 4, c. 30, s. 8, as if any other mode of destruction were used.

If a part of the object of rioters be to demolish a house, it makes no difference that they also acted with another object, such as to injure a person who had taken refuge there.—*R. v. HOWELL* (1839), 9 *C. & P.* 437; 3 *State Tr. N. S.* 1087.

*Annotations*:—*Held*, *R. v. Christian* (1842), 12 *L. J. M. C.* 26; *Drake v. Footitt*, *Drake v. Hankin* (1881), 7 *Q. B. D.* 201.

## ii. Assistance after Act.

468. **Larceny—Assisting to remove property—Continuing transaction.**—D. was indicted for stealing barilla which was on board a Swedish ship at P. consigned to H. D. had been employed by H. to bring the barilla on shore. The evidence was that while the barilla was in D.'s boat, some of his servants without his privity severed a portion & concealed it in another part of the boat under some rope. D., however, subsequently assisted in removing this portion from the boat for the purpose of carrying it off. It was objected that, in the circumstances, D. was not a principal but a receiver or accessory after the fact:—*Held*: it was one continuing transaction to the time of the complete carrying off from the boat, & D. was guilty as principal.—*R. v. DYER & DISTING* (1801), 2 *East, P. C.* 767.

469. ———.]—Some barilla was in H.'s warehouse. While it was there, several persons employed as labourers or servants by him entered into a conspiracy to steal some of it; & accordingly some of them who had access to the warehouse removed a parcel of it nearer to the door than it was before, in the course of the morning, & about nine at night these persons together with A. & D., who had in the meantime agreed to purchase it of the others, came to the warehouse yard, & assisted the others, who took it out of the warehouse, in carrying it away from thence. They being all indicted as principals in the felony, the objection was made that these two were only receivers or accessories after the fact, the felony being complete before their participation in the transaction:—*Held*: it was a continuing transaction as to those who joined in the plot before the goods were finally carried away from the premises, & all defts. having concurred in or been present at the act of removing them from the warehouse wherein they were lawfully deposited, were principals.—*R. v. ATTWELL & O'DONNELL* (1801), 2 *East, P. C.* 768.

470. ———.]—*R. v. KELLY & M'CARTHY*, No. 436, *ante*.

471. ———.]—S. was a barman at a refreshment bar, & C. went up to the bar, called for refreshments & put down a florin. S. served C., took up the florin, & took from his employer's till some money, & gave C. as his change 18s. 6d., which C. put in his pocket & went away with it. On leaving the place he took some silver from his pocket & was counting it when he was arrested. On entering the bar signs of recognition took place between S. & C., & C. was present when S. took the

that he had gone out with one A. to C., & examined G.'s store with a view of robbing it, & that afterwards A. & three others, having arranged the scheme with the prisoner, started from

T., & made the attempt, but were disturbed after one had got into the store through a panel taken out by them. Prisoner saw them off from T., but did not go himself:—*Held*: as

those actually engaged were guilty of the attempt to steal, the prisoner, under 27 & 28 Vict. c. 19, s. 9, was properly convicted.—*R. v. EDMONDE* (1866), 26 *U. C. R.* 152.—*CAN.*

money from the till. The jury convicted S. of stealing & C. of receiving:—*Held*: this was evidence which the judge ought to have left to the jury as reasonable evidence upon which C. might have been convicted as a principal in the second degree; & therefore the conviction of C. for receiving could not be sustained.—*R. v. COGGINS* (1873), 29 L. T. 469; 38 J. P. 38; 12 Cox, C. C. 517, C. C. R.

**472. ——— No felonious intent.]—R. v. MCMAKIN & SMITH** (1808), Russ. & Ry. 333, n.

**473. ——— Felony completed before removal.]—H. & S. broke open a warehouse & stole thereout 13 firkins of butter, etc. which they carried along the street 30 yds. They then fetched prisoner, who was apprised of the robbery, & he assisted in carrying away the property. He was indicted for the theft as a principal & convicted:—*Held*: the conviction was wrong, he being only an accessory, & not a principal.—*KING'S CASE* (1817), Russ. & Ry. 332, C. C. R.**

*Annotations:—Consd. R. v. Kelly* (1820), Russ. & Ry. 421; *R. v. Wiley* (1850), T. & M. 367.

**474. ———.]—Going towards a place where a felony is to be committed in order to assist in carrying off the property, & assisting accordingly, will not make a man a principal, if he was such a distance at the time of the felonious taking as not to be able to assist in it.—R. v. KELLY** (1820), Russ. & Ry. 421.

**475. ——— Part of consignment stolen—Presence at breaking bulk.]—A. & B. were indicted for larceny as principals. A. had been sent by his master to deliver goods to C. He only delivered part, & the rest was stolen, & found in the possession of B.:—*Held*: it was a question for the jury, whether B. was present at the time when A. separated the portion stolen from the bulk; for if he was, both were rightly charged as principals.—*R. v. BUTTERIS GROVE* (1833), 6 C. & P. 147.**

**476. Felonious wounding—Presence after wound inflicted—Subsequent assault.]—Where three persons were indicted jointly for cutting & wounding, & the third of them did not come up to the spot until after one of the first two had got away, & then kicked prosecutor while he was on the ground struggling with the other:—*Held*: the two, who jointly assaulted prosecutor & wounded him at first, might be found guilty either of the felony or of an assault only, but the third prisoner must under the circumstances be acquitted altogether.—*R. v. MCPHANE* (1841), Car. & M. 212.**

*Annotations:—Consd. Bird's Case* (1851), 2 Den. 94. *Refd. R. v. Archer* (1843), 2 Mood. C. C. 283.

#### (b) Constructive Presence.

**477. Standing near to assist—Larceny—In a shop.]—If several are acting together, some in the shop, etc. & some out, & the property is stolen by the hands of one of those who are in the shop, those who are on the outside are equally guilty as principals.—*GOGERLY'S CASE* (1818), Russ. & Ry. 343, C. C. R.**

**478. ——— In a house.]—E. & F. put a ladder against a window, E. opened the window & got inside & stole £40. F. stood on the ladder outside, saw, & assisted F., & shared the booty, but did not enter:—*Held*: F., though plainly a principal aiding & abetting, was not within**

39 Eliz., c. 15, against robbery in dwelling houses, because though a party to the robbery, he was outside the house.—*EVANS & FINCH'S CASE* (1638), Post. 356; Cro. Car. 473; 1 Hale, P. C. 527; W. Jo. 394; 79 E. R. 1009.

*Annotations:—Distd. R. v. Whistler* (1703), 7 Mod. Rep. 129. *Refd. Fletcher's Case* (1742), 1 Leach, 23; *Mouncey's Case* (1792), 2 Leach, 567. *Mentd. Cook v. Humber* (1861), 11 C. B. N. S. 33; *Henrette v. Booth* (1863), 15 C. B. N. S. 500; *A.-G. v. Mutual Tontine Westminster Chambers Assn.* (1876), 1 Ex. D. 469; *Yorkshire Insce. v. Clayton* (1881), 8 Q. B. D. 421; *Rogers v. Hosegood*, [1900] 2 Ch. 388.

**479. ———.]—A person waiting outside a house to receive goods which a confederate is stealing in the house, is a principal.—*OWEN'S CASE* (1825), 1 Mood. C. C. 96, C. C. R.**

**480. ——— House-breaking.]—An offender ousted of his clergy by 3 & 4 Will. & Mar., c. 9, as being present though out of the house, & aiding & abetting one who breaks in & steals may be charged with the breaking & entering.—*BYFORD'S CASE* (1823), Russ. & Ry. 521, C. C. R.**

**481. ——— & threats.]—In order to constitute the offence, under 7 Will. 4 & 1, Vict. c. 86, of stealing in a dwelling-house, & by menaces & threats putting persons being therein in bodily fear, it is not necessary that all the persons engaged in the crime should be actually in the house; & if one remains outside, he may be equally guilty of using menaces & threats, if there was a common**

statute, but it is a circumstance from which the jury may infer the line of conduct inside the house.

The act of placing persons with their faces against a wall, & desiring them not to look round, without the use of any actual violence, is evidence of an intention to obtain money by threats, & the bodily fear may be inferred, although the persons so treated may deny that such acts caused alarm or fear.—*R. v. MURPHY* (1853), 6 Cox, C. C. 341.

**482. ——— Burglary—Admission of thief to house by servant.]—C. was indicted with another person for burglary. He was a servant in a house & he opened the street door to the other prisoner. The other prisoner took plate & was let out again by C.:—*Held*: it was burglary in the servant & prisoner.—*CORNWALL'S CASE* (1730), 2 Stra. 881; 93 E. R. 914.**

*Annotations:—Distd. Egginton's Case* (1801), 2 Leach, 913. *Refd. Saqui & Lawrence v. Stearns*, [1911] 1 K. B. 426.

**483. Must be near enough to be able to assist—Uttering forged note.]—Where persons were privy to the uttering of a forged note, by previous concert with the utterer, but were not present at the time of uttering, or so near as to be able to afford any aid or assistance:—*Held*: they were not principals, but accessories before the fact.—*SOARES' CASE* (1802), Russ. & Ry. 25, C. C. R.**

*Annotations:—Distd. Greenwood's Case* (1852), 2 Den. 453. *Refd. R. v. Hayes & Mayes* (1846), 7 L. T. O. S. 236; *R. v. West & Jones* (1847), 2 Cox, C. C. 237.

**484. ———.]—*STEWART'S CASE* (1818), Russ. & Ry. 363, C. C. R.**

*Annotation:—Refd. R. v. Jarvis* (1855), 19 J. P. 758.

**485. ——— Consorting with utterer before & after uttering.]—It is not sufficient to make a person a principal in uttering a forged note, that he came with the utterer to the town where it was uttered, went out with him from the inn at which**

#### PART I. SECT. 6, SUB-SECT. 3.—A. (b).

**h. Standing near to assist—Uttering forged orders.]—V. abstracted a number of forms of post office orders from a local post office, filled them up for various amounts, & signed them "G. J., pro postmaster." He uttered**

these orders in payment for goods, & signed them as having received the amounts. At the time of the uttering the orders by V., H. & S. remained in a cab outside the shop in which V. uttered them, & assisted V. in taking away the goods which he had purchased but they were not in the cab

for the purpose of taking part in, or aiding, or assisting in the actual uttering. H. & S. were indicted with V. for uttering & were convicted:—*Held*: the conviction was right.—*R. v. VANDERSTERN, HARRIS & SOMERVILLE* (1865), 10 Cox, C. C. 177.—**IR.**



*Secl. 6.—Degrees of criminal liability: Sub-sect. 3, A. (b) & (c) i., ii. & iii. & B. (a).]*

they had put up a little before he uttered it, joined him again in the street a short time after the uttering, & at some little distance from the place of uttering, & ran away when the utterer was apprehended.—**DAVIS & HALL'S CASE** (1806), Russ. & Ry. 113, C. C. R.

*Annotation:—Distd. Greenwood's Case* (1852), 2 Den. 452.

**486. — Larceny.**—*R. v. KELLY*, No. 474, *ante*.

**487. — —.**—*A Principal in the second Degree cannot at the same time be treated as a Receiver.*

G. went into a warehouse, took some pork & gave it to H. who had remained outside, near enough to have rendered him aid in case he had been taken into custody:—*Held*: H. was a principal in the second degree.—*R. v. PERKINS* (1852), 2 Den. 459; 21 L. J. M. C. 152; 16 J. P. 406; 16 Jur. 481; 5 Cox, C. C. 554, C. C. R.

*Annotation:—Distd. R. v. Hilton & McEvin* (1858), 22 J. P. 770.

**488. — Riot—Acts committed within view.**—*SISSINGHURST HOUSE CASE* (1673), 1 Hale, P. C. 462.

### (c) *In Misdemeanours.*

#### i. *In General.*

**489. Person not present at crime may be convicted—Riot.**—If persons are assembled together to the number of three or more, & speeches are made to those persons to excite & inflame them with a view to incite them to acts of violence, & if that same meeting is so connected in point of circumstances with a subsequent riot that you cannot reasonably sever the latter from the incitement that was used, those who incited are guilty of the riot, although they are not present when it occurs.—*R. v. SHARPE* (1848), 6 State Tr. N. S. App. A. 1125; 12 L. T. O. S. 537; 12 J. P. 475; 3 Cox, C. C. 288.

**490. — Attempted arson.**—*R. v. CLAYTON*, No. 427, *ante*.

**491. — Obtaining money by false pretences.**—*MOLAND'S CASE*, No. 428, *ante*.

#### ii. *Coinage Cases.*

**492. Consort with utterer—Sufficiency of evidence.**—Prisoners, J. & S., were indicted for uttering a bad shilling to M., & having another bad shilling in their possession at the time. The uttering was by S. alone in the absence of J.:—*Held*: (1) J. was not liable to be convicted with the actual utterer, although proved to be the associate of S. on the day of the uttering, & to have had other bad money for the purpose of uttering; (2) S. could not be convicted of the second offence of having other bad money in her possession at the time, on the evidence of her associating with J., who was not present at the uttering, but had large quantities of bad money about him for the purpose

of uttering.—**ELSE'S CASE** (1808), Russ. & Ry. 142 2 Den. 454, n., C. C. R.

*Annotation:—As to (1) Overd. Greenwood's Case* (1852), 2 Den. 453.

**493. — —.**—If two prisoners are indicted for uttering a counterfeit shilling, having another counterfeit shilling in their possession, it is not necessary to prove with certainty which of the pieces was the one uttered, & which was found on them unuttered, if both the pieces of money are proved to be counterfeit, & if it appear that the two prisoners went to a shop, & that one of them went in & uttered the bad money, having no more in her possession, & the other stayed outside the shop, having other pieces of bad money, both may be convicted, the uttering & the possession being both joint.—*R. v. SKERRIT* (1826), 2 C. & P. 427.

*Annotation:—Refd. R. v. Jones* (1841), 9 C. & P. 761.

**494. — Not near enough to assist.**—If two utterers of counterfeit coin, with a general community of purpose, go different ways, & utter coin apart from each other, & not near enough to assist each other, their respective utterings are not joint utterings by both.—*R. v. MANNERS* (1837), 7 C. & P. 801.

*Annotation:—Refd. R. v. West & Jones* (1847), 2 Cox, C. C.

**495. — —.**—If two persons jointly prepare counterfeit coin, & then utter it at different shops, apart from each other, but in concert & intending to share the proceeds, the utterings of each are the joint utterings of both, & they may be convicted jointly.—*R. v. HURSE & DUNN* (1841), 2 Mood. & R. 360.

*Annotation:—Refd. R. v. West & Jones* (1847), 2 Cox, C. C. 237.

**496. — —.**—On an indictment for a joint uttering of counterfeit coin, where both defts. are not present at the time of the uttering, the true question seems to be, whether the one was so near the other as to help the other to get rid of the counterfeit coin.—*R. v. JONES* (1841), 9 C. & P. 761.

**497. — —.**—A. & B. were indicted for jointly uttering counterfeit coin. The evidence was, that A. went into a shop & uttered the same, B. remaining outside at a distance of fifty yds.:—*Held*: before B. could be convicted it must be shown that he was so near to A. as to be able to assist her in such uttering, as by a sign, etc.—*R. v. HAYES & MAYES* (1840), 7 L. T. O. S. 236; 1 Cox, C. C. 362; 2 Cox, C. C. 68.

*Annotation:—Refd. R. v. West & Jones* (1847), 2 Cox, C. C. 237.

**498. — — Previous consort insufficient.**—Prisoners together uttered a bad half-crown. Shortly afterwards they separated, & one of them went to a shop & uttered another bad half-crown, & then the other went to the same shop & uttered a third bad half-crown, but at these second & third utterings neither was proved to have been near the other:—*Held*: the proof of previous concert would not sustain a count for a joint

### PART I. SECT. 6, SUB-SECT. 3.— A. (c) i.

**k. Seditious meeting—Seconding motion—Putting motion to the meeting.**—War Precautions Regulations, 1915, reg. 28, provides that any person who by word of mouth, makes any statement likely to prejudice the recruiting of any of H.M.'s Forces is guilty of an offence. At a meeting of the Trades Hall Council a motion was moved by M., & seconded by S., "That in the opinion of this Council the Political Labour Council Executive should call

upon all Labour members of Parliament to refuse to assist in recruiting." This motion was put to the meeting by P., who was acting as chairman. There was no evidence that P. said anything in favour of the motion. P. & S. were charged with committing an offence under the above reg.:—*Held*: (1) P. was not guilty of an offence, as by merely putting to the meeting as chairman a motion moved by another person he could not be taken to have made the statement contained therein either by word of mouth or otherwise; (2) S., by seconding the motion,

adopted the statement therein contained & was guilty of the offence.—*PEARCE v. JONES, SMITH v. JONES*, [1917] V. L. R. 650.—**AUS.**

**l. Aiding administration of unlawful oath.**—Prisoner was indicted for being present, aiding, etc., on A. to administer an unlawful oath to B. It appeared that the oath was administered by C., prisoner, & D. being present, aiding, etc.:—*Held*: the indictment was sustained by proof of the above facts.—*R. v. GREENE & LACY* (1797), 1 Craw. & D. 198.—**IR.**

## PART I.—PRINCIPLES OF CRIMINAL LIABILITY.

uttering in either of the second or third utterings.—*R. v. WEST & JONES* (1847), 2 Cox, C. C. 237.

**499. Presence not essential if common purpose proved.]**—*GREENWOOD'S CASE*, No. 429, *ante*.

### iii. Poaching Cases.

**500. Presence of all at place laid in indictment.]**—To support an indictment for night poaching, by three or more, being armed, it is not sufficient to prove that one of the prisoners was in the place laid in the indictment, & that the rest of the party were in another wood, which was separated from the place mentioned by a turnpike road.—*R. v. DOWSELL* (1834), 6 C. & P. 398; 2 Nev. & M. M. C. 194.

*Annotations*.—*Consd. R. v. Scotton* (1844), 5 Q. B. 493. *Refd. R. v. Lockett* (1836), 7 C. & P. 300; *R. v. Nickless* (1839), 8 C. & P. 757.

**501. — Watching near by to give alarm.]**—(1) Those who are watching at the outside of a preserve for the purpose of giving the alarm on the approach of the gamekeeper to others who are in the preserve, & who afterwards go into the preserve for that purpose, are equally guilty with those who enter the preserve at first.

(2) *Semble*: in cases of night poaching, all who are at the place, each acting his part with a common intent, are equally guilty, although some only are bodily upon the land.—*R. v. PASSEY* (1836), 7 C. & P. 282; 3 Nev. & M. M. C. 426.

*Annotations*.—*Consd. R. v. Scotton* (1844), 5 Q. B. 493. *Refd. R. v. Fry* (1846), 10 J. P. 219.

**502. —.]**—On an indictment for night poaching by four, one being armed:—*Semble*: if two enter the land laid in the indictment, & the other two remain outside the preserve, but are of the same party, & are there for the same purpose, all ought to be found guilty.—*R. v. LOCKETT* (1836), 7 C. & P. 300; 3 Nev. & M. M. C. 430.

*Annotation*.—*Consd. R. v. Scotton* (1844), 5 Q. B. 493.

**503. —.]**—If one of a party of poachers be found in the land specified in the indictment, the rest co-operating in the pursuit of game in adjoining land, all may be alleged to be found in the land specified.—*R. v. ANDREWS* (1837), 2 Mood. & R. 37, N. P.

**504. —.]**—If three persons go out together night poaching, one being armed, & two of them stand in a road & set nets in the hedge of a field of M., & send their dogs into the field to drive hares into the net, & after this the third leave them in the road & go to poach by himself in another field of M., this will not support an indictment for night poaching on the land of M., for the sending in of a dog is not an entering of land within Night Poaching Act, 1828 (c. 69), s. 9, & the entering of the second field was not a joint act of the three.—*R. v. NICKLESS* (1839), 8 C. & P. 757.

*Annotation*.—*Refd. R. v. Pratt* (1855), 1 Jur. N. S. 681.

**505. —.]**—Under 6 & 7 Will. 4, c. 65, s. 9, an information under Game Act, 1831 (c. 32), if laid by a person not deposing on oath to the matter of charge, must distinctly show that the charge was deposed to by some other credible

witness on oath. If the information leaves this doubtful, all further proceedings upon it are without jurisdiction; & if deft. is summoned & appears to answer the charge, a witness giving false evidence on the hearing cannot be convicted of perjury.

*Qu.*: whether, under Night Poaching Act, 1828 (c. 69), s. 9, or Game Act, 1831 (c. 32), s. 30, a party can be convicted of entering or being upon land for the purpose of poaching, if he does not himself go upon the land, but is on an adjacent close, employing, assisting, & in company with, those who actually enter.—*R. v. SCOTTON* (1844), 5 Q. B. 493; 1 Dav. & Mer. 501; 1 New Sess. Cas. 27; 13 L. J. M. C. 58; 2 L. T. O. S. 327; 8 J. P. 55, 409; 8 Jur. 400; 114 E. R. 1335.

*Annotations*.—*Consd. R. v. Berry* (1859), 8 Cox, C. C. 121; *R. v. Hughes* (1879), 4 Q. B. D. 614.

**506. —.]**—Six prisoners were indicted under Night Poaching Act, 1828 (c. 69), s. 9, for having been in a certain field at night, armed, for the purpose of taking game. Some of the prisoners had been in the field, some had remained outside of it, aiding & assisting the others:—*Held*: the actual entry of some of the party armed was sufficient to support the conviction of all the prisoners, though it could not be proved which of the prisoners had actually entered the field.—*R. v. WHITTAKER* (1848), 2 Car. & Kir. 636; 1 Den. 310; 17 L. J. M. C. 127; 11 L. T. O. S. 310; 12 J. P. 612; 3 Cox, C. C. 50, C. C. R.

*Annotation*.—*Refd. R. v. May & Darling* (1851), 5 Cox, C. C. 176.

**507. —.]**—In order to bring a case of night poaching within Night Poaching Act, 1828 (c. 69), s. 9, it is not necessary to prove that three persons were all within the same close or inclosure, or the same piece of open land, if all were of one party, one or more being armed, with the same common purpose, in the place described in the indictment.—*R. v. EATON* (1851), T. & M. 598; 2 Den. 274; *sub nom. R. v. UEZZELL*, 3 Car. & Kir. 150; 4 New Sess. Cas. 599; 20 L. J. M. C. 192; 17 L. T. O. S. 136; 15 J. P. 324; 15 Jur. 434; 5 Cox, C. C. 188, C. C. R.

*Annotation*.—*Mentd. Ex p. Brown* (1852), 16 J. P. 69.

See GAME.

### B. Common Purpose.

#### (a) Necessity for.

**508. Murder—General rule.]**—On an indictment for murder, if the jury find a special verdict, it is necessary, in order to affect principals in the second degree, to state either (1) that they were actually present, or (2) some acts done by them at the very time, which unavoidably show that they were present, or (3) that they were of the same party, on the same pursuit, & under the same engagements & expectation of mutual defence & support with the person who did the fact.—*R. v. BORTHWICK* (1779), 1 Doug. K. B. 207; 99 E. R. 136.

*Annotations*.—*Consd. R. v. Downing & Powys* (1845), 1 Cox, C. C. 156; *R. v. Coney* (1882), 8 Q. B. D. 534.

witnesses saw the blow struck & identified M.; & one witness, B., swore that about six on that evening deceased left his office with R. & his wife, & that about twenty minutes after he saw prisoner, with M. & another, go into the vacant lot where the wood pile was, M. having a stick in his hand, & heard M. say to the others, "Let us go for him." It was also proved by others that the three were together before the affray, & in a saloon together about nine o'clock afterwards:—*Held*: there was not

### PART I. SECT. 6, SUB-SECT. 3.— B. (a).

*m. General rule.]*—Where a person takes no part in the actual commission of a crime, & has not been party to a previous concert thereto, he cannot be convicted as a principal, although he may in cases such as theft, under certain conditions, be convicted of unlawful possession.—*R. v. ABRAMS*, 1 S. 393.—S. AF.

*n. —.]*—Prisoner was indicted for aiding & abetting one M. in a

murder, of which M. was convicted. It appeared that about six in the evening the deceased was with R. & his wife on the river bank at A., standing near a pile of wood. She saw M. standing behind the pile, who on deceased going up to him struck deceased with a stick, inflicting a wound of which he died; deceased ran, when two other men sprang out & followed him, but in a few seconds two of them returned & assaulted her & her husband. She could not identify the prisoner. Two other



*Sect. 6.—Degrees of criminal liability: Sub-sect. 3, B. (a), (b) & (c).]*

**509. — Principal in first degree insane.]—***R. v. TYLER*, No. 455, *ante*.

**510. Robbery with violence—Proof of assault only.]—**Upon an indictment of three prisoners for robbery with violence, it was proved that A. knocked prosecutor down & B. & C. took the property from his pockets:—*Held*: (1) if A. took no part in the robbery, he could not be convicted of an assault, inasmuch as the assault was unconnected with the robbery, & therefore an independent offence; (2) it was competent to the jury to find all the prisoners guilty of an assault, if they were of opinion that prosecutor had not been robbed by either of them, but only assaulted by all of them.—*R. v. BARNETT, O'BRIEN & WHITNEY* (1848), 2 Car. & Kir. 594; 3 Cox, C. C. 432.

*Annotations:—As to (1) Reffd. R. v. Phillips* (1848), 3 Cox, C. C. 225. *As to (2) Distd. R. v. Phillips* (1848), 3 Cox, C. C. 225.

**511. Wounding.]—**Where two persons make an attack upon a third, & one of the two stabs him with a knife, the jury must be satisfied that the person who did not stab assented to & was co-operating with the particular blow by which the injury was inflicted, without being aware that a knife was used, in order to find him guilty of an assault.—*R. v. BURNS & SMITH* (1849), 13 J. P. 138.

**512. Larceny.]—**Where a prisoner is charged in two counts with stealing & receiving, the jury may return a verdict of guilty on the latter count, if warranted by the evidence, although the evidence is also consistent with prisoner having been a principal in the second degree in the stealing.

To constitute a principal in the second degree there must be a common purpose (*WILLIAMS, J.*).—*McEVIN'S CASE* (1858), Bell, C. C. 20; *sub nom. R. v. HILTON*, 28 L. J. M. C. 28; 32 L. T. O. S. 151; 22 J. P. 770; 5 Jur. N. S. 47; 7 W. R. 59; 8 Cox, C. C. 87, C. C. R.

*Annotation:—Reffd. R. v. Coggins* (1873), 29 L. T. 469.

**513. Mere presence not sufficient—Murder.]—**Where a man murders another it does not necessarily follow that those in his company are involved in the crime & it may be that they are guilty of manslaughter only, even though they knew of animosity between the murderer & his victim. Even if A. had some days before heard B. threaten to kill C., if A. merely stood by, without any malice against C. & without contributing in any way to the fact, he might not be guilty even of manslaughter, but if A., knowing of the design of B. to kill C., accompanies B. in that design & C. is killed in his presence, then A. is guilty of murder though he had no hand in it.

sufficient evidence to warrant the prisoner's conviction, for there was no direct proof that he was present when the blow was struck, & no evidence whatever that he & the others were together with any common unlawful purpose; & the words spoken were in themselves unimportant.—*R. v. CURTLEY* (1868), 27 U. C. R. 613.—**CAN.**

**511 i. Wounding.]—A.**, being fired at & hit by one of a gang:—*Held*: upon an indictment for aiding & abetting the person who shot at A., with intent to kill, it ought to have been left to the jury, as a ground of acquittal, whether the prisoner was not aiding in the very shot which inflicted the wound.—*R. v. McALHON* (1819), 1 Craw. & D. 156.—**IR.**

**o. Conspiracy.]—**An indictment for conspiracy charged G., a member of W., with conspiracy with certain other members of W. to secure by lawful means the release of B., a member of W., who was serving a sentence. The only evidence against G. was that he was present at an ordinary meeting of W. where he spoke but did not refer to B.'s release. At that meeting another of accused spoke & advocated effecting B.'s release by unlawful means:—*Held*: accused's presence at the meeting when the speech was made did not afford sufficient evidence to support his conviction on this count.—*R. v. REEVE* (1917), 17 S. R. N. S. W. 81; 34 N. S. W. W. N. 123.—**AUS.**

*p. False pretences.]—*The infor-

So also if A. said that he would stand by B. But if A. accompanies B. in an unlawful action, & after that is over C. happens to come in the way of B. & is killed by B., then A. is not guilty.—*MOHUN'S (LORD) CASE* (1692), Holt, K. B. 479; 12 State Tr. 949; 90 E. R. 1164.

*Annotations:—Mentd. R. v. Acton* (1729), 1 Barn. K. B. 250; *R. v. Dalton* (1731), 2 Stra. 911; *R. v. Magrath* (1745), 2 Stra. 1242; *R. v. Andrews* (1844), 2 Dow. & L. 10.

**514. — Manslaughter—Presence at prize-fight.]—***R. v. HODKISS* (1882), cited in 8 Q. B. D. at p. 560.

*Annotation:—Consd. R. v. Coney* (1882), 8 Q. B. D. 534.

**515. — — — — —.]—**Prisoners were indicted for a common assault. They were in a crowd, which surrounded a ring, formed by ropes supported by posts, where a prize fight was going on. They took no part in the management of the fight, & they neither said nor did anything:—*Held*: the combatants at a prize fight, & all persons aiding & abetting therein, are guilty of an assault, for which an indictment will lie.

*Semle*: mere presence of a person, unexplained, at a prize fight affords some evidence for the consideration of a jury of an aiding or abetting in such fight.

It is a general rule in the case of principals in the second degree that there must be participation in the act, & that, although a man is present whilst a felony is being committed, if he takes no part in it, & does not act in concert with those who commit it, he will not be a principal in the second degree merely because he does not endeavour to prevent the felony, or apprehend the felon. Where presence may be entirely accidental, it is not even evidence of aiding & abetting. Where presence is *prima facie* not accidental it is evidence, but no more than evidence, for the jury (*CAVE, J.*).—*R. v. CONEY* (1882), 8 Q. B. D. 534; 51 L. J. M. C. 66; 46 L. T. 307; 46 J. P. 404; 30 W. R. 678; 15 Cox, C. C. 46, C. C. R.

*Annotations:—Consd. Seaward v. Paterson*, [1897] 1 Ch. 545; *Du Cros v. Lambourne*, [1907] 1 K. B. 40.

**516. Must be illegal purpose.]—***R. v. NUBOLT* (1512), Keil. 161; 72 E. R. 335.

**517. — Violence by member of a crowd—Actual perpetrator not identified.]—**Where in a village a mob assembled to carry an effigy, & were riotously conducting themselves, T., the parish constable, in endeavouring to stop the proceeding, was struck. On a summons for an assault against L., one of ten persons from whom the blow proceeded, no evidence being given to show which of them struck the blow:—*Held*: the justices were right in dismissing the case, & the rule that all were equally guilty participants did not apply.—*TUCKEY v. LITTLE* (1863), 27 J. P. 135.

mation charged deft. with obtaining money by false pretences. The pretended cheque was actually presented not by deft., but by R. in his presence. There was evidence of a preconcerted design on the part of R. & deft. Chairman directed the jury that if it were established by evidence that the scheme was arranged between the deft. & R. from the first that they were both influenced by a common object & mutually assisted in carrying it out, & that the one as well as the other obtained part of the spoil at the time the cheque was cashed, then deft. as well as R. would be guilty under the information:—*Held*: direction was right & deft. properly convicted.—*R. v. KNOWLING* (1877), Knox, 329.—**AUS.**

*(b) Offences against the Person.*

**518. Murder.]**—If several persons act together with a common intent, every act done by each of them in furtherance of that intent is done by all.

If a deadly weapon be used, an intention to kill is to be inferred—not so from a blow with a fist.

From continued violence, after much beating, an intention to kill may be inferred.—**MACKLIN & MURPHY'S CASE** (1838), 2 Lew. C. C. 225.

**519. — Intention to commit an assault—Assault by one of a party.]**—**R. v. NUBOLT** (1512), KEIL. 161; 72 E. R. 335.

**520. — — — — —.]**—**R. v. GRIFFITH** (1553), 1 Plowd. 97; 75 E. R. 152.

**521. — — — — —.]**—Prisoners came at 11 o'clock one night to a public-house & demanded some beer. The publican refused to serve them owing to the late hour & they left. Some time afterwards when the door of the public-house was opened to let out some company one of the prisoners rushed in & again demanded beer. He was collared by the publican, who, when they reached the outer door of the public-house, received a violent blow on the head from the other prisoner who had remained outside, from which he subsequently died:—**Held**: both prisoners were guilty of murder, as it appeared prisoners came a second time with a deliberate intention to use personal violence if their demands were not complied with.—**R. v. WILLOUGHBY** (1791), 1 East, P. C. 288.

**522. — Resisting arrest.]**—**R. v. STANDLIE & ANDREWS** (1663), 1 Sid. 159; 82 E. R. 1031; *sub nom.* **STANLEY'S CASE**, Kel. 86; 1 Keb. 584.

**523. — Presence in order to see act done.]**—Where one person shoots another & two are with him, though they do nothing but come on purpose to countenance that evil fact, that is murder in them all (**PEMBERTON, C.J.**).—**CONINGSMARK'S (COUNT) CASE** (1682), 9 State Tr. 1.  
*Annotation*:—**Mentd.** **Mansell v. R.** (1857), 8 E. & B. 54.

**524. — — — — —.]**—**MOHUN'S (LORD) CASE**, No. 513, *ante*.

**525. — Assault by several—Stab by one.]**—Six men assaulted another man. In the course of the assault one of them inflicted a stab & killed the person assaulted. They were jointly indicted for murder:—**Held**: (1) the man who stabbed was guilty of murder, whether he intended to kill or not; (2) the other five would be guilty of murder if they participated in a common design to kill; (3) if there was no common design to kill, if the knife was used in pursuance of a common design to use it, they would all be guilty of murder; (4) if there was no common design to use the knife, if being present at the moment of stabbing, they assented, & manifested their assent by assisting in the offence, they were guilty of murder; (5) if neither of the last three modes of putting the case be proved against the five, the stabber must be found guilty & the rest acquitted; (6) if it could not be ascertained which of them stabbed, all must be acquitted.—**R. v. PRICE** (1858), 8 Cox, C. C. 96.

**526. — Common design to use violence in burglary.]**—On a charge of murder, deceased having been found tied hand & foot, & with something forced into the throat, apparently to prevent any outcry, but which had caused suffocation, & the state of the premises showing that a burglary had been committed, & the evidence

against prisoner being a chain of circumstances tending to identify him as one of two persons employed in the burglary (the other of whom had not been apprehended) the jury were directed, that, if satisfied that prisoner was engaged in the burglary, & a party to the violence on the person of deceased, they should find him guilty of the murder.—**R. v. FRANZ** (1861), 2 F. & F. 580.

**527. — Common design to kill.]**—**R. v. TURNER**, No. 458, *ante*.

**528. — Common design to commit felony.]**—All engaged in a common design to commit a felony are guilty of murder, though only one strikes the fatal blow.—**R. v. RUBENS & RUBENS** (1909), 2 Cr. App. Rep. 163, C. C. A.

*Annotation*:—**Mentd.** **R. v. Rose** (1919), 14 Cr. App. Rep. 14.

**529. Manslaughter—Common design to inflict unlawful violence.]**—**R. v. TURNER**, No. 458, *ante*.

**530. — Death in a fight.]**—A. & B. engage in a quarrel with C. & D.; A. fights with C., & B. with D.; A. kills C.; B. is equally guilty of manslaughter with A.—**THOBY'S CASE** (1673), 1 Freem. K. B. 514; 89 E. R. 386.

**531. — — — — —.]**—If A. & B. agree together to assault C. with their fists, & C. receives a chance blow of the fists from either of them, both A. & B. are guilty of manslaughter. But should A., of his own impulse, kill C. with a weapon suddenly caught up, B. would not be responsible for the death, he being only liable for acts done in pursuance of the common design of himself & A.—**R. v. CATON** (1874), 12 Cox, C. C. 624.

*Annotation*:—**Distd.** **R. v. Rubens & Rubens** (1909), 2 Cr. App. Rep. 163.

**532. Shooting.]**—Persons present, aiding & assisting in shooting of another, are principals.—**COAL-HEAVERS' CASE** (1768), 1 Leach, 64, C. C. R.

**533. Felonious wounding — Wound inflicted during a robbery.]**—**R. v. BOWEN**, No. 460, *ante*.

**534. — — — — —.]**—B. was indicted, with three others, for an assault with intent to do some grievous bodily harm. It was proved that he, with the other prisoners, had assaulted prosecutor, & afterwards they had returned together & picked up some stones. Then B. withdrew, & the other prisoners threw the stones & wounded prosecutor. The jury found the three prisoners who threw the stones guilty of the felony, & B. guilty only of a common assault:—**Held**: B. was rightly convicted.—**R. v. PHILLIPS** (1848), 3 Cox, C. C. 225.

*(c) Agreements to commit Suicide.*

**535. If death results survivor is guilty of murder.]**—If two encourage each other to murder themselves together, & one does so, but the other fails in the attempt upon himself, he is a principal in the murder of the other.—**R. v. DYSON** (1823), Russ. & Ry. 523, C. C. R.

**536. — — — — —.]**—If two persons mutually agree to commit suicide together, & the means employed to produce death only take effect on one, the survivor will, in point of law, be guilty of the murder of the one who died.—**R. v. ALISON** (1838), 8 C. & P. 418.

**537. — — — — —.]**—If two persons enter into an agreement to commit suicide together & the means employed to produce death prove fatal in one only, the survivor is guilty of murder.—**R. v. JESSOP** (1887), 16 Cox, C. C. 204.

*Annotation*:—**Refd.** **R. v. Abbott** (1903), 67 J. P. 151.

## PART I. SECT. 6, SUB-SECT. 3.—B. (b).

**9. Suicide.]**—Persons actively assisting a Hindu widow in becoming a sati are guilty of the offence of abetment of suicide.—**R. v. RAM DAYAL** (1913), 1 L. R. 36 All. 26.—**IND.**

*Sect. 6.—Degrees of criminal liability: Sub-sect. 3, B. (c), (d), (e) & (f) i.]*

**538.** —[—]—If two persons enter into an agreement to commit suicide together, & in accordance with that agreement, they attempt to take their lives, but one of them survives, the survivor is guilty of murder. The fact that the survivor may not have made any real endeavour to take his life or have had any real intention to do so, makes no difference in law.—*R. v. STORMONTH* (1897), 61 J. P. 729.

**539.** —[—]—If two persons agree together to commit suicide, & in accordance with that agreement attempt to take their lives, but one of them survives, the survivor is guilty of murder.—*R. v. ABBOTT* (1903), 67 J. P. 151.

(d) *Prizefights.*

**540. Liability of persons present other than the actual fighters—Presence as spectator.]—***R. v. WILBURN* (prior to 1602), Noy, 50; 74 E. R. 1019.

**541. — Encouraging.]—**If several are in concert encouraging one another & co-operating, they are all equally guilty, though one only committed the actual assault (*BAYLEY, J.*).—*ANON.* (1829), 1 Lew. C. C. 17.

**542.** —[—]—When several persons go out together deliberately to commit murder, they are all equally guilty, & may all be indicted as principals in the first degree: all are alike guilty—the seconds as well as the principals. When the combat is not an act of deliberation, but ensuing upon a sudden quarrel, & one of the combatants is killed, no advantage being taken, or sought, the law, in consideration of human weakness, regards this homicide not as murder but as manslaughter. But when the duel is premeditated, there being time for cooling, & an appointment made to fight with deadly weapons, & one is killed, all who are present encouraging the conflict incur the guilt of murder (*CRESSWELL, J.*).—*R. v. GRANT* (1844), 8 J. P. 139.

**543. — Deliberate attendance in order to watch.]—**Persons who are present at a prize fight, & who have gone thither with the purpose of seeing the persons strike each other, are all principals in the breach of the peace & indictable for an assault, as well as the actual combatants; & it is not at all material which of the combatants struck the first blow.—*R. v. PERKINS* (1831), 4 O. & P. 537; 2 Man. & Ry. M. C. 506.

*Annotations:—Consd. R. v. Coney* (1882), 8 Q. B. D. 534  
*Refd. R. v. Clarkson* (1892), 66 L. T. 297.

**544. — Encouragement may be by mere presence.]—**When, upon a previous arrangement, & after there has been time for the blood to cool, two persons meet with deadly weapons, & one of them is killed, the party who occasions the death is guilty of murder, & the seconds also are equally guilty; & with respect to others shown to be present, the question is, did they give their aid & assistance by their countenance & encouragement of the principals in the contest? Mere presence will not be sufficient; but if they sustain the principals either by advice or assistance, or go to the ground for the purpose of encouraging & forwarding the unlawful conflict, although they do not say or do anything, yet if they are present,

assisting & encouraging by their presence at the moment when the fatal shot is fired, they are, in law, guilty of the crime of murder.—*R. v. YOUNG* (1838), 8 C. & P. 644.

*Annotation:—Consd. R. v. Coney* (1882), 8 Q. B. D. 534.

**545.** —[—]—Where two persons go out to fight a deliberate duel, & death ensues, all persons who are present, encouraging & promoting that death, will be guilty of murder. The person who acted as the second of the deceased person in such a duel may be convicted of murder, on an indictment charging him with being present, aiding & abetting the person by whose act the death of his principal was occasioned.—*R. v. CUDDY* (1843), 1 Car. & Kir. 210.

*Annotation:—Consd. R. v. Coney* (1882), 8 Q. B. D. 534.

**546.** —[—]—*R. v. CONEY*, No. 515, *ante*.

**547. — Indictment of seconds.]—**In an indictment against the seconds in a prize-fight, they may be indicted as principals, although neither of the principals is included in the indictment.—*R. v. SKEATS & BILES* (1846), 7 L. T. O. S. 433.

(e) *Possession.*

**548. Housebreaking Implements.]—**Where several persons are found out together by night for the common purpose of housebreaking, & one only is in possession of the housebreaking implements, all may be found guilty of the misdemeanour of being found by night in possession of implements of housebreaking without lawful excuse under Larceny Act, 1861 (c. 96), s. 58, for the possession of one is in such case the possession of all.—*R. v. THOMPSON* (1869), 21 L. T. 397; 33 J. P. 791; 11 Cox, C. C. 362, C. C. R.

**549. Explosive substance—Explosive Substances Act, 1883 (c. 3), s. 4.]—**If several persons are connected in a common design to have articles, amounting to an explosive substance within the above Act, made for an unlawful purpose, each of the confederacy is responsible in respect of such articles as are in the possession of others connected in the carrying out of their common design.—*R. v. CHARLES* (1892), 17 Cox, C. C. 499.

**550. Counterfeit Coin.]—**When pieces of counterfeit coin are found on one of two persons acting in guilty concert, & both knowing of the possession, both are guilty under Coinage Offences Act, 1832 (c. 34), s. 8.—*ROGERS'S CASE* (1839), 2 Mood. C. C. 85.

*Annotations:—Refd. R. v. Gerrish & Brown* (1839), 2 Mood & R. 219; *R. v. Wiley* (1850), 2 Den. 37.

**551.** —[—]—Where one of two persons in company utters counterfeit coin, & other counterfeit coin is found on the other person, they are jointly guilty of the aggravated offence, under Coinage Offences Act, 1832 (c. 34), if acting in concert, & both knowing of the possession.—*R. v. GERRISH & BROWN* (1839), 2 Mood. & R. 219, N. P.

*Annotation:—Refd. R. v. Wiley* (1850), 2 Den. 37.

**552.** —[—]—*R. v. WILLIAMS*, No. 94, *ante*.

**553. Arms when in pursuit of game.]—**If several persons are out with the intent to kill game, & only one of them is armed, the rest who are unarmed are liable to be convicted under 57 Geo. 3, c. 90.—*SMITH'S CASE* (1818), Russ. & Ry. 368, C. C. R.

*Annotation:—Consd. R. v. Goodfellow* (1845), 9 J. P. 297.

**PART I. SECT. 6, SUB-SECT. 3.—**  
**B. (e).**

**550 i. Counterfeit coin.]—**Where two were charged with having coin in their possession at the time of uttering other base coin:—*Held: it was sufficient to establish the offences under the statute against*

both prisoners, to show that they were acting under a common design in uttering, although one of them only had possession of the base coin.—*H.M. ADVOCATE v. SUTHERLAND & GIBSON* (1848), 1 J. Shaw, Just. 135.—**SCOT.**

**553 i. Arms when in pursuit of game.]**

—When several persons are out in company for the purpose of taking or destroying game & only one of them is armed the rest who are unarmed are liable to be convicted under 9 Geo. 4, c. 69.—*H.M. ADVOCATE v. GRANGER* (1863), 4 Irv. 432; 36 Sc. Jur. 3.—**SCOT.**

**554. — Possession by one without the knowledge of the others.]**—If several go into a close in the night to kill game, & one has arms without the knowledge of the others, the other persons who are unarmed are not liable to be convicted under 57 Geo. 3, c. 90.—*R. v. SOUTHERN* (1821), Russ. & Ry. 444, C. C. R.

(f) *Collateral Acts.*

i. *Consequent upon Common Design.*

**555. Riot by several—Murder by one.]**—*SIS-SINGHURST HOUSE CASE* (1673), 1 Hale, P. C. 462.

**556. — —.]**—If several make a riot, & a man is killed, they are all principals in the murder. Though the indictment be against prisoner for aiding, assisting & abetting A., who was acquitted, yet the indictment & trial of this prisoner is well enough, for who actually did the murder is not material; the matter is that a murder was committed & the other is but a circumstance, & all are principals in this case; therefore if a murder be proved it is well enough (*HOLT, C.J.*).—*R. v. WALLIS* (1703), 1 Salk. 334; *Holt, K. B.* 484; 91 E. R. 294.

**557. — Manslaughter by one.]**—If sundry persons be together, aiding & assisting to an action, wherein a manslaughter ensues, as in case of a sudden business without malice prepense, they are equally guilty of the manslaughter, as they are in the case of murder prepense (*per CUB.*).—*CORNWALLIS'S (LORD) CASE* (1678), 7 State Tr. 143.

*Annotation:—Mentd. R. v. Pain* (1696), Comb. 358.

**558. Riotous demolition by several—Murder by one.]**—*R. v. HOWELL*, No. 467, *ante*.

**559. Robbery by several—Robbery of different kind committed by one in course of original robbery.]**—A. & B. assaulted C. to rob him in the highway, but C. escaped by flight, & as they were assaulting him A. rode from P. & B., & assaulted D. out of the view of P. & B. & took from him a dagger by robbery, & came back to P. & B. & for this was P. indicted & convicted of robbery, though he assented not to the robbery of D. neither was it done in his view, because they were all three assembled to commit a robbery, & this taking of the dagger was in the mean time.—*R. v. PUDSEY* (1586), 1 Hale, P. C. 534; *Post.* 354; 1 And. 116; 123 E. R. 383.

**560. — Murder by one.]**—Where two persons charged with murder by the same indictment had made statements implicating one another, & those statements were evidence for the prosecution, the ct., upon the application of counsel appearing for one prisoner, allowed them to have separate trials.

Where two persons go out with the common object of robbing a third person, & one of them, in pursuit of that common object, does an act which causes the death of that third person, under such circumstances as to be murder in him

who does the act, it is murder in the other also.—*R. v. JACKSON* (1857), 7 Cox, C. C. 357.

**561. Burglary by two—Violence by one after escape of the other.]**—Prisoners were indicted for burglary, & C., in endeavouring to escape, had used great violence & seriously injured prosecutor. The jury found C. guilty on the whole indictment for burglary committed with violence, & the other prisoner of burglary without violence.

If two persons set about the commission of a crime, & one of them, in the execution of their common purpose, uses violence, both may be convicted of the whole offence; but if the violence used by the one take place after the other has escaped, & is resorted to merely to prevent being captured, then only the one actually using it is within the meaning of the statute (*LORD DENMAN, C.J.*).—*R. v. HARVEY & CAYLOR* (1843), 2 L. T. O. S. 193; 1 Cox, C. C. 21.

**562. Burglar admitted by servant—Murder by burglar.]**—A woman servant conspired with her paramour to rob her mistress. The man came in the night, & she hid him, & then he killed the mistress:—*Held*: the man was guilty of murder, & the woman of petit treason.—*ANON.* (1568), *Moore, K. B.* 91; 72 E. R. 461.

*See, now, Offences against the Person Act, 1861 (c. 100), s. 8.*

**563. Breach of peace by several—Manslaughter by one.]**—If two or more persons go out together with a purpose to commit a breach of the peace, & in the course of the accomplishment of that common design, one of them kills a man, the other also is guilty of manslaughter.—*R. v. HARRINGTON* (1851), 5 Cox, C. C. 231.

**564. Furious driving on highway by two—Death caused by one.]**—(1) If each of two persons be driving a cart furiously along the public road, & inciting & encouraging each other so to drive, & one of the carts runs over a man & kills him, both are guilty of manslaughter, the one as principal in the first degree, the other as principal in the second degree.

(2) Prisoners are charged with contributing to the death of deceased by their negligence & improper conduct, & if they did so, it matters not whether he was deaf, or drunk, or negligent or in part contributed to his own death, for in this consists a great distinction between civil & criminal proceedings. If two coaches run against each other, & the drivers of both are to blame, neither of them has any remedy against the other for damages. But in the case of loss of life the law takes a different view & the converse of that proposition is true, for there each party is responsible for any blame that may ensue, however large the share may be, & so highly does the law value human life that it admits of no justification wherever life has been lost, & the carelessness or negligence of any one person has contributed to the death of another person. Generally it may be laid down that, where one by his negligence has

PART I. SECT. 6, SUB-SECT. 3.—  
B. (f) i.

**assembling and guilty of an unlawful assembly whether a riot takes place or not, & if a homicide takes place in consequence of that unlawful assembly, every one taking a part in the unlawful assembly may be himself personally responsible for the homicide.**—*R. v. McNAUGHTEN, DONNELLY & HAYES* (1881), 14 Cox, C. C. 676.—*IR*:

constable in lawful charge of a number of prisoners is killed by one of them in the prosecution of a common design to escape at all hazards, it is murder.—*R. v. CROOKWELL* (1865), 5 N. S. W. S. C. R. 119.—*AUS.*

t. — —.]—The prisoner & two other men were in lawful custody in a cab, when loaded pistols were thrown in by an unknown person, & all three endeavoured to escape by using the pistols. In the struggle which ensued one of the constables in charge of the three men was shot, & killed by one of the prisoners. The trial judge told the jury that there

was no evidence of common design up to the moment the pistols were thrown in, yet if at that moment, before the shot fired that killed the constable, the three men resolved to escape from lawful custody, each was responsible for the acts of the other. The jury did not agree as to whether the prisoner actually fired the shot which killed the constable, but found the prisoner guilty on what their foreman called the second "count," & their verdict was recorded with their consent as one of "guilty," with a clause added as to their inability to agree as to whether the prisoner fired the shot:—*Held*: having regard to the evidence

proved to have connived at a robbery in which excessive violence was used, resulting in the death of the persons robbed. The Sessions Judge convicted M. & C. of abetment of murder, on the ground that the death was "a probable consequence of the intention known & abetted" by them:—*Held*: the test of guilt in charges of abetment must always be whether, having regard to the immediate object of the instigation or conspiracy, the act done by the principal is one which, according to ordinary experience & common sense, the abettor must have foreseen as

**Itself evidence of intention to commit murder.]—**Suspicion that A. intends to arrest C. will not, *per se*, clear C. from the charge of murder if he kills A. to prevent the arrest.

**Semle :** circumstances simply indicative of a common intention to poach will not make one of the poachers answerable if one of his companions kills a keeper whilst he is himself continuing his flight.—*R. v. CHANDLER & KEEN* (1844), 3 L. T. O. S. 304.

**577. — Assault on keeper—No evidence of intention to inflict violence.]—**In an indictment against A. & B. & six others, for shooting at C. with intent to maim, it appeared that prisoners were out poaching, & that A. having fired without effect at the keepers, called out to his companions to fire, whereupon B. fired at prosecutor, & severely wounded him :—**Held :** A. & B. alone were liable to be found guilty.—*R. v. COUZINS, BURROWS, KEEBLE, HARSUM, SMITH, HATCHER & PALMER* (1849), 13 L. T. O. S. 327 ; 13 J. P. 254.

**578. — — —.]—**Prisoners were indicted for night poaching, & for assaulting a game-keeper with intent. Prisoners were seen upon the land of prosecutor at night in pursuit of game. They escaped into a highway & there assaulted the keepers. But the keepers stated that they had not followed prisoners into the highway with an intention to arrest them there :—**Held :** (1) evidence of the common intent to poach did not sustain the allegation of a common intent to wound ; (2) there being no intention on the part of the keepers to arrest prisoners at the time when the attack was made upon them, it was not an assault within Night Poaching Act, 1828 (c. 69).—*R. v. DODDRIDGE* (1860), 8 Cox, C. C. 335.

**579. Common design to commit assault—Felony committed by one not part of the common design.]—**MACKLIN & MURPHY'S CASE, No. 518, *ante*.

**580. — — —.]—***R. v. PRICE*, No. 525, *ante*.

**581. — — —.]—***R. v. CATON*, No. 531, *ante*.

**582. Illegal entry into house by several—Larceny by some of the party.]—**ANON. (1664), 1 Leach, 7, n. ; cited in Kel. 113 ; 12 Mod. Rep. 629 ; 84 E. R. 1105.

**Annotation :—***Reld.* Hodgson's Case (1690), 1 Leach, 6.

**583. Racing on highway—Death caused by one only.]—**If A. & B. be riding fast along a highway as if racing, & A., ride by without doing any mischief, but B. rides against the horse of C., whereby C. is thrown & killed, this is not manslaughter in A.—*R. v. MASTIN* (1834), 6 C. & P. 398.

**584. Common design to commit trespass—Murder by one in sudden affray.]—**Three soldiers went to rob an orchard ; two got upon a tree, &

the third stood at the gate with a sword in his hand. The owner's son coming by collared him & asked him what business he had there & thereupon the soldier stabbed him :—**Held :** murder in him ; but those in the tree were innocent as they came to commit a small trespass & the man was killed in a sudden affray without their knowledge, but it would have been otherwise if they had all come thither with a general resolution against all opposers.—**THREE SOLDIERS' CASE** (1697), *Fost.* 353.

**585. Common design to do unlawful act—Attempt by all to resist arrest—Accidental shooting by one of another of the party.]—***R. v. PLUMMER* (1701), Kel. 109 ; 12 Mod. Rep. 627 ; *Fost.* 352 ; 84 E. R. 1103.

**Annotations :—***Reld.* Hodgson's Case (1690), 1 Leach, 6 ; *R. v. Burrigge* (1735), 3 P. Wms. 439 ; *R. v. Pembilton* (1874), 22 W. R. 553. **Mentd.** *R. v. Huggins* (1730), 1 Barn. K. B. 396 ; *R. v. Francis* (1735), *Cunn.* 165.

**586. — — —.]—**Prisoners were hired by a tenant to carry away his goods to prevent distress & went armed with bludgeons & other offensive weapons, & the landlord assisted by others attempted to prevent it, & in the violence of the affray, after the constable had in vain attempted to disperse them, a boy standing at his father's door who took no part therein was killed by one of the company unknown :—**Held :** as the boy was unconcerned in the affray the killing of him could not be imputed to the rest who were merely engaged in the general affray.—**HODGSON'S CASE** (1690), 1 Leach, 6 ; *sub nom.* *R. v. HUBSON*, 1 East, P. C. 258.

**587. — Attempt to seize goods—Accidental killing of bystander.]—**Where persons assembled with force to seize goods under pretence of lawful authority & an unarmed woman coming out of the house was killed by a stone thrown by one of the assailants at another person in the gateway :—**Held :** this was murder in them all.—**MANSSELL & HERBERT'S CASE** (1556), 2 Dyer, 128 b ; 73 E. R. 279.

**Annotation :—***Distd.* *R. v. Plummer* (1701), 12 Mod. Rep. 627.

**588. — Nature of common design not proved—Riotous demolition of house by some in absence of others.]—***R. v. HOWELL*, No. 467, *ante*.

### iii. Committed after Completion of Common Design.

**589. Murder.]—**MOHUN'S (LORD) CASE, No. 513, *ante*.

**590. — — —.]—**A. beat a constable in the execution of his office but was separated & desisted. B., a friend of A., without any preconcerted arrangement, thereupon rushed in & took up the struggle

probable ; & having regard both to the strictness of the tests which should be applied to the interpretation of a penal statute, & specially of a section such as Penal Code, s. 111, & also to the necessary difficulty of questions as to the state of a man's mind at a particular moment, it could not, in the present case, be said that, because the accused knew of & connived at the intended robbery, they must be presumed to have foreseen that such excessive violence as was used was probable.—*R. v. MATHURA DAS* (1884), 1 L. R. 6 All. 491.—**IND.**

**c. Common design to assault—Injury inflicted by one causing death.]—**Where three prisoners assaulted the deceased & gave him a beating, in the course of which one of the prisoners struck the deceased a blow on the head, which resulted in death :—**Held :** in the absence of proof that prisoners had the common intention to inflict

injury likely to cause death, they could not be convicted of murder.—*R. v. DUMA BAIDYA* (1896), 1 L. R. 19 Mad. 483.—**IND.**

**d. Common design to do lawful act—Mule killed by one.]—**Several persons having been indicted for killing a mule, on proof having been given that they were at the time preventing the illegal removal of a crop which had been distrained :—**Held :** the person only who had actually killed the mule could be convicted, the others not having been present for an illegal purpose.—*R. v. CASEY* (1841), 2 Leg. Rep. 216.—**IR.**

**e. — Excessive violence by some.]—**If the accused are justified in resisting the theft of the crops, they cannot be considered as members of an unlawful assembly, with the common object to assert a right to the disputed land & crops, because some

members thereof may have exceeded the right of private defence ; but if some of the members continue in it, after the others have exceeded the right by the infliction of unnecessary violence, & aid & abet the latter, they also must be considered as having exceeded the right. Where the accused, three of whom were armed with a sword, a scythe & an iron-shod stick respectively, & the rest with lathis, went in a large body to a certain disputed land, where the labourers of the opposite party were reaping some musouri crop & attacking them, fatally wounding one & severely injuring another, it was held that the accused who ordered the attack & those who used the weapons had exceeded the right of private defence, & so also the others, who continued in the unlawful assembly thereafter & aided & abetted the former.—**BAIJNATH DHANUK v. R.** (1908), 1 L. R. 36 Calc. 296.—**IND.**



*Sect. 3.—Degrees of criminal liability: Sub-sect. 3, B. (f) iii., (g) & (h).]*

& the constable was killed without A. taking any further part:—*Held*: B. was guilty of murder, but A. was innocent, for it did not appear that A. & B. had previously agreed upon offering any violence to the constable, or to obstruct him in the execution of his office, & the murder was not committed in consequence of any unlawful combination between them.—*R. v. A. & B. (temp. 1088–1710)*, Fost. 353.

591. —.]—Two men were beating another in the street & a stranger passing said, "I am ashamed to see two men beat one," whereupon one of those who were beating the one, rushed at the stranger & stabbed him so that he died later. Both were indicted as principals in the murder:—*Held*: because it did not appear that one of them intended any injury to the person killed, he could not be guilty of his death either as principal or accessory, for although they were both doing an unlawful act, the death of the party did not ensue upon that act.—*ANON. (1723)*, 8 Mod. Rep. 164; 88 E. R. 121.

592. Robbery by one—Previous assault by several.]—If a gang of poachers attack a gamekeeper, & leave him senseless on the ground, & one of them return & steal his money, etc., that one only can be convicted of the robbery, as it was not in pursuance of any common intent.—*R. v. HAWKINS (1828)*, 3 C. & P. 392.

593. Violence in resisting arrest.]—If several are out for the purpose of committing a felony, & upon an alarm run different ways, & one of them maim a pursuer to avoid being taken, the others are not to be considered principals in such act.—*WHITE & RICHARDSON'S CASE (1806)*, Russ. & Ry. 99, C. C. R.

594. —.]—*R. v. HARVEY & CAYLOR*, No. 561, ante.

(g) Evidence of Common Purpose.

595. Murder—Supplying drug for abortion—Not party to administration.]—Prisoner, at the request of a pregnant woman who wished to procure abortion, obtained for her a poisonous drug. He knew the purpose for which she wanted it, & though he gave it to her for that purpose, he was unwilling that she should use it, & he did not administer it to her or cause her to take it. She, however, took it for the purpose assigned, & died in consequence:—*Held*: prisoner was not liable to be convicted on an indictment charging him with the murder of the woman.—*R. v. FRETWELL (1862)*, Le. & Ca. 161; 31 L. J. M. C. 145; 6 L. T. 333; 26 J. P. 499; 8 Jur. N. S. 466; 10 W. R. 545; 9 Cox, C. C. 152, C. C. R.

*Annotation*:—*Refd. R. v. Lomas (1913)*, 78 J. P. 152.

596. Coining—Sufficiency of evidence.]—*R. v. ISAACS (1813)*, Russell on Crimes & Misdemeanours, 8th ed. 354.

597. Riot—Verbal encouragement without physical assistance.]—Verbal encouragement & incitement at the time & place of the offence but without physical assistance in it is sufficient for conviction as a principal in the second degree.—*R. v. ROYCE (1767)*, 4 Burr. 2073; 98 E. R. 81, C. C. R.

*Annotation*:—*Refd. R. v. Smith O'Brien (1848)*, 7 State Tr. N. S. 1.

598. Unlawful assembly—Attendance as partisan.]—If the purposes of an assembly are unlawful, every one who, after becoming aware of those purposes, attends as a partisan without taking steps to counteract such purposes, is guilty of taking part in an unlawful assembly. If there are circum-

stances of illegality such as the exhibition of arms, so as to excite terror, every one who, with knowledge of those circumstances, lends himself to the purposes of the meeting is guilty.—*DEWHURST'S CASE (1820)*, 1 State Tr. N. S. 529.

*Annotation*:—*Mentd. R. v. Clarkson (1892)*, 56 J. P. 375.

599. Poaching—Sufficiency of evidence.]—Two prisoners were seen together running out of a coppice, one of them with a gun. The third immediately afterwards came out of it alone with a gun & a pheasant:—*Held*: insufficient evidence of concert.—*R. v. JONES (1847)*, 9 L. T. O. S. 180; 2 Cox, C. C. 185.

Manslaughter of keeper.]—More than nine men, of whom seven were armed with guns, being out at night in pursuit of game, were met by a party of gamekeepers, without firearms, who at once assaulted them with sticks, & one of them with a dangerous weapon, likely to inflict deadly injury, with which he struck one of the poachers, upon which another of them fired & killed him. The grand jury were directed to throw out bills for murder against two of the men, one of whom was supposed to have fired the fatal shot, & the whole nine were indicted for manslaughter. There was evidence that they all stood in a row & cried "shoot":—*Held*: (1) whether or not the man who fired the shot could be identified, none of the prisoners would be guilty, unless parties to the act of firing, & though their being in a row, & crying out "shoot" was evidence that they were parties to the act, it was only evidence, & its effect would depend upon how far all the circumstances showed that the firing was in pursuance of a common design to shoot, or only in consequence of a particular personal encounter; (2) an approver having given evidence that one of the prisoners fired the shot, a policeman might be asked whether another of them, who had given information, had not stated that it was a different man who fired.—*R. v. LUCK (1862)*, 3 F. & F. 483.

*Annotation*:—*As to (1) Distd. R. v. Turner (1864)*, 4 F. & F. 339.

601. —.]—On the trial of I. & P., two poachers, for shooting with intent to murder, the Crown advanced no evidence of any actual arrangement made between I. & P. to act with a common purpose, but put forward the case that they were acting as the result of a common purpose to resist apprehension at all costs. The jury found both prisoners guilty of shooting with intent to murder, but they added that they were unable to say which of them fired the shot, but that the intention was to prevent arrest at all costs, even to the extent of murder, & that they were acting with that common purpose:—*Held*: the jury were justified in inferring the common purpose from prisoners' actions & conduct when they became aware of the pursuit of the keepers.—*R. v. PRIDMORE (1913)*, 77 J. P. 339; 29 T. L. R. 330; 8 Cr. App. Rep. 198, C. C. A.

602. Deer stealing—Loan of articles for the purpose.]—*R. v. NASH (1702)*, 2 Salk. 542; 91 E. R. 458.

603. —.]—A man who persuades another to kill deer & lends him any thing for that purpose, is liable to the penalties of a statute made in terms against persons killing deer.—*R. v. WHISTLER (1703)*, 2 Ld. Raym. 842; 7 Mod. Rep. 129; 11 Mod. Rep. 25; 2 Salk. 542; Holt, K. B. 215; 92 E. R. 63.

604. Slight evidence may suffice.]—A jury may convict on slight evidence of a common design. Where there is evidence to go to the jury that applt. & a co-prisoner were acting in concert,

they having entered a public-house & been seen together afterwards:—*Held*: the conviction would not be quashed.—*R. v. BOLSTER* (1909), 3 Cr. App. Rep. 81, C. C. A.

(h) *Aiding and Abetting in Misdemeanours.*

**605. Seditious libel—Sale of pamphlet.**—A. was indicted for publishing a libel in the form of a pamphlet, attempting to justify the crimes of assassination & murder, & to incite persons to commit those crimes upon the sovereigns & rulers of Europe. There were also counts, under Offences against the Person Act, 1861 (c. 100), s. 4, charging him with encouraging & endeavouring to persuade persons unknown to murder the sovereigns & rulers of Europe. B. was charged with aiding & abetting H. to commit these misdemeanours:—*Held*: the words "sovereigns of Europe" specified a definite class, & the counts were good.

The jury were directed that if they found A. guilty, then B., who had sold copies of the pamphlet, was guilty of aiding & abetting if he knew what was in the pamphlet, or deliberately shut his eyes to what was in it.

*Semle*: a document published in this country, which is calculated to disturb the govt. of some foreign country, is not a seditious libel, nor punishable as a libel at all.—*R. v. ANTONELLI & BARBERI* (1905), 70 J. P. 4.

**606. Procuring obscene literature to be sent by post—Insertion in newspaper of advertisement regarding sale—Liability of editor.**—Deft. inserted in a newspaper, of which he was the editor, advertisements which, though not obscene in themselves, related, as he knew, to the sale of obscene books & photographs. A police officer wrote to the addresses given in the advertisements, & received in return from the advertisers, who were foreigners resident abroad, obscene books & photographs. Deft. was tried on an indictment charging him with causing & procuring obscene books & photographs to be sold & published, & to be sent by post contrary to Post Office (Protection) Act, 1884 (c. 76), s. 4, & was convicted:—*Held*: the conviction was right. *v. DE MARNY*, [1907] 1 K. B. 388; 76 L. J. K. B. 210; 96 L. T. 159; 71 J. P. 14; 23 T. L. R. 221; 51 Sol. Jo. 146; 21 Cox, C. C. 371, C. C. R.

*Annotations*:—*Reid*, *Cook v. Stockwell* (1915), 84 L. J. K. B. 2187; *Gould v. Houghton*, [1921] 1 K. B. 509.

**607. Cruelty to animals—Certificate of fit condition to work by veterinary surgeon—Liability of veterinary surgeon.**—The owner of a horse which was lame consulted a veterinary surgeon as to whether the horse was in a fit condition to work. The veterinary surgeon advised that it was, & that the work would not cause it additional suffering. The owner worked the horse. The veterinary surgeon was summoned, under Cruelty to Animals Act, 1849 (c. 92), s. 2, for cruelly ill-treating the horse "by causing it to be worked while in an unfit state." The magistrate found that deft. knew, when he advised the working of the horse, that to work it in its then state would be an act of cruelty:—*Held*: anyone who counsels the commission of an offence punishable summarily may

be proceeded against as a principal.—*BENFORD v. SIMS*, [1898] 2 Q. B. 641; 67 L. J. Q. B. 655; 78 L. T. 718; 47 W. R. 46; 14 T. L. R. 424; 42 Sol. Jo. 556; 19 Cox, C. C. 141, D. C.

*Annotations*:—*Consd.* *Callow v. Tillstone* (1900), 83 L. T. 411. *Fold*, *Du Cros v. Lambourne*, [1907] 1 K. B. 40. *Reid*, *Gould v. Houghton*, [1921] 1 K. B. 509.

**608. Sale of unsound meat—Certificate of soundness by veterinary surgeon—Liability of veterinary surgeon.**—Negligence on the part of a veterinary surgeon in making an examination & giving a certificate that meat which is in fact unsound is sound & healthy is not of itself sufficient to justify a conviction against the veterinary surgeon for aiding & abetting the exposing of the unsound meat for sale, although such negligence in fact causes the exposure of the meat.—*CALLOW v. TILLSTONE* (1900), 83 L. T. 411; 64 J. P. 823; 19 Cox, C. C. 576, D. C.

**609. Sale of adulterated food by retailer—Liability of wholesale dealer.**—*GOULD & Co. v. HOUGHTON*, No. 431, *ante*.

**610. Dangerous driving of motor car—Approval of owner—Liability of owner.**—A person who has aided & abetted the commission of an offence punishable on summary conviction may, under Summary Jurisdiction Act, 1848 (c. 43), s. 5, be convicted upon an information which charges him with having committed the offence as principal offender. Applt. appealed to quarter sessions against a conviction for unlawfully driving his motor car at a speed dangerous to the public. At the hearing of the appeal there was a conflict of evidence as to whether the car was being driven by applt. or by a lady seated by his side in the car. Quarter sessions, without deciding whether applt. was himself driving the car, dismissed the appeal finding as facts that if the lady was driving she was doing so with the consent & approval of applt., who must have known that the speed was dangerous, & who, being in control of the car, could, & ought to, have prevented it. On appeal:—*Held*: there was evidence on which applt. could be convicted of aiding & abetting the commission of the offence.—*DU CROS v. LAMBOURNE*, [1907] 1 K. B. 40; 76 L. J. K. B. 50; 95 L. T. 782; 70 J. P. 525; 23 T. L. R. 3; 21 Cox, C. C. 311; 5 L. G. R. 120, D. C.

*Annotations*:—*Distd.* *R. v. De Marny* (1906), 96 L. T. 159. *Consd.* *Gould v. Houghton*, [1921] 1 K. B. 509. *Reid*, *Provincial Motor Car Co. v. Dunning* (1909), 101 L. T. 231; *Samson v. Aitchison*, [1912] A. C. 844.

**611. Breach of motor car regulation by driver—Liability of proprietor.**—Appls., a limited co., who were motor cab proprietors were convicted before a magistrate of aiding & abetting a driver in their service in using a motor cab in contravention of Article 11 of Motor Car (Registration & Licensing) Order, 1903 made by the Board of Trade under Motor Car Acts, 1896 (c. 36), & 1903 (c. 36). The driver was using a motor cab more than one hour after sunset having a lamp, which was lighted, hanging too low to illuminate the identification plate. The motor cab was fitted with a proper & permanent bracket on which to hang the lamp. Appls. had in their service a foreman, who was charged by them with the duty of seeing that the cabs left their premises in such

PART I. SECT. 6, SUB-SECT. 3.—  
B. (h).

**1. Attempt to rape.**—B. & G. were charged on an information of one count with committing a rape on F. The evidence showed that F. in the night heard a noise downstairs & going down in her nightdress found G. under a table, G. producing a

pistol & using threats carried F. upstairs. He threw her down on her bed & tied her hands & feet to the head & foot of her bed. He then left her. He came again to her twice, once naked, but did not then assault her. He then dressed himself. After this B. appeared. B. had known F. before. As she lay tied he conversed with her & attempted to have con-

nection with her but desisted saying, "I can't." G. then returned & after conversation with B. was then overheard by F. to say to B., "You coward! if you don't I will." B. left the room & was heard by F. to go downstairs & jump out of the kitchen window. G. then undressed & with violence assaulted F. with intent. The jury acquitted both of rape but found both



**Sect. 6.—Degrees of criminal liability: Sub-sect. 3, B. (h), (i) & C.]**

a condition as to comply in all respects with the above Acts, & the regulations of the Board of Trade made thereunder. The magistrate found that appts. were careless in not seeing to it that a proper lamp was fixed on the cab:—*Held*: there was evidence on which appts. might be convicted of aiding & abetting their driver in committing a breach of the above regulation.—**PROVINCIAL MOTOR CAB CO. LTD. v. DUNNING**, [1909] 2 K. B. 599; 78 L. J. K. B. 822; 101 L. T. 231; 73 J. P. 387; 25 T. L. R. 646; 22 Cox, C. C. 159; 7 L. G. R. 765, D. C.

*Annotation*:—**Mentd.** *Dickeson v. Mayes*, [1910] 1 K. B. 452.

**612. Breach of motor regulations by proprietor—Liability of driver—Roads Act, 1920 (c. 72), s. 8 (3).**—By the above sub-sect., "Where a licence has been taken out as for a vehicle to be used solely for a certain purpose, & the vehicle is at any time during the period for which the licence is in force used for some other purpose, the person so using the vehicle shall, if the rate of duty chargeable in respect of a licence for a vehicle used for that other purpose is higher than the rate chargeable in respect of the licence held by him, be liable to an excise penalty":—*Held*: where a summons against the licence-holder & owner of a motor vehicle for using the vehicle for an unlicensed purpose, chargeable with a higher duty than that charged under the licence which he has taken out, was dismissed on the ground that he was not using the vehicle at the time of the alleged offence, the driver could not be convicted of aiding & abetting, because where a summons for the principal offence had been dismissed, an aider & abettor could only be convicted as a principal & on the particular words of the sub-sect. only the licence-holder could be guilty of the principal offence.—**MORRIS v. TOLMAN**, [1923] 1 K. B. 166; 92 L. J. K. B. 215; 128 L. T. 118; 86 J. P. 221; 20 T. L. R. 39; 67 Sol. Jo. 169; 20 L. G. R. 803; 215 D. C.

**613. Sale of liquor without a licence—Supply of liquor to vendors by brewer—Knowledge by brewer of resale.**—Applt., a brewer, was in the habit of supplying three of his private customers, small cottagers, with beer for their own consumption. Shortly after war broke out between Great Britain & Germany, the supply by applt. of beer to the cottagers increased considerably. Applt. was told by his carman that these customers were selling beer to soldiers, when he said that they must not do it, but that there was nothing to prevent the soldiers giving the cottagers something for their trouble in obtaining the beer. This remark was communicated by the carman to the cottagers, & the increased supply of beer continued. The cottagers were charged with, & pleaded guilty to, selling intoxicating liquors without a licence to the soldiers, & applt. was charged with, & convicted of, aiding & abetting them:—*Held*: there was evidence before the justices which would support such conviction.—**COOK v. STOCKWELL** (1915), 84 L. J. K. B. 2187; 113 L. T. 426; 79 J. P. 394; 31 T. L. R. 426; 15 Cox, C. C. 49, D. C.

*See, further*, INTOXICATING LIQUORS.

guilty of the attempt by G. On a question of law reserved, whether there was evidence to support the conviction of B. as a principal in the misdemeanour:—*Held*: the conviction of both was right.—**R. v. BRANCH** (1863), 2 W. & W. 253.—**AUS.**  
**g. Travelling in train while suffer-**

**ing from cholera—Purchase of ticket by second person with knowledge of disease.**—K., knowing that he was suffering from cholera, entered a train as a passenger without informing the railway co.'s servants of his condition. M. knowing of K.'s condition, bought K.'s ticket & travelled with him:—

**614. Exercise of calling on Sunday—Purchase of goods from vendor—Knowledge of purchaser—Sunday Observance Act, 1877 (c. 7).**—The purchase of cigarettes from the proprietor of an eating house on a Sunday does not *per se* amount to the offence of aiding & abetting the vendor in the offence, under the above Act, of the vendor exercising his ordinary calling on the Lord's day.

*Qu.*: whether it would amount to such an offence if the purchaser knew that the vendor was exercising his ordinary calling on a Sunday.—**CHIVERS v. HAND** (1914), 84 L. J. K. B. 304; 112 L. T. 221; 79 J. P. 88; 31 T. L. R. 19; 24 Cox, C. C. 520; 13 L. G. R. 537, D. C.

*Annotation*:—**Distd.** *Fairburn v. Evans*, [1916] 1 K. B. 218.

**615.** ————*Applt. purchased sweets from a refreshment-house keeper on a Sunday & took them from the premises for consumption. At the time of his purchase applt. knew that the refreshment-house keeper was exercising his ordinary calling on the Sunday & that he had constantly been convicted of having done so on previous occasions, under Sunday Observance Act, 1877 (c. 7):—Held*: applt. could be convicted of aiding & abetting the refreshment-house keeper in the exercise of his ordinary calling in contravention of the above Act.—**FAIRBURN v. EVANS**, [1916] 1 K. B. 218; 85 L. J. K. B. 479; 114 L. T. 363; 80 J. P. 63; 32 T. L. R. 166; 25 Cox, C. C. 289; 14 L. G. R. 306, D. C.

*Annotation*:—**Mentd.** *Brightman v. Tate*, [1919] 1 K. B. 463.

*See, further*, TIME.

**616. Harboursing prostitutes—Liability of servant.**—If the keeper of a place of public resort instructs his servant to manage it in such a way as to be a violation of Metropolitan Police Act, 1839 (c. 47), s. 44, & the servant does so, the master is guilty of an offence within that Act, & the servant is guilty as aiding & abetting him within Summary Jurisdiction Act, 1848 (c. 43), s. 5.—**WILSON v. STEWART** (1863), 3 B. & S. 913; 2 New Rep. 115; 32 L. J. M. C. 198; 8 L. T. 277; 27 J. P. 661; 9 Jur. N. S. 1130; 11 W. R. 640; 6 Cox, C. C. 354; 122 E. R. 341.

(i) *Other Cases.*

**617. Uttering forged note.**—**R. v. TATTERSALL** (1801), 1 Russell on Crimes & Misdemeanours, 8th ed. 112.

*Annotations*:—**Mentd.** *R. v. Wylie* (1804), 1 Bos. & P. N. R. 92; *Whiley & Haines's Case* (1804), 2 Leach, 983; *R. v. Francis* (1874), L. R. 2 C. C. R. 128.

**618. Killing cattle.**—M. & S. were tried on an indictment grounded on 9 Geo. I., c. 22, for unlawfully, maliciously & feloniously killing a mare, the property of D. M. & S. agreed to kill one of D.'s breeding mares, & with that intent they went to a close where they were kept; M. & S. caught one of the mares, & M. buckled his own girdle about her neck, fastening one of S.'s to his own. S. took hold of the girdle, fixed in this manner to the mare's neck, & held it straight, in order to prevent the mare getting away, or starting from the blow, while M., with a large sharp hook, gave the mare a deep wound of which she died that night:—*Held*: although S. did not give the stroke, his being present & aiding in the manner stated above, would bring him within the penalty of this law, so as to oust him of clergy, since the Act does

*Held*: K. was properly convicted under Penal Code, s. 269, of negligently doing an act which was, & which he had reason to believe was, likely to spread infection of a disease dangerous to life, & M. of abetting of K.'s offence.—**R. v. KRISHNAPPA & MURUGAPPA** (1883), 1 L. R. 7 Mad. 276.—**IND.**

not by any express provision take in aiding & abetting.—*R. v. MIDWINTER & SIMS* (1749), 1 Leach, 68, n.

*Annotation*:—*Reid. R. v. Royce* (1767), 4 Burr. 2073.

**619. Smuggling.**—In smuggling goods, all present & aiding are principals & equally liable to the whole penalty.—*R. v. MANNING* (1739), 2 Com. 616; 92 E. R. 1236.

*Annotation*:—*Mentd. Burnell v. Hunt* (1841), 5 Jur. 650.

**620. Larceny by a trick.**—To aid & assist a person, to the jurors unknown, to obtain money by the practice of ring-dropping, is felony if the jury find that the prisoner was confederating with the person unknown to obtain the money by means of this practice.—*MOORE'S CASE* (1784), 1 Leach, 314; 2 East, P. C. 679, C. C. R.

*Annotations*:—*Reid. R. v. Marsh* (1784), 1 Leach, 345. *Mentd. R. v. Wilson* (1837), 8 C. & P. 111.

**621. —.**—If several act in concert to steal a man's goods, & he is induced by fraud to trust one of them in the presence of the others with the possession of such goods, & another of them entices him away, that the man who has his goods may carry them off, all are guilty of felony. The receipt by one is a felonious taking by all.—*STANDLEY'S CASE* (1816), Russ. & Ry. 305, C. C. R.

—*R. v. COUNTY* (1816), 2 Russell on Crimes & Misdemeanours, 8th ed., 1149.

**623. Obtaining by false pretences.**—(1) To constitute an offence within 30 Geo. 2, c. 24, money or goods must be obtained by defts. by a false pretence, with an intent to defraud, & it is no objection that the pretence consists in a representation as of some transaction to take place at a future time.

(2) Where the pretence is conveyed by words spoken by one deft. in the presence of others, who are acting in concert together, they may be all indicted jointly.

(3) It is no objection in arrest of judgment that the indictment contains several charges of the same nature in the different counts.—*YOUNG v. R.* (1789), 3 Term Rep. 98; 100 E. R. 475; *sub nom. R. v. YOUNG*, 1 Leach, 505; 2 East, P. C. 828.

*Annotations*:—*As to (1) Reid. R. v. Parker* (1837), 7 C. & P. 825; *Hamilton v. R.* (1846), 9 Q. B. 271; *R. v. Hamilton* (1846), 10 Jur. 1028; *R. v. Gray* (1891), 17 Cox, C. C. 299. *As to (2) Reid. Castro v. R.* (1881), 6 App. Cas. 229. *As to (3) Reid. R. v. Darley* (1803), 4 East, 174; *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *R. v. Downing & Powys* (1845), 1 Cox, C. C. 156; *Campbell & Haynes v. R.* (1846), 1 Cox, C. C. 269; *Latham v. R.* (1864), 5 B. & S. 635; *Castro v. R.* (1881), 6 App. Cas. 229. *Generally, Mentd. R. v. Mitchell* (1848), 3 Cox, C. C. 1; *R. v. Heywood* (1864), 9 Cox, C. C. 479; *R. v. Brallsford*, [1905] 2 K. B. 730; *R. v. Lockett, Grizzard, Gutwirth, & Silverman*, [1914] 2 K. B. 720.

**624. Challenge to fight**—Bearer of challenge —*R. v. DARCY & COLLINS* (1664), 1 Sid. 186;

**625. Riot**—Inflammatory speeches at previous unlawful assembly—*Liability of speakers.*—*R. v. SHARPE*, No. 489, *ante*.

**626. Trespass in pursuit of game.**—*MAYHEW v. WARDLEY*, No. 461, *ante*.

**627. —.**—In support of an information, under Summary Jurisdiction Act, (1848) (c. 43), s. 5, against A. for aiding & abetting B. to commit the offence of trespass in pursuit of game, there was evidence that A. drove B. in a conveyance along a turnpike-road for a lawful purpose, that the conveyance was afterwards stopped, when B. got out & entered a field & shot a hare, which he gave to A. on returning to the conveyance, & A. then drove along the road:—*Held*: there was evidence on which the justices might find A. guilty of the offence so charged.—*STACEY v. WHITEHURST* (1865), 18 C. B. N. S. 344; 5 New Rep.

368; 34 L. J. M. C. 94; 11 L. T. 710; 29 J. P. 136; 13 W. R. 384; 144 E. R. 477.

*Annotations*:—*Consd. Du Cros v. Lambourne*, [1907] 1 K. B. 40. *Reid. Gould v. Houghton*, [1921] 1 K. B. 509.

**C. Where Person charged is incapable of being Principal in the First Degree.**

**628. Rape—Assistance by husband.**—*R. v. AUDLEY (LORD), CASTELHAVEN'S (EARL) CASE* (1631), Hut. 115; 1 Hale, P. C. 629; 3 State Tr. 401; 123 E. R. 1140, H. L.

*Annotations*:—*Consd. Brown's Case* (1673), 1 Vent. 243. *Reid. R. v. Fleet Warden* (1699), 12 Mod. Rep. 337; *R. v. Reading* (1734), Lee temp. Hard. 79; *R. v. Story* (1849), 13 J. P. 766; *Reeve v. Wood* (1864), 5 B. & S. 364; *R. v. Clarence* (1888), 22 Q. B. D. 23. *Mentd. Grigg's Case* (1660), T. Raym. 1; *Morley's Case* (1666), 6 State Tr. 770; *R. v. Azire* (1725), 1 Stra. 633; *R. v. Serjeant* (1826), Ry. & M. 352.

**629. — Assistance by a woman.**—*Ball* allowed in rape under special circumstances.

A person may be a principal in the second degree even if from sex or age incapable of being a principal in the first degree.—*R. v. BALTIMORE (LORD)* (1768), 1 Wm. Bl. 648; 96 E. R. 376; *sub nom. R. v. GRIEFFENBURGH*, 4 Burr. 2179.

**630. —.**—(1) A woman may be indicted for rape as a principal in the second degree.

(2) There is no right to separate trial in cases of a joint indictment. It is solely a matter for the discretion of the ct.—*R. v. RAM & RAM* (1893), 17 Cox, C. C. 609.

**631. Assault with intent to commit rape—Liability of boy under fourteen.**—*R. v. ELDERSHAW*, No. 200, *ante*.

**632. Carnal knowledge of girl under sixteen—Girl not liable for abetting—Criminal Law Amendment Act, 1885 (c. 69), s. 5.**—It is not a criminal offence for a girl between the ages of thirteen & sixteen to aid & abet a male person in committing, or to incite him to commit, the misdemeanour of having unlawful carnal knowledge of her contrary to sect. 5 of the above Act.—*R. v. TYRRELL*, [1894] 1 Q. B. 710; *sub nom. R. v. TYRRELL*, 63 L. J. M. C. 58; 70 L. T. 41; 42 W. R. 255; 10 T. L. R. 167; 38 Sol. Jo. 130; 17 Cox, C. C. 716; 10 R. 82, C. C. R.

**633. Procurement of girl—Person for whom girl is procured liable as abettor—Criminal Law Amendment Act, 1885 (c. 69), s. 2 (1).**—*R. v. MACKENZIE & HIGGINSON*, No. 840, *post*.

**634. Assault with intent to commit sodomy—Liability of boy under fourteen who assists.**—*R. v. CRATCHLEY*, No. 212, *ante*.

**635. Abortion by means of instrument—No allegation of pregnancy in indictment—Liability of woman on whom operation performed.**—A person who consents to another using an instrument upon her with the intent to procure her miscarriage can be convicted of being present, aiding & abetting & assisting the other to use an instrument upon her with the intent to procure her miscarriage under Offences against the Person Act, 1861 (c. 100), s. 58, although there is no allegation in the indictment that accused was with child at the time of the offence.—*R. v. SOCKETT* (1908), 72 J. P. 428; 24 T. L. R. 893; 52 Sol. Jo. 729; 1 Cr. App. Rep. 101, C. C. A.

**636. Concealment of birth—Burial of body by agent—Liability of agent.**—If the body of a dead child be secretly buried or otherwise disposed of by an accomplice of its mother, the accomplice acting as her agent in the matter, the mother of the child is punishable under 9 Geo. 4, c. 31, s. 14.

*Semble*: although under sect. 14 of the statute the woman only is indictable for concealment of the birth of a dead child, yet any other person who has counselled the concealment is indictable under

*Sect. 6.—Degrees of criminal liability: Sub-sect. 3, C. & D.; sub-sect. 4, A.]*

sect. 31.—*R. v. DOUGLAS* (1836), 7 C. & P. 644; 1 Mood. C. C. 480.

637. ———.]—A woman who was delivered of a child which died soon after its birth, concurred with her paramour in endeavouring to conceal the birth, & he, in consequence of her persuasion, she remaining in bed, took the body & buried it, intending thereby to conceal the birth:—*Held*: she could be convicted of endeavouring to conceal the birth under 9 Geo. 4, c. 31, s. 14, & he could be convicted of counselling, aiding & abetting her in the offence under sect. 31.—*R. v. BIRD* (1849), 2 Car. & Kir. 817.

638. ———.]—If a woman be delivered of a child which is dead, & a man take the body & secretly bury it the woman is indictable for the concealment by secret burying under 9 Geo. 4, c. 31, s. 14, & he is liable for aiding & abetting her under sect. 31 if there was a common purpose in both in thus endeavouring to conceal the birth of the child; but the jury must be satisfied not only that she wished to conceal the birth, but was a party to the carrying that wish into effect by the secret burial by the hand of the man in pursuance of a common design between them.—*R. v. SKELTON* (1850), 3 Car. & Kir. 119.

*See, now, Larceny Act, 1861 (c. 100), s. 60.*

#### *D. Indictment and Trial.*

639. May be indicted as principal in the first degree—Or as aider & abettor.]—An indictment on 43 Geo. 3, c. 58, charging in one count, that A. feloniously, wilfully, maliciously & unlawfully & of his malice aforethought, did shoot at B., with intent feloniously, etc., to kill, etc., & that C. & D. were then & there aiding & abetting A. the felony aforesaid, in manner & form aforesaid, to do & commit, against the form, etc.; & in another count, charging the act of shooting on a person unknown, in the same words as before; & that all three A., C. & D. were then & there aiding & abetting him the felony aforesaid, in manner & form aforesaid, to do & commit, omitting the word feloniously to the aiding & abetting:—*Held*: good, on the whole, notwithstanding that omission, the statute having made aiders & abettors principal felons; although the jury, having found A. guilty generally & acquitted the others, afterwards expressly negated that A.'s was the hand that fired.—*R. v. TOWLE* (1816), 3 Price, 145; Russ. & Ry. 314; 2 Marsh. 466; 146 E. R. 217, Ex. Ch.

*Annotation:—Consd. R. v. Downing & Powys* (1845), 1 Cox, C. C. 156.

640. ———.]—A general conviction of a prisoner, charged both as principal in the first degree, & as an aider & abettor of other men in rape, is valid on the count charging him as principal. On such an indictment evidence may be given of several rapes on the same woman at the same time, by prisoner & other men, each assisting the other

in turn, without putting prosecutor to elect on which count to proceed.—*R. v. FOLKES* (1832), 1 Mood. C. C. 354, C. C. R.

641. ———.]—A count charging A. with a rape as a principal in the first degree, & B. as principal in the second degree, may be joined with another count charging B. as principal in the first degree & A. as principal in the second degree.—*R. v. GRAY* (1835), 7 C. & P. 164.

*Annotation:—Mentd. R. v. Francis* (1874), 22 W. R. 663.

642. ———.]—An indictment is good which charges that A. committed a rape, & that B. was present aiding & assisting him in the commission of the felony. In such a case the party aiding may be charged either, as he was in law, as a principal in the first degree, or, as he was in fact, a principal in the second degree.—*R. v. CRISHAM* (1841), Car. & M. 187.

643. ———.]—*R. v. DOWNING*, No. 457, ante.

644. Person indicted as principal in the first degree may be found guilty as principal in the second degree—Person indicted as aider & abettor may be found guilty as principal.]—If A. be indicted as having given the mortal stroke & B. & C. as present, aiding & assisting, & upon the evidence it appears that B. gave the stroke & A. & C. were only aiding & assisting, it maintains the indictment, & judgment shall be given against them all, for it is only a circumstantial variance, & in law it is the stroke of all that were present, aiding & abetting.—*MACKALLEY'S CASE* (1611), 9 Co. Rep. 61 b; Cro. Jac. 279; 77 E. R. 824.

*Annotations:—Relfd. Heydon's Case* (1613), 11 Co. Rep. 5 a; *R. v. Cary* (1616), 3 Bulst. 206; *R. v. Plummer* (1701), Kel. 107; *R. v. Huggins* (1730), 2 Ld. Raym. 1574. *Mentd. Hodges v. Marks & Marks* (1618), Cro. Jac. 485; *Waite v. Stoke Hundred* (1618), Cro. Jac. 496; *Holloway's Case* (1628), W. Jo. 198; *Gwinne v. Poole* (1692), 2 Lut. App. 1560; *London Corpn. v. Wood* (1701), 12 Mod. Rep. 669; *Harvy v. Broad* (1704), 2 Salk. 626; *Jackson v. Humphreys* (1706), 1 Salk. 273; *R. v. Tooley* (1709), 11 Mod. Rep. 242; *Smith v. Boucher* (1734), Kel. W. 144; *Swann v. Broome* (1764), 3 Burr. 1595; *O'Brian's Case* (1844), 1 Den. 9; *R. v. Davies* (1861), 8 Cox, C. C. 486; *Galliard v. Laxton* (1862), 2 B. & S. 363; *Barnacott v. Passmore* (1887), 51 J. P. 821.

645. ———.]—On an appeal of murder charging that A. gave the mortal wound, & that B. was present aiding & assisting, a verdict finding that B. gave the wound & that A. was present & assisting, is good.—*BANSON v. OFFLEY* (1687), 3 Mod. Rep. 121; 87 E. R. 78; *sub nom. BAUSON v. OFFLEY*, 3 Salk. 38; *sub nom. BENSON v. OFFLEY & LIPPON*, 2 Show. 510; Comb. 45.

646. Conviction of principal in the second degree though principal in the first degree not convicted.]—*R. v. WALLIS*, No. 556, ante.

647. ———.]—If two persons be indicted for murder, the one as a principal in the first degree, & the other as being present, aiding & assisting to commit it, the jury may find the principal in the first degree not guilty & convict the principal in the second degree.—*TAYLOR & SHAW'S CASE* (1785), 1 Leach, 360, C. C. R.

648. ———.]—*R. v. TOWLE*, No. 639, ante.

#### *V. L. R. 55.—AUS.*

*m. Admissibility of evidence.—Common design—Acts of others after prisoner's arrest.*—Whenever a joint participation in an enterprise is shown, any act done in furtherance of the common design is evidence against all who were at any time concerned in it. In this case, the prisoner being charged with being in arms in Upper Canada with intent to levy war against the Queen, evidence was admitted against the prisoner of an engagement between the body of men with whom he had been & the Canadian volunteers, although the same took place several

#### **PART I. SECT. 6, SUB-SECT. 3.—D.**

*h. May be indicted as aider & abettor.*—The indictment charged one B. with obtaining by false pretences from one J. T., two horses, with intent to defraud, & deft. was present aiding & abetting B.:—*Held*: good, deft. being charged as a principal in the second degree.—*R. v. CONNOR* (1864), 14 C. P. 629.—*CAN.*

*k. Sufficiency of evidence.*—An aider & abettor may be tried & convicted as a principal. The evidence in such case must show common criminal intent with the principal,

*R. v. GRAHAM* (1898), Q. R. 8 Q. B. 169.—*CAN.*

*l. Charged as "knowingly concerned in" crime.*—Prisoner, D., was charged with having stolen certain property belonging to the Commonwealth, & in the same presentment the prisoner, S., was charged with having been "knowingly concerned in stealing the property".—*Held*: the presentment charging Schiffman with "knowingly being concerned in stealing the property" was sufficient.—*R. v. DOLAN*, *R. v. SCHIFFMAN*, [1919]

**649.** —.]—A., B. & C. were indicted for murder, in the first count as principals in the first degree, & in the second count A. was indicted as a principal in the first degree & B. & C. as principals in the second degree. The grand jury ignored the first count as to B. & C. & found a true bill, on the second, against all. *Semble*: B. & C. might be convicted on the second count as principals in the murder, although A. was acquitted.

I am inclined to think that prisoner may demur & plead over to the felony at the same time (COLTMAN, J.).—*R. v. PHELPS* (1841), Car. & M. 180; 2 Mood. C. C. 240, C. C. R.

*Annotations*:—*Consd. R. v. Bird* (1851), 5 Cox, C. C. 20. *Mentd. R. v. Boden* (1844), 1 Car. & Kir. 395.

**650.** —.]—A limited co. cannot be committed for trial on an indictment.

A limited co. was charged before a justice with an offence under Representation of the People Act, 1918 (c. 64), s. 34, & a servant of the co. was charged with aiding & abetting the co. therein. Both defts. were ostensibly committed for trial under Grand Juries (Suspension) Act, 1917 (c. 4), s. 1 (2), which was then in force. An indictment was then presented against both defts. in which they were respectively charged as aforesaid, & they were both thereupon tried & convicted. On appeal by both defts. to the Ct. of Criminal Appeal:—*Held*: as against deft. co. the indictment & the conviction must be quashed, inasmuch as a limited co. could not be committed for trial; but, although the other deft. was charged with aiding & abetting deft. co., it did not on that account follow that the indictment & conviction must be quashed as against that deft. also.—*R. v. DAILY MIRROR NEWSPAPERS, R. v. GLOVER*, [1922] 2 K. B. 530; 91 L. J. K. B. 712; 127 L. T. 218; 86 J. P. 151; 38 T. L. R. 531; 66 Sol. Jo. 559; 16 Cr. App. Rep. 131, C. C. A.

**651.** —.]—*Misdemeanour*.—*R. v. BURTON*, No. 430, *ante*.

#### SUB-SECT. 4.—ACCESSORIES BEFORE THE FACT.

##### A. In General.

**652. Definition.**—(1) It is a principle in law which can never be controverted that he who procures a felony to be done is a felon. If present he is a principal, if absent, an accessory before the fact (FOSTER, J.).

(2) As to prisoners the judges are unanimously of opinion that, supposing a robbery were committed, the facts found are sufficient to charge them as accessories (FOSTER, J.).—*M'DANIEL'S CASE* (1755), 19 State Tr. 745; Fost. 121, 384.

*Annotations*:—*Generally. Mentd. Rafael v. Vereist* (1776), 2 Wm. Bl. 1055; *Donnelly's Case* (1779), 1 Leach, 193; *Smith's Case* (1783), 1 Leach, 288; *Prosser's Case* (1784), 1 Leach, 290, n.; *R. v. Webster* (1861), 9 Cox, C. C. 13; *R. v. Middleton* (1873), L. R. 2 C. C. R. 38; *R. v. Ashwell* (1885), 16 Q. B. D. 190.

**653. Previous concert—Absence at time of offence.**—*SOARES' CASE*, No. 483, *ante*.

hours after his arrest:—*Held*: the evidence had been properly received, as showing to some extent that the engagement in question had been contemplated by the parties while the prisoner was with them before his arrest.—*R. v. SLAVIN* (1866), 17 C. P. 205.—*CAN.*

n. —.]—*Res gestæ*.—Where an aider is indicted, it is, in order to prove the commission of the offence by the actual perpetrator, admissible to prove not only the acts done by the actual perpetrator, but also the statements of the actual perpetrator forming

part of the *res gestæ*, though not made in the actual or constructive presence of the person indicted.—*R. v. BROWN* (1896), 15 N. Z. L. R. 18.—*N.Z.*

#### PART I. SECT. 6, SUB-SECT. 4.—A.

**652 i. Definition.**—If one man incites another to commit murder, & that murder is committed, he not being present, the man inciting the other is what is called an accessory, & he must be indicted as an accessory before the fact, & such is the form of the indictment.—*R. v. MEAGHER* (1848), 7 State Tr. N. S. 1091.—*IR.*

**654. Absence essential.**—If the mortal blow is given on one day, & death ensues on another, & the indictment charges the accessories with being present aiding, etc., on the first day, it is bad.—*HEYDON'S CASE* (1586), 4 Co. Rep. 41 a; 76 E. R. 985.

*Annotations*:—*Refd. O'Brian's Case* (1844), 1 Den. 9. *Mentd. Hume v. Ogle* (1590), 4 Co. Rep. 42 b; *Wrote v. Wiggles* (1592), 4 Co. Rep. 45 b; *Long's Case* (1604), 5 Co. Rep. 120 a; *Mackalley's Case* (1611), 9 Co. Rep. 65 b; *Cooper v. Basingstoke Hundred* (1702), 2 Ld. Raym. 826.

**655.** —.]—(1) On an indictment for the murder of a constable in the execution of his office, it is not necessary to produce his appointment; it is sufficient if it be proved that he was known to act as constable.

(2) A person indicted as an accessory before the fact, cannot be convicted of that charge upon evidence proving him to have been present, aiding & abetting.—*GORDON'S CASE* (1789), 1 Leach, 515, C. C. R.

*Annotation*:—*As to (1) Refd. Butler v. Ford* (1833), 1 Cr. & M. 662.

**656.** —.]—To sustain an indictment against a party as an accessory before the fact to a felony, it is essentially necessary that he should be absent at the time of the commission of the felony, for if he be present he is a principal in the felony.—*R. v. COZENS & BULL* (1840), 4 J. P. 476.

**657.** —.]—Where a man was indicted for murder, his wife being also indicted as an accessory before the fact, it was proved that the fatal blow was struck within a few feet of where the wife was standing:—*Held*: the wife should be acquitted.

The wife should have been indicted as a principal if anything. An accessory before the fact must be absent at the time when the crime is committed, & the act must be done in consequence of some counsel or procurement of his (LORD COLERIDGE, J.).—*R. v. BROWN* (1878), 14 Cox, C. C. 144.

**658. Principal felony must have been committed.**—To persuade an apprentice to embezzle his master's goods is an indictable offence; but the indictment must positively aver, that he did take away the goods in consequence of such persuasion.

You show here a special matter, viz. that deft. received them, but do not show that they were taken away, & if this were felony, as you here show it, deft. would only be accessory, & that could not be without a principal fact committed (*per CUR.*).—*R. v. COLLINGWOOD* (1705), 6 Mod. Rep. 288; 3 Salk. 42; 87 E. R. 1029; *sub nom. R. v. CALLINGWOOD*, 2 Ld. Raym. 1116.

*Annotations*:—*Refd. R. v. Higgins* (1801), 2 East, 5. *Mentd. R. v. Chadderton* (1801), 2 East, 27; *Rowlands' Case* (1851), 2 Den. 364.

**659.** —.]—*M'DANIEL'S CASE*, No. 652, *ante*.

**660.** —.]—A servant pretended to concur with two persons, who proposed to him to unite with them in robbing his master's house. The master being out of town, the servant communicated with the police, & acted under their instructions. He let in one of the persons, but before that person had taken any property he was

**652 ii.** —.]—By the Roman-Dutch law, whoever counsels or commands the commission of a crime is, if the crime be committed, equally guilty & punishable with the principal. The accused sent four others to follow up & rob a sixth person of his purse. This they did, & brought the purse to the first accused, who was not present when the robbery was committed:—*Held*: the first accused was rightly charged with & convicted of robbery together with the others.—*R. v. VENI DUME* (1908), E. D. C. 461.—*S. AF.*

*Sect. 6.—Degrees of criminal liability: Sub-sect. 4,*

seized by the police, & a crowbar being found upon him, was immediately placed in confinement. After this the servant went out again & fetched the second person, & let him in in the same manner. This person was seized with a basket of plate in his hand, which he had carried from the kitchen part of the way upstairs:—*Held*: (1) neither of the persons could be convicted of burglary, but the one who was seized with the plate might be convicted of stealing in a dwelling-house, (2) the other might be indicted as an accessory before the fact to such stealing.—*R. v. JOHNSON & JONES* (1841), *Car. & M.* 2.

*Annotation*:—*As to* (1) *Distd.* *R. v. Chandler*, [1913] 1 K. B. 125.

661. —. —.] — *Semble*: an indictment of an accessory should contain a positive averment that the principal was guilty.—*R. v. READ* (1844), 3 L. T. O. S. 143; 1 Cox, C. C. 65.

662. —. —.] — (1) In an indictment for inciting another to commit a felony, the party charged to have been incited must be shown to have been aware that the act contemplated was a felony.

(2) If the party incited is not an innocent agent, & the act incited be committed, the party inciting is a principal felon, inasmuch as he is an accessory before the fact to a felony, & the misdemeanour merges in the felony.—*R. v. WELHAM* (1845), 5 L. T. O. S. 246; 9 J. P. 428; 1 Cox, C. C. 192.

*Annotation*:—*Generally*, *Mentd.* *R. v. Ransford* (1874), 31 L. T. 488.

663. —. —.] — The offence of soliciting & inciting a man to commit a felony is, where no such felony is actually committed, a misdemeanour only, & not a felony under Accessories & Abettors Act, 1861 (c. 94), s. 2, which only applies to cases where a felony is committed as the result of the counselling & procuring therein mentioned. There can be no accessory to a felony unless a felony has been committed. Here there was no principal felony, & therefore prisoner's offence was a misdemeanour only, & he has been properly convicted (*KELLY, C.B.*).—*R. v. GREGORY* (1867), L. R. 1 C. C. R. 77; 36 L. J. M. C. 60; 16 L. T. 388; 31 J. P. 453; 15 W. R. 774; 10 Cox, C. C. 459, C. C. R.

664. Incitement to commit suicide — *Suicide committed.*—*RUSSELL'S CASE*, No. 670, *post*.

665. —. —.] — A person cannot be tried for inciting another to commit suicide, although that other commit the suicide.—*R. v. LEDDINGTON* (1839), 9 C. & P. 79.

*B. Active Encouragement essential.*

666. Agreement to commit offence — *Act carried out by one party.*—A statement by prisoner that A. had proposed to him to murder B. on the following night, & that he, prisoner, agreed to go, but did not do so, is not of itself evidence that prisoner was accessory before the fact to the murder of B. by A. on that night.—*R. v. BLACKBURN* (1853), 6 Cox, C. C. 333.

*Annotation*:—*Mentd.* *R. v. Godinho* (1911), 76 J. P. 16.

**PART I. SECT. 6, SUB-SECT. 4.—B.**

*a. Consent to be present at illegal marriage.*—Mere consent of persons to be present at an illegal marriage, or their presence in pursuance of such consent, or the grant of accommodation in a house for the marriage, does not necessarily constitute abetment of such marriage.—*R. v. UMI* (1882), 1 L. R. 6 Rom. 126.—**IND.**

*p. Poaching—Inference from delivery of poached animals.*—A carrier was charged with having been found on a public road in possession of 40 rabbits under circumstances which showed the coming from land where he had been unlawfully in search or pursuit of game contrary to the Poaching Prevention Act, 1862 (c. 114). The evidence was to the effect that the rabbits were obtained by the person

667. *Privity of one to plan to commit murder—Act carried out by others.*—(1) Evidence that A. was privy to a plot to murder B. by explosive machines:—*Held*: sufficient to go to the jury on counts charging A. with the murder of C. accidentally killed by the explosion, with conspiring to murder him, & as an accessory to the murder.

(2) *Qu.*: whether he was indictable either as principal or as accessory within 9 Geo. 4, c. 31, s. 7, the attempt to assassinate having been made in Paris, & B. & C. being both Frenchmen, & A., prisoner, being also an alien, residing in England.—*R. v. BERNARD* (1858), 8 State Tr. N. S. 887; 1

*Annotations*:—*As to* (1) *Expld.* *R. v. Lomas* (1913), 110 L. T. 239. *As to* (2) *Refd.* *R. v. Kohn* (1864), 4 F. & F. 68.

668. *Prize fight—Death of one combatant—Liability of stakeholder not present at the fight.*—

Two men, having quarrelled, agreed to fight with their fists, & to bind themselves to fight, each put down £1, so that £2 might be paid to the winner. Prisoner consented to hold the £2, & pay it over to the winner, but otherwise, he had nothing to do with the fight, & he was not present at it. There was no reason to suppose that the life of either man would be endangered. The men fought, & one of them received injuries of which he afterwards died. Prisoner having been informed who was the winner, but not knowing of the other man's danger, paid over the £2 to the winner:—*Held*: prisoner was not an accessory before the fact of the manslaughter of the man killed.—*R. v. TAYLOR* (1875), L. R. 2 C. C. R. 147; 44 L. J. M. C. 67; 32 L. T. 409; 39 J. P. 484; 23 W. R. 616; 13 Cox, C. C. 68.

*Annotation*:—*Consd.* *R. v. Coney* (1882), 51 L. J. M. C. 66.

669. *Burglary—Loan of implements to burglar—Knowledge of illegal purpose—No knowledge of crime actually committed.*—Applt. & one K. were convicted of burglariously entering a dwelling-house, the jury having found in the case of applt. that he had handed a jemmy to K. with the knowledge that it was wanted for a burglary though he did not know that it was wanted for this particular burglary:—*Held*: on this finding applt. was not an accessory before the fact to the burglary, & his conviction must be quashed.—*R. v. LOMAS* (1913), 110 L. T. 239; 78 J. P. 152; 30 T. L. R. 125; 58 Sol. Jo. 220; 23 Cox, C. C. 765; 9 Cr. App. Rep. 220, C. C. A.

670. *Taking poison to procure abortion—Death resulting—Liability of person supplying poison—Absence at administration.*—If a woman takes poison with intent to procure a miscarriage, & dies of it, she is guilty of self-murder, whether she was quick with child or not, & a person who furnished her with the poison for that purpose will, if absent when she took it, be an accessory before the fact only, & as he could not have been tried as such before Criminal Law Act, 1826 (c. 64), s. 9, he is not triable for a substantive felony under that Act. An accessory before the fact to the crime of self-murder was not triable at common law, because the principal could not be tried, & he is not now triable under the 1826 Act, s. 9, for that sect. is not to be taken to make accessories triable except in cases in which they might have

charged early in the morning of the day libelled from a person who was seen to approach his house carrying a heavy bag & apparently wearing goloshes, as he had a noiseless footfall. The rabbits were addressed to a game dealer in P. without the name of the sender. On case stated after consideration, it was argued that the sheriff was not entitled to draw the inference that applt. had aided & abetted the





*Sect. 6.—Degrees of criminal liability: Sub-sect. 4, D., E. & F.; sub-sect. 5, A.]*

this story was, substantially, what was published, that, before the publication appeared, deft. remarked on the delay, & that, after the article came out, deft. expressed approbation of it:—*Held*: on this evidence, a jury might find that deft. authorised the publication of the particular libel, notwithstanding the comments added, & although it appeared that the editor had heard the story before deft. told it to him.—*R. v. COOPER* (1846), 8 Q. B. 533; 15 L. J. Q. B. 206; 6 L. T. O. S. 369; 10 J. P. 631; 1 Cox, C. C. 266; 115 E. R. 976.

*Annotations:—Distd. Parkes v. Prescott* (1869), L. R. 4 Exch. 169. *Reid. R. v. De Marny*, [1907] 1 K. B. 388.

#### *E. Acts done through Guilty Agent.*

**686. Administering poison.]**—An attempt by A. to administer poison to B. through the agency of C., under such circumstances that C. would have been the sole principal felon had the poison been administered, & A. an accessory before the fact, is not such an attempt as renders A. liable to be indicted under 7 Will. 4, & 1 Vict. c. 85, s. 3.—*R. v. WILLIAMS & REES* (1844), 1 Car. & Kir. 589; 1 Den. 39, C. C. R.

*Reid. R. v. Wilson* (1856), 7 Cox, C. C. 190.

**687. Uttering forged note.]**—*STEWART'S CASE*, No. 484, *ante*.

**688. Larceny.]**—*R. v. MANLEY*, No. 440, *ante*.

**689.** *Reid. R. v. De Marny*, [1907] 1 K. B. 388.

not

(1610), 2 State Tr. 965,

*Annotation:—Consd. McDaniel's Case* (1755), 19 State Tr. 745.

**691.** —.]—*M'DANIEL'S CASE* (1755), 19 State Tr. 745; Fost. 121, 364.

*Annotations:—Reid. Donnelly's Case* (1779), 1 Leach, 193; *Smith's Case* (1783), 1 Leach, 288; *Prosser's Case* (1784), 1 Leach 290, n.; *R. v. Webster* (1861), 9 Cox, C. C. 13; *R. v. Middleton* (1873), L. R. 2 C. C. R. 38; *R. v. Ashwell* (1885), 16 Q. B. D. 190.

**692.** —.]—It is not essential that there should have been any direct communication between an accessory before the fact & the principal felon. It is enough if the accessory direct an intermediate agent to procure another to commit the felony; & it will be sufficient, even if the accessory does not name the person to be procured, but merely direct the agent to employ some person.—*R. v. COOPER* (1833), 5 C. & P. 535; 1 Nev. & M. M. C. 371.

*Annotation:—Reid. R. v. De Marny* (1906), 96 L. T. 159.

#### *F. Indictment and Trial.*

**693. May be indicted as principal.]**—*R. v. CHADWICK* (1850), Greaves' Criminal Law Consolidation & Amendment Acts, 10.

**694.** —.]—The first two counts of an indictment charged A. & B. jointly with stealing, & the third charged B. alone with receiving the stolen goods. A. was acquitted, no evidence having been offered against him, in order that he

Upon his & other evidence, which proved that B. was an accessory before the fact to the stealing & afterwards received the stolen goods, the jury found a general verdict of guilty against B. which verdict was entered upon all the counts:—*Held*: (1) B. was not entitled to an acquittal upon the first two counts by reason of the principal, A., having been acquitted, because Criminal Procedure Act, 1848 (c. 64), s. 1, has made the being an accessory before the fact a substantive felony, & the conviction of the principal is not now a condition precedent to the conviction of an accessory; (2) there was no inconsistency in the general verdict, as an accessory before the fact may also be a receiver.—*R. v. HUGHES* (1860), Bell, C. C. 242; 29 L. J. M. C. 71; 1 L. T. 450; 24 J. P. 101; 6 Jur. N. S. 177; 8 W. R. 195; 8 Cox, C. C. 278, C. C. R.

*Annotation:—Folld. R. v. Godspeed* (1911), 75 J. P. 232.

**695.** —.]—A person who induces a servant of the Post Office to intercept & hand over a letter, which is in course of transmission by the post, is either guilty of larceny as a principal felon, or is accessory before the fact to the larceny committed by the servant of the Post Office, & in either view can be convicted on an indictment charging him with larceny of the letter.—*R. v. JAMES* (1890), 24 Q. B. D. 439; 59 L. J. M. C. 96; 62 L. T. 578; 54 J. P. 615; 17 Cox, C. C. 24, C. C. R.

**696.** —.]—*R. v. GODSPEED*, No. 677, *ante*.

**697. May be convicted though principal has**

justice.]—A. was indicted for felony in using an instrument to procure abortion, & B. was indicted with him as an accessory before the fact. A. did not appear to take his trial, but B. who was on bail, appeared:—*Held*: under these circumstances, B. was not compellable to plead to the indictment, & the judge allowed B. to be admitted to bail.—*R. v. ASHMALL* (1840), 9 C. & P. 236.

**699.** —.]—The Central Criminal Ct. has jurisdiction to try accessories before the fact to the felony of casting away & destroying a ship on the high seas, on an indictment in the usual form against principal & accessory, though the principal felon be not amenable to justice.—*R. v. WALLACE* (1841), Car. & M. 200; 2 Mood. C. C. 200, C. C. R.

**700. Receiving stolen property—Indictment as principal—Conviction as accessory before the fact.]**

—On an indictment under Larceny Act, 1801 (c. 96), s. 91, there may be a conviction as an accessory before the fact by virtue of Accessories & Abettors Act, 1861 (c. 94), ss. 1 & 2.—*R. v. GOODWIN* (1909), 3 Cr. App. Rep. 276, C. C. A.

**701. Principal already convicted—Guilt of principal may be controverted by accessory.]**—*SMITH'S CASE* (1783), 1 Leach, 288.

**702.** —.]—The record of the conviction of the principal is not conclusive evidence of the felony against the accessory & he may controvert the propriety of such conviction.—*PROSSER'S CASE* (1784), 1 Leach, 290, n.

*Annotation:—Reid. R. v. Pym* (1846), 6 L. T. O. S. 500.

**703.** —.]—where the principal has

*Re McCready* (1909), 2 Sask. L. R. 46; 10 W. L. R. 132; 14 Can. Crim. Cas. 481.—CAN.

#### **PART I. SECT. 6, SUB-SECT. 4.—E.**

**696 i. Administering poison.]**—Prisoner was indicted for soliciting B. to murder C. Prisoner procured saltpetre, & gave it to B. to administer to C. B. administered it accordingly, & C. detected the poison in time to

save her life, after having swallowed some of it. The jury found the prisoner guilty, & stated the solicitation was to administer saltpetre with intent to poison, & the saltpetre had been attempted to be administered:—*Held*: prisoner having been rightly indicted as a principal for soliciting to murder, instead of as an accessory before the fact to the administering poison with intent to murder.—*R. v.*

*MURPHY* (1840), Jebb, Cr. & Pr. Cas. 315.—IR.

**s. Murder.]**—Applt. was tried for murder & found guilty. The victim had been killed by applt.'s son at the instigation of his father. The son, having had his trial previously, had been found guilty of manslaughter:—*Held*: applt. could be convicted of murder.—*MILLARD v. R.*, [1921] 62 S. C. R. 21; 59 D. L. R. 34.—CAN.

been convicted, it is nevertheless on the trial of the accessory competent to deft. to prove the principal innocent (LORD KENYON, C.J.).—COOK v. FIELD (1788), 3 Esp. 133, N. P.

**704. Indictment as accessory—Disclosed by evidence to be principal.**—GORDON'S CASE, No. 655, *ante*.

**705.** ———.]—R. v. COZENS & BULL, No. 656, *ante*.

**706.** ———.]—R. v. BROWN, No. 657, *ante*.

**707.** ——— Principal found guilty of *misdemeanour*.]—An indictment charged H. with rape, & W. with aiding & abetting in the rape. The jury found H. & W. guilty of *misdemeanour*, H. of attempting to commit a rape, & W. of aiding H. in the attempt. It was contended that this verdict amounted to an acquittal of W., as the case did not fall within Criminal Procedure Act, 1851 (c. 100), s. 9, by which a person indicted for a crime may be found guilty of an attempt to commit the crime. The objection was overruled:—*Held*: the conviction should be affirmed.—R. v. HAPGOOD (1870), L. R. 1 C. C. R. 221; 21 L. T. 678; 34 J. P. 181; 18 W. R. 356; 11 Cox, C. C. 471; *sub nom.* R. v. WYATT, 39 L. J. M. C. 83, C. C. R.

**708.** ———.]—Upon the trial of an indictment against two prisoners charging one with feloniously wounding with intent to do grievous bodily harm, & the other with aiding & abetting in the commission of the felony, if the principal be convicted of the *misdemeanour* of unlawfully wounding, the second prisoner may be convicted of aiding & abetting him therein.—R. v. WAUDBY, [1895] 2 Q. B. 482; 64 L. J. M. C. 251; 73 L. T. 352; 59 J. P. 505; 44 W. R. 64; 11 T. L. R. 554; 39 Sol. Jo. 691; 18 Cox, C. C. 194; 15 R. 564, C. C. R.

*Annotation*:—*Refd.* Gould v. Houghton, [1921] 1 K. B. 509.

**709. Indictment as accessory to two—Verdict of guilty as accessory to one.**—If one is indicted as accessory to two he may be convicted on proof that he was accessory to one.—SANQUIRE'S (LORD) CASE (1612), 2 State Tr. 743; *sub nom.* SANCHAR'S

R. v. COOKE (1826), 7 Dow. & Ry. K. B. 673; R. v. [1902] 2 K. B. 339. *Mentd.* Judgment & Execution in Treason & Felony (1614), 12 Co. Rep. 130; Clarendon's Case (1667), 6 State Tr. 291; Smith v. R. (1849), 13 Q. B. 738; R. v. EYRE (1868), L. R. 3 Q. B. 487.

**710. Joint indictment of several accessories—Separate acts by each—Plea of guilty by one.**—Three persons were jointly charged with procuring certain other persons to utter a forged will. The only evidence for the prosecution was of separate acts, at separate times & places, done by each of the persons charged as accessories. At the end of that evidence one of them pleaded guilty:—

#### PART I. SECT. 6, SUB-SECT. 5.—A.

**t. Must lend active aid personally—Receiving stolen property.**—Evidence that the prisoner received property knowing it to have been stolen, is sufficient to support an indictment for being an accessory after the fact to the theft, & it is not necessary to show that the prisoner did some act to assist the thief personally to escape justice.—R. v. REEVES (1892), 13

Q. B. 220; 9 N. S. W. W. N.

—AUS.

—A. received a stolen promissory note & was indicted for a "substantive felony," under 9 Geo. 4, c. 55, s. 47; B. had stolen the note & had been tried for larceny & acquitted:—*Held*: the acquittal

*Held*: the other two might, notwithstanding, be convicted.—R. v. BARBER & FLETCHER (1844), 1 Car. & Kir. 442; 8 J. P. 712.

**711. Indictment as accessory to unnamed principal.**—An indictment charging that a certain evil-disposed person feloniously stole certain goods, & that A. feloniously incited him to commit the felony, & that C. & E. feloniously received the goods knowing, etc., is bad as against A., but good against the receivers as for a substantive felony, as the statement that an evil-disposed person stole was too uncertain to support the charge as accessory before the fact.—R. v. CASPAR (1839), 9 C. & P. 289; 2 Mood. C. C. 101; 4 J. P. 75, C. C. R.

*Annotation*:—*Refd.* R. v. Hansill (1849), 13 J. P. 556.

**712.** ——— Principal a witness before grand jury.]—An indictment against an accessory to a felony, stating that the felony was committed by a person to the jurors unknown, cannot be supported if the principal felon was a witness before the grand jury.—R. v. WALKER (1812), 3 Camp. 264.

**713.** ——— Bill found by same grand jury imputing principal felony to named person.]—If a charge against an accessory is, that the principal felony was committed by persons unknown, it is no objection that the same grand jury have found a bill imputing the principal felony to J.—R. v. BUSH (1818), Russ. & Ry. 372, C. C. R.

#### SUB-SECT. 5.—ACCESSORIES AFTER THE FACT.

##### A. In General.

**714. Must lend active aid personally.**—To substantiate the charge of harbouring a felon it must be shown that the party charged did some act to assist the felon personally.—R. v. CHAPPLE (1840), 9 C. & P. 355.

**715.** ——— Assisting concealment of fact of murder—Assisting murderer to escape from justice.]—A. was indicted for the wilful murder of B., & A. was indicted for receiving, harbouring, & assisting A. well knowing that he had committed & murder aforesaid:—*Held*: if the offence of A. was reduced to manslaughter, C. might, notwithstanding, accessory after the fact.

When a person is charged as accessory after the fact to a murder, the question for the jury is, whether such person, knowing the offence had been committed, was either assisting the murderer to conceal the death, or in any way enabling him to evade the pursuit of justice.—R. v. GREENACRE (1837), 8 C. & P. 35.

**716.** ——— Assisting disposal of stolen property.]—Upon an indictment against a party as an accessory after the fact in robbery, proof of

of B. was not conclusive evidence of A.'s innocence.—R. v. M'CUE (1831), Jebb Cr. & Pr. Cas. 120.—IR.

**b. ——— Concealing stolen property—Continuance of principal offence till property concealed.**—Although the crime of theft is usually complete when the thief takes & carries away the thing which he had formed the design to steal, the act of carrying the object away may be continued until it is concealed somewhere so as not to be found upon him; & any one who knowingly assist a thief to conceal stolen property which he is in the act of carrying away, render aid to that actual perpetrator & becomes an accessory to the crime; & under Criminal Code, Art. 61 (c), may be dealt with as a principal.—R. v.

CAMPBELL (1899), Q. R. 8 K. B. 322.—CAN.

**c. ——— Selling stolen property.**—The accused on an indictment charging them with theft were found guilty by the jury of assisting to sell the stolen property knowing it to have been stolen. On question being reserved for the decision of the full ct.:—*Held*: on the indictment the accused could be convicted as accessories after the fact, & the jury's finding amounted to a verdict of guilty of theft. It was not necessary to prove that the accused ever had the stolen property in their personal possession.—R. v. BRETT & LEVY (1915), T. P. D. 53.—S. AF.

**d. ——— Did not reaching prisoner.**—Prisoner, who was charged with being an accessory after the fact to a



**Sect. 6.—Degrees of criminal liability: Sub-sect. 5, A. & B.; sub-sect. 6, A.]**

prisoner's knowledge of the felony, together with proof of his aiding the principal in disposing of the fruits of the robbery, is sufficient evidence of comforting & assisting, to support the indictment.—*R. v. BUTTERFIELD* (1843), 2 L. T. O. S. 246; 8 J. P. 9; 1 Cox, C. C. 39.

*Annotation:—Reld. R. v. Levy*, [1912] 1 K. B. 158.

**717. — Removal of incriminating objects after arrest of principal.]**—After the arrest of a man charged with a coining offence, of which he was subsequently convicted, applt., a woman, removed from a workshop occupied by him certain articles which would be used in making counterfeit coin. Applt. was indicted as an accessory after the fact, the indictment alleging that she, well knowing the man to have committed the felony charged, "did feloniously receive, harbour, & maintain" him. The jury were directed that, if they believed that applt. removed the articles knowing the man to be guilty & for the purpose of assisting him to escape conviction, they should find applt. guilty. The jury convicted applt.:—*Held*: the direction was right, & the conviction must be affirmed.—*R. v. LEVY*, [1912] 1 K. B. 158; 81 L. J. K. B. 204; 106 L. T. 192; 76 J. P. 123; 28 T. L. R. 93; 56 Sol. Jo. 143; 22 Cox, C. C. 702; 7 Cr. App. Rep. 61, C. C. A.

**718. — Preventing apprehension.]**—Deft. an inn-keeper, having an escaped felon in his house, to a policeman, who had remarked, "You scoundrel, how dare you harbour a felon?" said, "You had better go & find him." But he did nothing, & the policeman went upstairs & saw the felon make his escape from the window:—*Held*: to be no evidence of an obstructing of the felon's apprehension.

*Qu.*: whether a count in an indictment, charging deft. as accessory to an escape of a felon from prison by harbouring him after his escape, is bad as charging deft. to be an accessory to a misdemeanour, prison breach being a misdemeanour only.—*R. v. GREEN* (1861), 8 Cox, C. C. 441.

**719. — Demanding money with menaces—Insertion in paper of articles to assist principal.]**—Under Criminal Procedure Act, 1848 (c. 46), s. 2, an accessory after the fact, indicted in the ordinary way with the principal felon, may be tried before the principal.

*Qu.*: whether, if A. writes letters demanding money with menaces, & then B. inserts letters & articles in a paper to assist A. in obtaining the money which A. had so demanded, B. is an accessory after the fact to A.'s felonious act.—*R. v. HANSILL* (1849), 13 J. P. 556; 3 Cox, C. C. 597.

**720. — Reception of thief—Joint attempt to**

felony, sent the principal, who was flying from justice a box of clothes & a letter, neither of which reached him:—*Held*: prisoner could not be convicted as an accessory, but might have been convicted of an attempt to assist the principal.—*R. v. MALONEY* (1901), 1 S. R. N. S. W. 77; 18 N. S. W. W. N. 96.—*AUS.*

**e. — Omission to give information of crime.]**—An omission to give information that a crime has been committed does not, under Penal Code, s. 107, amount to abetment, unless such omission involves a breach of a legal obligation. A private individual is not bound by any law to give information of any offence which he has seen committed.—*R. v. KHADIM*

(SHEIK) (1869), 4 B. L. R. A. C. 7.—*IND.*

*Annotation:—This not amounting to concealment of kidnapped child.]*—The mere fact of a girl being received into a house & retained there by the owner, even after he may have become aware or found reason to believe that she had been kidnapped, does not amount to concealment of her, unless an intention of keeping her out of view be apparent.—*R. v. JHURRUP* (1873), 5 N. W. 133.—*IND.*

**f. — Giving false information to police.]**—The definition contained in Indian Penal Code, s. 216 B, of the words "assisting a person in any way to evade apprehension" are meant to point out some method *ejusdem generis*

leave the country.]—A., a lad, robbed his employers, & after doing so, he went to the lodgings of B., who was much older than himself, & who had relations in America. A. stayed twenty minutes at B.'s lodgings, & after that, on the same night, A. & B. started together by the coach, & went from R. to L., intending to embark for America:—*Held*: on this evidence B. might be convicted as an accessory after the fact in harbouring, receiving, & maintaining the principal felon.—*R. v. LEE* (1834), 6 C. & P. 536.

**721. Must have knowledge of & consent to the**

**722.** —*R. v. GREENACRE*, No. 715, *ante*.

**723.** —*R. v. BUTTERFIELD*, No. 716, *ante*.

—*R. v. LEVY*, No. 717, *ante*.

**725. May act through agent.]**—A prisoner who employed another person to harbour the principal felons may be convicted as accessory after the fact, though he himself did no act of relieving, etc., & prisoner may be found guilty on the uncorroborated testimony of the person who actually harboured, etc.—*R. v. JARVIS* (1837), 2 Mood. & R. 40, N. P.

**726. Purchase of stolen property.]**—A partner stole goods belonging to the firm & rendered himself liable to be dealt with as a felon under Larceny Act, 1868 (c. 116), s. 1, & sold same to prisoner, who knew of their having been stolen:—*Held*: prisoner could not be convicted on an indictment for feloniously receiving under Larceny Act, 1861 (c. 96), s. 91, but might have been convicted as an accessory after the fact under Accessories & Abettors Act, 1861 (c. 94), s. 3, on an indictment properly framed.—*R. v. SMITH* (1870), L. R. 1 C. C. R. 266; 39 L. J. M. C. 112; 22 L. T. 554; 34 J. P. 484; 18 W. R. 932; 11 Cox, C. C. 511, C. C. R.

*Annotations:—Consd. R. v. Streeter*, [1900] 2 Q. B. 601 *R. v. Payne*, [1906] 1 K. B. 97. *Mentd. R. v. Plowden*, [1909] 2 K. B. 269.

**727. Liability of wife for harbouring husband.]**—*R. v. GOOD*, No. 366, *ante*.

**728. When principal is insane.]**—*R. v. COOMBES & FOX, PLAISTOW MURDER CASE* (1895), Wood Renton on Lunacy, 913.

**B. Indictment and Trial.**

**729. Cannot be indicted as principal.]**—Prisoner, a woman, was indicted for larceny. The evidence left it doubtful whether she was an accessory before or after the fact:—*Held*: although, if she were an accessory before the fact, she might be convicted on such an indictment, yet if she were an accessory after the fact, she could not be so convicted, but must be indicted as such accessory after the fact, & if the jury were in doubt as to whether she was or was not an accessory after the fact they should acquit her.—*R. v. MUNDAY* (1860), 2 F. & F. 170.

with those specified in the earlier portion of the sect. They will not include the assisting of an accused person to escape by merely telling lies to the police as to his whereabouts.—*R. v. HUSAIN BAKSHI* (1903), 1 L. R. 25 All. 261.—*IND.*

**PART I. SECT. 6, SUB-SECT. 5.—B.**

**h. Admissibility of evidence—Showing guilt of principal prisoner.]**—Letters are admissible in evidence on the trial of prisoners alleged to be accessories after the fact to murder, which tend to prove that the principal prisoner was guilty of the murder, on the ground that that is part of the case for the Crown.—*R. v. O'SHAUGHNESSY, R. v. HASSELL & CAMPBELL* (1912), 31 N. Z. L. R. 928.—*N.Z.*

**730.** —.]—A man cannot be indicted as a principal, & then be convicted of being an accessory after the fact to that crime for which he is so indicted (POLLOCK, C. B.).—R. v. FALLON (1862), Le. & Ca. 217; 32 L. J. M. C. 66; 7 L. T. 471; 27 J. P. 5; 8 Jur. N. S. 1217; 11 W. R. 74; 9 Cox, C. C. 242; *sub nom.* R. v. FELLON, 1 New Rep. 68, C. C. R.

*Annotation* :—*Consd.* R. v. Watson, [1916] 2 K. B. 385.

**731.** —.]—A person, charged on indictment with felony as a principal felon only, cannot be convicted thereon as an accessory after the fact. When a pltf. in error is in custody, the ct. may, by order dispense with his attendance in person upon the argument of the writ.—RICHARDS v. R., [1897] 1 Q. B. 574; 66 L. J. Q. B. 459; 61 J. P. 389; 13 T. L. R. 254, D. C.

*Annotation* :—*Refd.* R. v. Watson, [1916] 2 K. B. 385.

**732.** —.]—Deft. & one T. R. were indicted as principals for a misdemeanour. The jury convicted T. R., & returned a verdict against deft. of being an accessory after the fact :—*Held* : a verdict of guilty ought not to have been entered against deft. on that finding by the jury.—R. v. BUBB (1906), 70 J. P. 143, C. C. R.

**733.** — *Indictment for receiving stolen property—No evidence of possession.*—An indictment contained two counts charging accused & others in the first count with breaking & entering a shop & stealing jewellery therefrom, & in the second count with receiving the stolen property. There was no evidence in support of the first count, & the jury were so directed. On the second count, the jury were directed that applt., who was not charged as an accessory after the fact, could be convicted as a receiver of stolen property although there was no evidence that he had possession, or control, either joint or conclusive, of the stolen property. The verdict of the jury was that applt. was guilty of negotiating the sale of property well knowing it to have been stolen, & this was accepted as a verdict of guilty on the second count of the indictment :—*Held* : the direction given to the jury on the second count was bad in law. Applt. could not be found guilty of receiving, there being no evidence that he was in either exclusive or joint possession or control of the stolen property, & the ct. having no power under the circumstances of the case to substitute a different verdict, the conviction must be quashed.—R. v. WATSON, [1916] 2 K. B. 385; 85 L. J. K. B. 1142; 115 L. T. 159; 80 J. P. 391; 32 T. L. R. 580; 25 Cox, C. C. 470; 12 Cr. App. Rep. 62, C. C. A.

**734. Indictment as accessory to murder—Principal found guilty of manslaughter.**—R. v. GREENACRE, No. 715, *ante*.

**735.** —.]—Several persons were tried upon one indictment, some as principals in murder, others as accessories after the fact. The principals were convicted of manslaughter :—*Held* : those charged as accessories might rightly be convicted as accessories to manslaughter.—R. v. RICHARDS (1877), 2 Q. B. D. 311; 46 L. J. M. C. 200; 36 T. L. R. 227; 13 Cox, C. C. 344; 13 Cox,

J. R.

**736. May be tried before principal.**—R. HANSILL, No. 719, *ante*.

**737. Trial in absence of principal felon.**—Although an accessory after the fact may consent to be tried in the absence of one charged in the same indictment with the principal felony, he

cannot insist on taking his trial under such circumstances. It is a matter of discretion with the ct. whether it will proceed with the trial of the accessory alone, which must end in his acquittal in the absence of the principal.—R. v. SMITH & HEDGER (1842), 6 J. P. 476.

**738. Indictment as accessory to misdemeanour.**—R. v. GREEN, No. 718, *ante*.

**739. Sufficiency of indictment**—"Receive, harbour & maintain."—R. v. LEVY, No. 717, *ante*.

#### SUB-SECT. 6.—ATTEMPT TO COMMIT CRIME.

##### A. In General.

**740. Definition.**—The fact that a final step still remains to be taken to consummate an attempt to obtain by false pretences does not prevent the acts done amounting to such an attempt, if those acts would have culminated in the full offence if accused had not been interrupted.

The Draft Criminal Code definition is "An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted, either by the voluntary determination of the offender not to complete the offence or by some other cause" (PICKFORD, J.).—R. v. LAITWOOD (1910), 4 Cr. App. Rep. 248, C. C. A.

*Annotation* :—*Refd.* R. v. Robinson (1915), 79 J. P. 303.

**741. Offence at common law.**—(1) Conspiracy may be laid without any overt act, & if one be convicted judgment shall be given against him before the trial of the other.

(2) On a charge of attempted blackmail it was objected that a mere attempt or conspiracy had been made which was not punishable at common law :—*Held* : the objection would be overruled.—R. v. KINNERSLEY & MOORE (1719), 1 Stra. 193; 93 E. R. 467.

*Annotations* :—*As to* (1) *Fold.* R. v. Nicolls (1745), 2 Stra. 1227. *Consd.* R. v. Eccles (1783), 3 Doug. K. B. 337. *Appl.* R. v. Cooke (1826), 5 B. & C. 538. *Refd.* R. v. Spragg (1760), 2 Burr. 993; Allen v. Flood, [1898] A. C. 1.

**742.** —.]—(1) Where, upon an indictment, an act is charged to have been committed feloniously, & the jury find a verdict of guilty, though the charge laid does not amount to felony, yet if it does amount in law to a misdemeanour, the ct. will pronounce judgment as for that offence.

(2) It makes a great difference whether an act was done & where no act at all is done. The intent may make an act, innocent in itself, criminal; nor is the completion of an act, criminal in itself, necessary to constitute criminality (*per Cur.*).

(3) The next question is whether an act done in pursuance of an intent to commit an act which, if completed, would be a misdemeanour only, can itself be a misdemeanour. It was objected that an attempt to commit a misdemeanour was no offence; but no authority for this is cited, & there are many on the other side (LORD MANSFIELD, C.J.).

(4) So long as an act rests in bare intention, it is not punishable by our laws; but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done; & if it is coupled with an unlawful &

#### PART I. SECT. 6, SUB-SECT. 6.—A.

to commit incest is an indictable offence at common law.—H.M. ADVOCATE  
—SCOT.

**Sect. 6.—Degrees of criminal liability: Sub-sect. 6, A. & B. (a).]**

malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal & punishable (LORD MANSFIELD, C.J.).—*R. v. SCOFIELD* (1784), *Cald. Mag. Cas.* 397.

*Annotations:—As to (1), (3) & (4) Apld. R. v. Higgins* (1801), 2 East, 5. *Refd. R. v. Ransford* (1874), 31 L. T. 488.

**743. Misdemeanour at common law.—Where full offence misdemeanour at common law.]—**An attempt to commit a misdemeanour is a misdemeanour, whether the offence was created by statute, or was an offence at common law.—*R. v. RODERICK* (1837), 7 C. & P. 795.

**744. — Where full offence misdemeanour by statute.]—**An attempt to commit a misdemeanour created by statute is itself a misdemeanour.

A count in an indictment charged that deft. "did attempt to assault" a girl, "by soliciting & inducing her" to place herself in an indecent attitude, he doing the like:—*Held*: such a count was bad.—*R. v. BUTLER* (1834), 6 C. & P. 368.

*Annotation:—Refd. R. v. Bannen* (1844), 1 Car. & Kir. 295.

**745. — —.]—***R. v. RODERICK*, No. 743, *ante*.

**746. — —.]—**A prisoner cannot be convicted of an assault with an intent carnally to know, etc., a girl above ten & under twelve years of age, nor of a common assault, if she be consenting. The proper charge is of misdemeanour in attempting to commit a statutable offence.—*R. v. MARTIN* (1840), 9 C. & P. 213, 215; 2 Mood. C. C. 123, C. O. R.

*Annotations:—Consd. R. v. House* (1845), 9 J. P. 182. *Distd. R. v. Stevens* (1845), 1 Cox, C. C. 225. *Consd. Christopher-son v. Bare* (1848), 11 Q. B. 473; *R. v. Bird* (1851), 2 Den. 94; *R. v. Johnson* (1865), 11 Jur. N. S. 532; *R. v. Stephenson* (1912), 8 Cr. App. Rep. 36. *Refd. R. v. Read* (1849), 2 Car. & Kir. 957. *Mentd. R. v. Waters* (1849), 2 Car. & Kir. 864; *R. v. Waverton* (1851), 5 Cox, C. C. 400.

**747. — Where full offence felony.]—**Although it was found that a coining press & some other things, which prisoner had not procured, were required for the completion of the felony, & that prisoner only intended to make a few of the counterfeit coin in England by way of trying his apparatus:—*Held*: it was a misdemeanour at

common law to make or procure dies, having engraved thereon the obverse & reverse sides of a foreign coin, with intent therewith to make such coin; for it was an act done with intent to commit, & proximately connected with the commission of, a statutable felony.

It is difficult, & perhaps impossible, to lay down a clear & definite rule, to define what is & what is not such an act done, in furtherance of a criminal intent, as will constitute an offence (JERVIS, C.J.).—*R. v. ROBERTS* (1855), *Dears. C. C.* 539; 25 L. J. M. C. 17; 26 L. T. O. S. 126; 19 J. P. 789; 1 Jur. N. S. 1094; 4 W. R. 128; 7 Cox, C. C. 39, C. O. R.

*Annotations:—As to (1) Refd. R. v. McPherson* (1857), 7 Cox, C. C. 281; *R. v. Harvey* (1871), 40 L. J. M. C. 63; *R. v. Robinson* (1915), 11 Cr. App. Rep. 124. *As to (2) Refd. R. v. Cope* (1922), 86 J. P. 78.

**748. — —.]—**The misdemeanour of attempting to commit a burglary merges in the felony if it is proved that the burglary was completed.—*R. v. SIMPSON & KERRISON* (1851), 3 Car. & Kir. 207, n.; 15 J. P. 246.

**749. — —.]—**Prisoner was indicted under Larceny Act, 1861 (c. 96), s. 57, for breaking & entering a shop, with intent to commit a felony, viz. to steal. It was proved that prisoner broke in the roof, with intent to enter & steal, & was then disturbed; but there was no evidence that he ever entered the shop:—*Held*: prisoner might be convicted of the misdemeanour of attempting to commit a felony.—*R. v. BAIN* (1862), L. C. & Ca. 129; 31 L. J. M. C. 88; 5 L. T. 647; 26 J. P. 84; 8 Jur. N. S. 418; 10 W. R. 236; 9 Cox, C. C. 98, C. C. R.

**B. What constitutes an Attempt.**

**(a) Overl Act necessary.**

**750. Mere intention not enough.]—**An indictment charged deft., who had contracted with the guardians to deliver to the poor loaves of a certain weight, with attempting to obtain money from the guardians by falsely pretending to the relieving officer that he had delivered to certain poor persons certain loaves, & that each loaf was of a certain weight. The evidence was that he had contracted to deliver loaves of the specified weight to any poor persons bringing a ticket from

k. *Misdemeanour at common law.—Incitement of one to incite a third party to commit a crime.—Not an attempt.]—*Deft. charged with offering money to a person to swear that A., B., or C. gave a certain sum of money to vote for a candidate at an election:—*Held*: the offence was not an attempt to commit the crime of subornation of perjury, but something less, being an incitement to give false evidence or particular evidence regardless of its truth or falsehood, & was a misdemeanour at common law.—*It. v. Cole* (1902), 22 C. L. T. 132; 3 O. L. R. 389; 1 O. W. R. 117.—**CAN.**

l. *Explaining to another how a crime may be committed.—Subsequent attempt in consequence.]—*Where one person writes a letter to another explaining how a crime of a peculiar nature may be committed, & the other person subsequently attempts to commit a crime of that nature, the writer of the letter is guilty of an attempt to commit that crime equally with the person who actually made the attempt, even though when the letter was written no specific crime of that nature was in contemplation of either of the parties. Prisoner, evidently in answer to an inquiry, wrote a letter to S. instructing him as to the method of opening safes with explosives. Two days later S. & W. broke into certain

premises containing a locked safe, with explosives in their possession ready for use, but, imagining they were observed, before commencing to use the explosives they got frightened & decamped. They were captured, tried, & convicted of breaking into the premises with intent to commit a crime. The letter having been found on S., the prisoner was then put on his trial upon an indictment containing eight counts, one of them charging with an attempt to steal the contents of the safe on these premises, & one charging him with breaking & entering with intent to commit a crime. The jury found as a fact that when the letter was written the particular crime committed by S. & W. was not in contemplation, but that some crime of the nature was in contemplation. The prisoner was convicted:—*Held*: he was properly convicted under the count charging him with breaking & entering the premises with intent to steal, for, having counselled S. to commit that offence, & knowing that it would be likely to be committed in consequence, he was a party to the offence.—*R. v. BAKER* (1909), 28 N. Z. L. R. 536.—**N.Z.**

m. *Inciting another to commit a crime.—Not an attempt.]—*To incite another to commit a crime, where that other does nothing in furtherance of

the crime, does not constitute an attempt to commit the crime. An accused was convicted of attempting to administer poison with intent to commit murder. Accused had given N. some arsenite of soda, which he knew to be a poison, with instructions to put some into the food of V. N. took the poison to V., & together they delivered it to the police:—*Held*: accused should not have been convicted of an attempt to administer poison.—*R. v. NIHOVO*, [1921] App. D. 485.—**S. AF.**

n. *Attempt to murder.]—*Where two persons fire at one another & one is actually hit & killed, the other is not guilty of murder, but of attempt to murder, which offences do not constitute the same "act."—*R. v. NIRMAL KANTA ROY* (1914), 1 L. R. 41 Cal. 1072.—**IND.**

**PART I. SECT. 6, SUB-SECT. 6.—B. (a).**

**750 i. Mere intention not enough.]—**Prisoner drew a loaded revolver from his pocket with intent to shoot the prosecutor, but before he could do anything to discharge the same he was overpowered:—*Held*: there was no evidence to convict the prisoner. The mere drawing from his pocket a loaded revolver was not an attempt to discharge it at another person.—*R. v.*

the relieving officer, & that the duty of debt. was to return these tickets at the end of each week, together with a written statement of the number of loaves delivered by him to the paupers, whereupon he would be credited for that amount in the relieving officer's book, & the money would be paid at the time stipulated in the contract, namely, at the end of two months from a day named. Debt. having delivered loaves of less than the specific weight, returned the tickets, & obtained credit in account for the loaves so delivered; but before the time for payment of the money arrived the fraud was discovered.

The mere intention to commit a misdemeanour is not criminal. Some act is required, & we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are; & if, in this case, after the credit with the relieving officer for the fraudulent overcharge, any further step on the part of debt. had been necessary to obtain payment, as the making out of a further account or producing the vouchers to the board, we should have thought that the obtaining credit in account with the relieving officer would not have been sufficiently proximate to the obtaining the money. But, on the statement in this case, no other act on the part of debt. would have been required. It was the last act, depending on himself, towards the payment of the money, & therefore it ought to be considered as an attempt (PARKE, B.).—*R. v. EAGLETON* (1855), Dears. C. C. 376, 515; 24 L. J. M. C. 158; 26 L. T. O. S. 7; 19 J. P. 546; 1 Jur. N. S. 940; 4 W. R. 17; 3 C. L. R. 1145; 6 Cox, C. C. 559, C. C. R.

*Annotations*:—*Consd. R. v. Roberts* (1855), Dears. C. C. 539; *R. v. Robinson*, [1915] 2 K. B. 342. *Refd. R. v. Sherwood* (1857), 21 J. P. 342; *R. v. Goss* (1860), Bell, C. C. 208; *R. v. White* (1910), 4 Cr. App. Rep. 257; *R. v. Cope* (1921), 86 J. P. 78.

**751.** —[.]—Applt. was convicted of attempting to procure his wife to leave her usual place of abode in the United Kingdom with intent that she should become an inmate of a brothel outside the King's dominions. It appeared that the jury might have taken the view that the evidence only

showed an intention to so procure his wife or a mere idle threat. In the absence of a proper direction from the judge at the ct. of trial as to the difference between an attempt & an intention, a matter which otherwise the jury might not easily understand, the ct. allowed the appeal & quashed the conviction.—*R. v. LANDOW* (1913), 109 L. T. 48; 77 J. P. 364; 29 T. L. R. 375; 23 Cox, C. C. 457; 8 Cr. App. Rep. 218, C. C. A.

**752. Must be an act done.**—[.]—A. was indicted for making a false oath before a surrogate, for the purpose of obtaining a marriage licence:—*Held*: (1) a surrogate had a general power to administer an oath in that behalf, so as to make a false oath a misdemeanour; (2) such false oath was a misdemeanour as being made with a fraudulent intention in a matter of public concern; (3) it was immaterial whether the marriage actually took place or no. (4) *Qu.*: whether such false oath be indictable as perjury.

Any step taken with a view to the commission of a misdemeanour, is a misdemeanour (LORD DENMAN, C.J.).

To make a false oath, in order to procure a marriage licence from an officer empowered to grant such licence, is a misdemeanour; because it is a step towards the accomplishment of a misdemeanour (PARKE, B.).—*R. v. CHAPMAN* (1849), 1 Den. 432; T. & M. 90; 2 Car. & Kir. 846; 18 L. J. M. C. 152; 13 L. T. O. S. 308; 13 J. P. 363; 13 Jur. 885; 3 Cox, C. C. 467, C. C. R.

*Annotations*:—*As to* (1) *Appld. R. v. Hodgkiss* (1869), 39 L. J. M. C. 14. *Consd. Phillimore v. Machon* (1876), 1 P. D. 481. *As to* (2) *Refd. R. v. Shaw* (1911), 6 Cr. App. Rep. 103. *As to* (4) *Refd. Blalberg v. Parke* (1882), 10 Q. B. D. 90.

**753. — Must be more than merely preparatory.**—[.]—Prisoner was entrusted by his master with some meat, which was to be weighed out & delivered to a customer. By means of a false weight he kept back a part of the meat with intent to steal it; but the fraud was discovered, before he had actually moved away with it:—*Held*: (1) he was rightly convicted of an attempt to steal the meat; (2) the property was well laid in the master.

There is a difference between the preparation

GROGAN (1889), 15 V. L. R. 340.—AUS.

**750 ii.** —[.]—Where the accused was indicted for "concealing himself with intent to escape from the penitentiary":—*Held*: as the criminal act consists in an attempt to commit an offence, doing something with intent to commit the offence is not necessarily sufficient to constitute an attempt.—*R. v. LABOURDETTE* (1908), 13 B. C. R. 443.—CAN.

**750 iii.** —[.]—An attempt implies an intent, but an intent is not enough; intending to commit a crime is not the same as attempting to commit it.—*R. v. MCCARTHY* (1917), 41 O. L. R. 153; 13 O. W. N. 310; 29 Can. Crim. Cas. 448.—CAN.

**750 iv.** —[.]—It is not necessary in order to constitute the crimes of attempting to murder by means of poison, & attempting to administer poison with the intent of doing great bodily injury, that the poison should actually be taken by the person for whom it was intended.—*H.M. Advocate v. TUMBLESON* (1863), 4 Ir. 426; 36 So. Jur. 1.—SCOT.

**752 i. Must be an act done.**—[.]—A young Brahman widow was confined of a child. The chief constable of police, acting, as he stated, on information that the accused was about to kill a baby, went to search her house

with a number of men, & found her lying on the first floor, & discovered on the second floor a living new-born child wrapped up in a cloth with a cooking pot turned over it. She was convicted of attempt to murder:—*Held*: the evidence was insufficient to support the conviction.—*R. v. CHIMA* (1871), 8 Bom. Cr. Cas. 164.—IND.

**753 i.** — *Must be more than merely preparatory.*—[.]—*R. v. DELIP SINGH* (1918), 26 B. C. R. 390.—CAN.

**753 ii.** —[.]—*Held*: by Glover, J., incendiarism having, on several occasions occurred in a village, produced by a ball of rag, with a piece of burning charcoal within it, & the prisoner one evening being discovered to have a ball of that description concealed in his dhoti, which contained burning charcoal, he is guilty of an attempt to commit mischief by fire. The possession of the instrument to commit mischief by fire, & the going about of the person with it, are sufficient to raise a presumption that he intended to commit the act, & had already begun to move towards the execution. These facts are sufficient to constitute an attempt:—*Held*: that the possession of a fire-ball & moving about, it cannot support a conviction under Penal Code, ss. 436 & 511. These facts are not sufficiently indicative of an intention to destroy a building used for human

dwelling. To constitute an offence, it is not only necessary that the prisoner should have done an overt act towards commission of the offence, but that the act itself should have been done in the attempt to commit it.—*R. v. DAYAL BAWRI* (1869), 3 B. L. R. A. C. 55.—IND.

**753 iii.** —[.]—The act of causing the publication of banns of marriage is an act done in the preparation to marry, but does not amount to an attempt to marry. Where a man, having a wife living, caused the banns of marriage between himself & a woman to be published, he could not be punished for an attempt to marry again during the lifetime of his wife.—*R. v. PETERSON* (1876), 1 L. R. 1 All. 316.—IND.

**753 iv.** —[.]—In a prosecution for an attempt to cheat, the accused was charged & convicted of having at the central octroi office made false representations as to the contents of certain kuppas (skin vessels), the object of which was to obtain a certificate entitling him to obtain a refund of octroi duty. Prior to granting the certificate, the octroi officers examined the contents of the kuppas, & found that the representations of the accused regarding them was untrue. In consequence of this discovery, no certificate was given to him, & he was

*Sect. 6.—Degrees of criminal liability: Sub-sect. 6, B. (a) & (b).]*

antecedent to an offence, & the actual attempt. But, if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime (BLACKBURN, J.).—*R. v. CHEESEMAN* (1862), L. & C. 140; 31 L. J. M. C. 89; 5 L. T. 717; 26 J. P. 163; 8 Jur. N. S. 143; 10 W. R. 255; 9 Cox, C. C. 100, C. C. R.

754. ———.]—Prisoners were indicted for conspiring to commit larceny. A second count charged an attempt to commit a larceny. The evidence was that the two prisoners, with another boy, were seen by a policeman to sit together on some doorsteps near a crowd, & when a well-dressed person came up to see what was going on, one of the prisoners made a sign to the others, & two of them got up & followed the person into the crowd. One of them was seen to lift the tail of the coat of a man, as if to ascertain if there was anything in the pocket, but making no visible attempt to pick the pocket, & to place a hand against the dress of a woman, but no actual attempt to insert the hand into the pocket was observed. Then they returned to the doorstep & resumed their seats. They repeated this two or three times. There was no proof of any preconcert other than this proceeding:—*Held*: (1) this was not sufficient evidence of a conspiracy; (2) it was not evidence of an attempt to steal.—*R. v. TAYLOR & SMITH* (1871), 25 L. T. 76.

755. ———.]—Prisoner was indicted under Offences against the Person Act, 1861 (c. 100), s. 18, with attempting to discharge a loaded revolver at prosecutor with intent to do him grievous bodily harm. Evidence was given at the trial that during an interview between prisoner & prosecutor, prisoner drew a loaded revolver from his coat pocket. Prosecutor immediately seized prisoner & prevented him from raising his arm, a struggle ensued, in the course of which prisoner nearly succeeded in getting his arm free, but after a few minutes prosecutor wrested the revolver from him & he was taken into custody. During the struggle prisoner several times said to prosecutor, "You've got to die":—*Held*: there was evidence upon which prisoner could properly be convicted of an attempt to discharge the revolver within the meaning of sect. 18 of above Act.

If there had only been evidence of intention to shoot, or of preparation to shoot, the conviction could not be maintained. But there was evidence of an attempt to discharge, of acts "forming part of a series of acts" (LORD ALVERSTONE, C.J.).—*R. v. LINNEKER*, [1906] 2 K. B. 99; 75 L. J. K. B.

charged & convicted as above mentioned. The procedure necessary for obtaining a refund of octroi duty was that the central office, on satisfying itself that the articles produced were of the nature stated, would grant a certificate, which certificate would have to be indorsed by the outpost clerk when he passed the goods (on which refund was claimed) out of the town, & the owner would have to take back the certificate so indorsed to the central office & present it to be cashed:—*Held*: even assuming the accused to have falsely represented the contents of the kuppas as alleged, he had not completed an attempt to cheat, but had only made preparation for cheating.—*R. v. DHUNDI* (1886), 1 L. R. 8 All. 304.—IND.

753 v. ———.]—Two persons were charged with attempting to defraud underwriters by insuring a necklace & afterwards claiming the

insurance money on the pretence that the necklace had been stolen. At the trial the Crown omitted to prove by competent evidence that the accused had actually claimed the insurance money from the underwriters. The Lord Justice General charged the jury that although they must take the case on the footing that no claim had been made by the accused they were entitled to find the accused guilty if satisfied that the fraudulent scheme had been carried beyond the stage of preparation & had entered the stage of perpetration.—*H.M. ADVOCATE v. CAMERONS*, [1911] S. C. (J.) 110; 48 Sc. L. R. 804; 2 S. L. T. 108; 6 Adam, 456.—SCOT.

753 vi. ———.]—When the interval which necessarily exists between completed preparation for, & final execution of, a contemplated crime is sought to be filled by some other act leading, so far as the actor could know, in the natural order of things, to the

385; 94 L. T. 856; 70 J. P. 293; 54 W. R. 494; 22 T. L. R. 495; 50 Sol. Jo. 440; 21 Cox, C. C. 196, C. C. R.

*Annotations*.—*Consd.* R. v. White, [1910] 2 K. B. 124. *Refd.* R. v. Robinson (1915), 79 J. P. 303.

756. ———.]—A person cannot be convicted of an attempt to obtain money by false pretences, unless he made the false pretence to the person from whom the money was intended to be obtained, or to his agent; a false pretence made to a third person, although intended to be ultimately reported to the person from whom the money was to be obtained, will not suffice.

A jeweller, who had insured his stock in trade against burglary, with the object of obtaining the policy money from the insurers, falsely represented to the police that a burglary had been committed on his premises & the jewellery stolen, in the hope that the police would make a report by which the insurers might be induced to pay; but before he had made any communication about the pretended burglary to the insurers the fraud was discovered & he was arrested:—*Held*: on those facts he could not be convicted of an attempt to obtain money from the insurers by false pretences.—*R. v. ROBINSON*, [1915] 2 K. B. 342; 84 L. J. K. B. 1149; 113 L. T. 379; 79 J. P. 303; 31 T. L. R. 313; 59 Sol. Jo. 360; 24 Cox, C. C. 726; 11 Cr. App. Rep. 124, C. C. A. *Annotation*:—*Refd.* R. v. Cope (1921), 86 J. P. 78.

757. ——— *May be voluntarily discontinued*.]—It is a sufficient overt act to render a person liable to be found guilty of attempting to set fire to a stack, under 9 & 10 Vict. c. 25, s. 7, if he go to the stack with the intention of setting fire to it, & light a lucifer match for that purpose, but abandons the attempt because he finds that he is being watched.

Where prisoner demanded a shilling from prosecutor, & on being refused, became very abusive, & threatened to burn up prosecutor, & then proceeded to make the attempt above described:—*Held*: prisoner was liable to be indicted for demanding money by menaces, under 7 Will. 4 & 1 Vict. c. 87, s. 7.—*R. v. TAYLOR* (1859), 1 F. & F. 511.

758. ——— *May be interrupted*.]—If a person intending to shoot another, put his finger on the trigger of a loaded pistol, but is prevented from pulling the trigger, this is not an attempt to discharge loaded arms "by drawing a trigger, or in any other manner," within 1 Vict. c. 85, ss. 3 & 4, as the words "In any other manner" in that statute mean something analogous to drawing the trigger, which is the proximate cause of the loaded arm going off. The applying a lighted match to a loaded match-lock gun, or the striking

commission of the particular crime intended, then every such act is an attempt, & as such indictable. But mere acts of preparation, though done with criminal intent, do not amount to attempts to commit crimes. The accused had threatened to shoot S., had prepared a gun & loaded it, & then with it in his hand had gone in search of S., with intent to shoot him. Before he could find S. he was arrested:—*Held*: the acts of S. constituted no indictable attempt to commit a crime.—*R. v. SHARPE* (1903), T. S. 868.—S. AF.

758 i. ——— *May be interrupted*.]—Prisoner, who was charged with being an accessory after the fact to a felony, sent the principal, who was flying from justice, a box of clothes & a letter, neither of which reached him:—*Held*: the prisoner could not be convicted as an accessory, but might have been convicted of an attempt to assist the

the percussion cap of a percussion gun, would be sufficient attempts within these enactments.—*R. v. ST. GEORGE* (1840), 9 C. & P. 483.

*Annotations*:—*Consd. R. v. Bird* (1851), 5 Cox, C. C. 20. *Distd. R. v. Cheeseman* (1862), 9 Cox, C. C. 100. *Dbtd. R. v. Brown* (1883), 10 Q. B. D. 381. *Overd. R. v. Duckworth*, [1892] 2 Q. B. 83. *Refd. R. v. Ladyman* (1851), 15 J. P. 581; *R. v. Linneker*, [1906] 2 K. B. 99.

**759.** ———.]—An indictment on 7 Will. 4 & 1 Vict., c. 85, ss. 3 & 4, charged prisoner with attempting to discharge at prosecutor a certain blunderbuss, loaded with gunpowder & divers leaden shots. It appeared that prisoner, on a refusal by prosecutor to give him up some title-deeds, addressed him in these words: "Then you are a dead man," & immediately unfolded a great coat which he had on his arm, & took out a blunderbuss, but was not able to raise it to his shoulder, or point it directly at the prosecutor, before he was seized. The blunderbuss was found to be very heavily loaded, but the flint had dropped out, & was discovered between the lining of the great coat:—*Held*: the evidence was not sufficient to sustain the charge in the indictment.—*R. v. LEWIS* (1840), 9 C. & P. 523.

*Annotations*:—*Distd. R. v. Cheeseman* (1862), 9 Cox, C. C. 100. *Dbtd. R. v. Brown* (1883), 10 Q. B. D. 381. *Consd. R. v. Duckworth*, [1892] 2 Q. B. 83. *Distd. R. v. Linneker* (1906), 75 L. J. K. B. 385.

**760.** ———.]—B. drew a loaded pistol from his pocket for the purpose of murdering S., but before he had time to do anything further in pursuance of his purpose the pistol was snatched out of his hand, & he was at once arrested:—*Held*: the offence was not within Offences against the

Person Act, 1861 (c. 100), s. 15, under which sect. prisoner had been tried & convicted.—*R. v. BROWN* (1883), 10 Q. B. D. 381; 52 L. J. M. C. 49; 48 L. T. 270; 47 J. P. 327; 31 W. R. 400; 15 Cox, C. C. 199, C. C. R.

*Annotation*:—*Consd. R. v. Linneker*, [1906] 2 K. B. 99.

**761.** ———.]—On the trial of an indictment under Offences against the Person Act, 1861 (c. 100), s. 18, it was proved that prisoner drew from his pocket a loaded revolver & pointed it towards his mother. His wrists were seized by bystanders as he was raising the pistol, & after a struggle it was taken from him. During the struggle his finger & thumb were seen fumbling about the revolver, which cocked automatically when the trigger was pulled:—*Held*: there was evidence upon which the prisoner could properly be convicted of an attempt to discharge the revolver within the meaning of the statute.—*R. v. DUCKWORTH*, [1892] 2 Q. B. 83; 66 L. T. 302; 56 J. P. 473; 40 W. R. 448; 8 T. L. R. 324; 36 Sol. Jo. 272; 17 Cox, C. C. 495, C. C. R. *Annotation*:—*Consd. R. v. Linneker*, [1906] 2 K. B. 99.

**762.** ———.]—*R. v. LINNEKER*, No. 755, ante.

(b) Connection of Overt Act with Offence.

**763. Act done must lead directly towards the commission of full offence.**—*R. v. ROBERTS*, No. 747, ante.

**764.** ———.]—*R. v. TAYLOR & SMITH*, No. 754, ante.

**765. Act done may be one of a series—Need**

principal.—*R. v. MALONEY* (1901), 1 S. R. N. S. W. 77; 18 N. S. W. W. N. 96.—*AUS.*

**758 ii.** ———.]—Penal Code, s. 511, does not apply to attempts to commit murder, which are fully & exclusively provided for by sect. 307. A person is criminally responsible for an attempt to commit murder when, with the intention or knowledge requisite to its commission, he has done the last proximate act necessary to constitute the completed offence, & when the completion of the offence is only prevented by some cause independent of his volition.—*R. v. NIDDAH* (1891), 1 L. L. R. 14 All. 38.—*IND.*

**PART I. SECT. 6, SUB-SECT. 6.—B. (b).**

**763 i. Act done must lead directly towards the commission of full offence.**—*B.*, the managing director of a co., registered in New South Wales, on Sept. 25, 1914, as such director, wrote a letter to A. & Co., their business correspondents in New York, as follows:—"M. (an American subject) of P. Co., Ltd., is at present in Sydney, & on his arrival here found that 215 bags of cocoa which he had consigned to D. (a German subject who carried on business at Hamburg) had not left Sydney. It is, of course, impossible to get this cargo away to Germany, & M. has therefore consigned this parcel to K. & Co., San Francisco. We thought that if there was a good opening for a first-class cocoa in New York you might possibly assist in the disposal of same, & it may be advisable for you to get into touch with K. & Co. for the purpose of getting samples of this & following lots. M. does not know how to communicate with B. of the disposal of the cocoa, think it better to advise you, and know the safest way of to the proceeds which are due for his account & will be held by K. & Co. pending instructions from B." The evidence bore out the statements in this letter. B. also assisted M. to obtain shipment of the

particular lot of cocoa to San Francisco. M. had told B. that he owed B. money & intended to leave the proceeds of the cocoa in America at the disposal of B. On the several prosecutions of B. & the co., of which he was managing director, for attempting to trade with the enemy, debts, were convicted. On appeal:—*Held*: there was no evidence of an attempt by M. to trade with the enemy.—*BERWIN v. DONOHUE* (1915), 21 C. L. R. 1.—*AUS.*

**763 ii.** ———.]—Prisoners being indicted for an attempt to commit burglary, it appeared that they had agreed to commit the offence on a certain night, together with C., but C. was kept away by his father, who had discovered their design. The two were seen about twelve that night to come within about thirteen feet of the house, towards a picket fence in front, in which there was a gate; but without entering this gate they went, as was supposed, to the rear of the house, & were not seen afterwards. Afterwards, about two o'clock, some persons came to the front door & off on being alarmed, & were not identified:—*Held*: there was no evidence of an attempt to commit the offence, no overt act directly approximating to its execution.—*R. v. MCCANN* (1869), 28 U. C. R. 514.—*CAN.*

**763 iii.** ———.]—On an indictment for attempt to commit arson, the evidence showed that a person, under the direction of the prisoner, after so arranging a blanket saturated with oil, that if the flame were communicated to it the building would have caught fire, lighted a match, held it till it was burning well, & then put it down to within an inch or two of the blanket, when the match went out, the flame not having touched the blanket:—*Held*: the prisoner was properly convicted of an attempt to commit arson.—*R. v. GOODMAN* (1872), 22 C. P. 338.—*CAN.*

**763 iv.** ———.]—To ask for a bribe is an attempt to obtain one, & a bribe may be asked for as effectually in implicit as in explicit terms. Where

B., who was employed as a clerk in the pension department, in an interview with A., who was an applicant for a pension, after referring to his own influence in that department & instancing two cases in which by that influence increased pensions had been obtained, proceeded to intimate that anything might be effected by "karrawai," & on the overture being rejected, concluded by declaring that A. would rue & repent the rejection of it:—*Held*: the offence of attempting to obtain a bribe was consummated.—*R. v. BALDEO SAHAI* (1879), 1 L. R. 2 All. 253.—*IND.*

**763 v.** ———.]—Prisoner, who was charged with attempting to commit forgery of a valuable security, was found guilty by the jury of attempting to commit forgery. The jury explained their finding by saying that prisoner had ordered certain receipt forms to be printed similar to those used by the Bengal Coal Co., & that one of these forms had actually been printed & the proof corrected by him; that prisoner had had an intention of making such addition to the printed form as would make it a false document, & that he did this dishonestly & with intent to commit fraud. On a conviction for attempted forgery:—*Held*: the conviction was wrong.—*Re RIASAT ALI*, *R. v. RIASAT ALI* (1881), 1 L. R. 7 Calc. 352.—*IND.*

**765 i. Act one of a series—Need not be final act necessary.**—Prisoner made a bargain with B., who was set on by military authorities to trap prisoner to convey four Austrians named in the indictment, from Canada to U. S. A. by putting them across the Niagara River in a boat. Prisoner accepted money from B. for the promised service, & secreted the four men on his premises near the river. He intended to take the men across the river for the purpose mentioned in the indictment, & evidence from which the jury might properly conclude that if prisoner had not been arrested, he would have carried out that intention:—*Held*: an attempt to commit a crime is an



**Sect. 6.—Degrees of criminal liability: Sub-sect. 6, B. (b), C. & D.; sub-sect. 7, A.]**

**not be final act necessary.]—R. v. CHEESEMAN, No. 753, ante.**

**766. ———.]—R. v. LAITWOOD, No. 740, ante.**

**767. ———.]—The completion or attempted completion of one of a series of acts intended to result in killing is an attempt to murder, even although the completed act would not, unless followed by other acts, result in killing.—R. v. WHITE, [1910] 2 K. B. 124; 79 L. J. K. B. 854; 102 L. T. 784; 74 J. P. 318; 26 T. L. R. 460; 54 Sol. Jo. 523; 22 Cox, C. C. 325; 4 Cr. App. Rep. 257, C. C. A.**

**Annotation:—Refd. R. v. Robinson (1915), 79 J. P. 303.**

**768. ——— Last act committed by accused.]—R. v. EAGLETON, No. 750, ante.**

**769. ———.]—A collier placed certain false "tallies" in a tub whereby in the ordinary course of business the tallies would have been hung on a "tally-board" & he would have received payment as if for having raised as many tubs of coal as the tallies represented:—Held: these facts were sufficient to constitute a complete attempt to obtain money by false pretences.—R. v. RIGBY (1858), 7 Cox, C. C. 507.**

**770. ———.]—Prisoner was indicted for attempting to obtain money by false pretences in a begging letter. In reply to the letter prosecutor sent prisoner 5s.; but he stated in his evidence at the trial that he knew the statements contained in the letter were untrue:—Held: prisoner might be convicted on this evidence of attempting to obtain money by false pretences.**

This is an attempt by prisoner to obtain money by false pretences which might have been so obtained. The money was not so obtained because prosecutor remembered something which had been told him previously. In my opinion as soon as ever the letter was put into the post the offence was committed (KELLY, C.B.).—R. v. HENSLER (1870), 22 L. T. 691; 34 J. P. 533; 19 W. R. 108; 11 Cox, C. C. 570, C. C. R.

**Annotation:—Consd. R. v. Light (1915), 84 L. J. K. B. 865.**

### C. When Full Offence Impossible to commit.

**771. Liability for attempt—Burglary—Goods laid in indictment not in the house.]—Prisoner was indicted for breaking & entering a dwelling-**

house & stealing therein certain goods, specified in the indictment, the property of prosecutor. At the time of the breaking & entering the goods specified were not in the house, but there were other goods there the property of prosecutor. The jury acquitted prisoner of the felony charged, but found him guilty of breaking & entering the dwelling-house of prosecutor, & attempting to steal his goods therein:—Held: the conviction was wrong, as there was no attempt to commit the felony charged within the meaning of Criminal Procedure Act, 1851 (c. 100), s. 9.

An attempt must be to do that which, if successful, would amount to the felony charged, but here the attempt never could have succeeded, as the things which the indictment charged prisoner with stealing had been already removed, stolen by somebody else (COCKBURN, C.J.).—R. v. M'PHERSON (1857), Dears. & B. 197; 26 L. J. M. C. 134; 29 L. T. O. S. 129; 21 J. P. 325; 3 Jur. N. S. 523; 5 W. R. 525; 7 Cox, C. C. 281, C. C. R.

**Annotation:—Folld. R. v. Collins (1864), 9 Cox, C. C. 497.**

**772. ——— Larceny—Picking empty pocket.]—There can only be an attempt to commit an act, when there is such a beginning as, if uninterrupted, would end in the completion of the act.**

Prisoner was indicated for attempting to commit a felony by putting his hand into A.'s pocket, with intent to steal the property in the said pocket then being. The evidence was that he was seen to put his hand into a woman's pocket, but there was no proof that there was anything in the pocket:—Held: on the assumption that there was nothing in the pocket, prisoner could not be convicted of the attempt charged.—R. v. COLLINS (1864), Le. & Ca. 471; 4 New Rep. 299; 33 L. J. M. C. 177; 10 L. T. 581; 28 J. P. 436; 10 Jur. N. S. 686; 12 W. R. 886; 9 Cox, C. C. 497, C. C. R.

**Annotations:—Distd. R. v. Hensler (1870), 19 W. R. 108. Dtd. R. v. Brown (1889), 24 Q. B. D. 357. Overd. R. v. Ring, Atkins & Jackson (1892), 61 L. J. M. C. 116. Refd. R. v. Jones (1901), 18 T. L. R. 156.**

**773. ———.]—In order to prove that an attempt to commit a larceny has been committed, it is not necessary to prove that, had the attempt not been frustrated, the larceny could have been committed. R. v. Collins, No. 772, ante, overd.—R. v. RING, ATKINS & JACKSON (1892), 61 L. J. M. C. 116; 66 L. T. 300; 56 J. P. 552; 8 T. L. R. 326; 17 Cox, C. C. 491, C. C. R.**

act done with intent to commit that crime & forming part of a series of acts which would constitute its actual commission if it were not interrupted, & the bargain prisoner made with B., & his acts with reference to the four men, were overt acts forming part of such a series.

As there was no evidence that prisoner incited the men to leave Canada, & it could not be said he assisted them to leave, there was neither design nor willingness to be assisted on the part of the person who is said to have been assisted, therefore there was no evidence to be submitted to a jury of the offences charged in the indictment or of an attempt to commit it.—R. v. SNYDER (1915), 34 O. L. R. 318; 8 O. W. N. 594; 25 D. L. R. 1.—CAN.

**765 ii. ———.]—Penal Code, s. 511, was not meant to cover only the penultimate act towards completion of an offence & not acts precedent, if those acts are done in the course of the attempt to commit the offence, are done with the intent to commit it, & done towards its commission. Whether any given act or series of acts amounts to an attempt of which the law will take notice, or merely to preparation,**

is a question of fact in each case.—Re MACCREA (1893), 1 L. R. 15 All. 173.—IND.

**765 iii. ———.]—One C., calling himself K., the son of B., went to a stamp vendor, accompanied by a man named S., & purchased from him in the name of K. a stamp paper of the value of 4 annas. The two men then went to a petition-writer, & C., again giving his name as K., they asked the petition-writer to write for them a bond for Rs. 50, payable by K. to S. The petition-writer commenced to write the bond, but, his suspicions being aroused, did not finish it, but took C. & S. to the nearest thana:—Held: in the above circumstances, S. was rightly convicted of an attempt to commit the offence defined in Penal Code, s. 467, & C. of abetment of the attempt.—R. v. KALYAN SINGH (1894), 1 L. R. 16 All. 409.—IND.**

### PART I. SECT. 6, SUB-SECT. 6.—C.

**a. Whether liable for attempt.]—A person cannot be convicted of an attempt to commit an offence, under Penal Code, s. 511, unless the offence would have been committed if the attempt charged had succeeded.—Re**

RIASAT ALI, R. v. RIASAT ALI (1881), 1 L. R. 7 Calc. 352.—IND.

**p. ——— Intimidation.]—The accused sent a fabricated petition to the Revenue Comr., S. D., containing a threat that, if a certain forest officer were not removed elsewhere, he would be killed. The accused was charged with the offence of criminal intimidation under Penal Code, s. 507. The sessions judge found that the comr. had neither official nor personal interest in the forest officer. He therefore acquitted the accused of the offence of criminal intimidation, but convicted him of an attempt to commit the offence punishable under sect. 507:—Held: as the person to whom the petition was addressed was not interested in the person threatened, the act intended & done by the accused did not amount to the offence of criminal intimidation. The accused was not guilty of committing criminal intimidation, because the act intended & done by him lacked an ingredient of that offence, he could not be guilty of an attempt at that offence.—R. v. MANGESH JIVAJI (1887), 1 L. R. 11 Bom. 376.—IND.**

**q. ——— Attempt to procure abortion—Drug innocuous.]—Where on a**

**774. — Unnatural offence with fowl.]—**Prisoner pleaded guilty at assizes to an indictment charging him with having attempted to commit unnatural offences with domestic fowls, & was sentenced to a term of imprisonment. After the judge left the assize town his attention was called to an unreported case which was said to have decided that a duck was not an "animal" within the meaning of Offences against the Person Act, 1861 (c. 100), s. 61, & he thereupon stated a case, requesting the opinion of the ct. for C. C. R. whether the conviction was good:—*Held*: the indictment was good, & prisoner was properly convicted.—*R. v. BROWN* (1889), 24 Q. B. D. 357; 59 L. J. M. C. 47; 61 L. T. 594; 54 J. P. 408; 38 W. R. 95; 16 Cox, C. C. 715, C. C. R.

*Annotations*:—*Folld.* *R. v. Ring, Atkins & Jackson* (1892), 61 L. J. M. C. 116. *Mentd.* *R. v. Plummer*, [1902] 2 K. B. 339.

**775. — Carnal knowledge by boy under fourteen.]—***R. v. WILLIAMS*, No. 204, *ante*.

**776. — Attempt by woman to procure her own abortion—Drug taken incapable of procuring abortion.]—**A person who incites a woman by means of advertisement to administer to herself a thing that, to his knowledge, is not in fact noxious or capable of procuring abortion, but which he knows she will take in the belief that it is capable of procuring abortion, is not guilty of inciting her to attempt to commit the crime within the meaning of Offences against the Person Act, 1861 (c. 100), s. 58. But the woman who takes the thing, in the belief that it is capable of procuring abortion, though in fact it is not capable of so doing, is guilty of the attempt to commit the crime. *Semble*: if the person who incites the woman to take the thing believes the thing to be noxious or capable of procuring abortion, he is guilty of inciting her to attempt to commit the crime, although, owing to facts being otherwise than he believed, the commission of the crime in the manner proposed was impossible.—*R. v. BROWN* (1899), 63 J. P. 790.

*Annotation*:—*Refd.* *R. v. Jones* (1901), 18 T. L. R. 156.

**777. — Attempt to shoot—Weapon defective.]—***R. v. LEWIS*, No. 759, *ante*.

**778. — Revolver incapable of being fired at first attempt.]—**Upon an indictment for attempting to discharge a loaded arm with intent to murder, the evidence for the prosecution was that the prisoner had pointed at prosecutor a

revolver loaded in some of its chambers with ball cartridges, but not in others, saying that he would shoot him, & that he had pulled the trigger of the revolver, but that the hammer had fallen upon a chamber which contained an empty cartridge case:—*Held*: the revolver was a loaded arm within the meaning of Offences against the Person Act, 1861 (c. 100) s. 14, & prisoner could, upon the evidence, be convicted of attempting to discharge a loaded arm with intent to murder prosecutor.—*R. v. JACKSON* (1890), 17 Cox, C. C. 104.

*Annotation*:—*Refd.* *R. v. Jones* (1901), 18 T. L. R. 156.

#### D. Indictment and Trial.

**779. Where full offence is proved—Charge of assault with intent to commit rape—Proof of rape.]—**HARMWOOD'S CASE (1787), 1 East, P. C. 411.

**780. — — — — —.]—**On an indictment for an assault with intent to commit a rape, if penetration be proved, prisoner cannot be convicted of the attempt.—*R. v. NICHOLLS* (1847), 9 L. T. O. S. 179; 2 Cox, C. C. 182.

**781. — Charge of attempt to commit burglary—Burglary proved.]—***R. v. SIMPSON & KERRISON*, No. 748, *ante*.

#### SUB-SECT. 7.—INCITEMENT TO COMMIT CRIME.

##### A. Nature of Offence.

**782. Misdemeanour at common law—Mere incitement sufficient—Offence not committed.]—**To solicit a servant to steal his master's goods is a misdemeanour, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting & inciting, & such offence is indictable at the sessions, having a tendency to a breach of the peace.—*R. v. HIGGINS* (1801), 2 East, 5; 102 E. R. 269.

*Annotations*:—*Folld.* *R. v. Quail* (1866), 4 F. & F. 1076. *Refd.* *R. v. Gregory* (1867), 10 Cox, C. C. 459; *R. v. Ransford* (1874), 31 L. T. 488; *Barratt v. Burder* (1893), 10 T. L. R. 124. *Mentd.* *R. v. Meredith* (1838), 8 C. & P. 589; *R. v. Rowed* (1842), 11 L. J. M. C. 74; *R. v. Bartlett* (1843), 12 L. J. M. C. 127; *R. v. Brailsford*, [1905] 2 K. B. 730.

**783. — — — — — Submission to incitement for purpose of betrayal of inciter.]—**To incite a servant to rob his master is a misdemeanour at common law, & an incitement to steal any silk that may be in the servant's care without further

charge of attempting to administer a drug or other noxious thing with intent to procure a miscarriage, the record discloses sufficient evidence to justify the inference that the accused attempted to obtain noxious substances from a physician, that he believed that he had got them & that he tried to get the woman to take them, the conviction should be sustained, although the charge to the jury, apparently overlooking the fact that the charge against the accused was one of an attempt only, submitted to it the question whether the substances were in fact drugs or other noxious things, & there was not sufficient evidence to support a reasonable inference to that effect.—*R. v. PERTIBONE*, [1913] 2 W. W. R. 806; 13 Alta. L. R. 463; 41 D. L. R. 411.—*CAN.*

*R. v. — — — — —.]—**R. v. AUSTIN* (1905), 24 N. Z. L. R. 983.—*N.Z.*

*R. v. — — — — —.]—**R. v. THOMPSON* (1911), 30 N. Z. L. R. 690.—*N.Z.*

**t. — — — — — No proof of pregnancy.]—**Accused can be convicted of attempting to procure abortion, if there is no proof that the woman on whom such attempt was made was pregnant.—*R. v. FREE-*

*STONE* (1913), T. P. D. 758.—*S. AF.*

**u. — — — — — Attempt to murder.]—**In order to constitute the offence of attempt to murder, under Penal Code, s. 307, the act committed by prisoner must be an act capable of causing death in the natural & ordinary course of events. Where prisoner presented an uncapped gun at F., believing the gun to be capped, with the intention of murdering him, but was prevented from pulling the trigger:—*Held*: that he could not be convicted of an attempt to murder upon a charge framed under above sect., but that in the same circumstances he might be convicted upon a charge of simple attempt to murder framed under s. 511 in connection with ss. 299 & 300.—*R. v. CASSIDY* (1867), 4 Bom. Cr. Ca. 17.—*IND.*

#### PART I. SECT. 6, SUB-SECT. 6.—D.

**a. Where full offence is proved—Charge of attempt to steal—Proof of larceny.]—**Where a prisoner is indicted for an attempt to steal, & the proof establishes that the offence of larceny was actually committed, the jury may convict of the attempt, unless the ct. discharges the jury & directs that the

prisoner be indicted for the complete offence.—*R. v. TAYLOR*, [1895] Q. R. 4 Q. B. 226.—*CAN.*

**b. Restraint or confinement forming part of attempt to kidnap—Subject of one charge.]—**Where an act of restraint or confinement in an attempt to kidnap has been exercised in furtherance of the attempt, & goes to form part of that offence, & is not done with an intention or object which can be separated from the general intention to kidnap, it will constitute an integral part of that offence, & should not form the subject of a separate conviction & sentence.—*R. v. MUNROO* (1874), 6 N. W. 293.—*IND.*

#### PART I. SECT. 6, SUB-SECT. 7.—A.

**c. Whether mere incitement sufficient—Offence not committed.]—**Every person is guilty of an offence which counsels another to commit it, whether the person so counselled actually commits the offence or not.—*BROUSSEAU v. R.* (1917), 56 S. C. R. 22; 39 D. L. R. 114; 29 Can. Crim. Cas. 207.—*CAN.*

**d. — — — — —.]—**Prisoner was indicted for soliciting J. B. to murder C. M. The evidence was that the prisoner procured saltpetre, & gave it



**Sect. 6.—Degrees of criminal liability: Sub-sect. 7, A., B. & C.]**

defining the particular silk to be stolen, is sufficiently certain to support a conviction. It is no defence that the servant purposely submitted himself to the incitement with intent to betray the inciter.—*R. v. QUAIL* (1866), 4 F. & F. 1076.

**784. ——— Effect of Accessories & Abettors Act, 1861 (c. 94), s. 2.]—***R. v. GREGORY*, No. 663, *ante*.

**785. ———.]—**Applt. telephoned to W. asking if he could have two boys for immoral purposes. No particular boys were named or indicated. Applt. was charged with inciting W. "to procure the commission by certain male unknown persons of acts of gross indecency with him," applt. :—*Held*: as applt. was inciting W. to commit what, if he had done the acts, would have been a criminal offence, it was immaterial that the male persons he was to procure were not at the time ascertained or that applt. was inciting W. to incite another to commit an offence, & applt. was rightly convicted.—*R. v. BENTLEY*, [1923] 1 K. B. 403; 92 L. J. K. B. 366; 87 J. P. 55; 39 T. L. R. 105; 67 Sol. Jo. 279, C. C. A.

**786. ———.]—**A count in an indictment charged that prisoner unlawfully, wickedly, & indecently did write & send to H. a letter, with intent thereby to move & incite H. to attempt & endeavour feloniously & wickedly to commit an unnatural offence, & by the means aforesaid did unlawfully attempt & endeavour to incite H. to attempt to commit the crime aforesaid. The evidence was, that H. was a boy at school, & that he had received two other letters from prisoner, which he read, but that when he received the one mentioned in the above count he did not read it, nor was he in any way aware of its contents, but handed it over to the school authorities :—*Held*: (1) the count charged an indictable misdemeanour; (2) the sending the letter proved the attempt to incite, although it might be doubtful whether it could be said to amount to inciting or soliciting, inasmuch as H. was not aware of its contents.—*R. v. RANSFORD* (1874), 31 L. T. 488; 13 Cox, C. C. 9, C. C. R.

*Annotation*:—As to (2) *Refd.* *R. v. Cope* (1921), 86 J. P. 78.

**787. Knowledge of person incited—Nature of offence.]—***R. v. WELHAM*, No. 662, *ante*.

to J. B. to administer to C. M., & that J. B. administered it accordingly, & that C. M. detected the poison in time to save her life, after having swallowed some of it. The jury found the prisoner guilty, that the solicitation was to administer saltpetre with intent to poison, & that the saltpetre had been attempted to be administered :—*Held*: the conviction was good, prisoner having been rightly indicted as a principal for soliciting to murder, instead of as an accessory before the fact to the administering poison with intent to murder.—*R. v. MURPHY* (1840), Jebb, Cr. & Pr. Cas. 315.—*IR.*

**e. ———.]—**It is not an offence under Crimes Act, 1908, to counsel the commission of a crime that was not actually committed.—*R. v. BOWEN* (1915), 34 N. Z. L. R. 696.—*N.Z.*

**f. ———.]—**Inciting to commit a crime is itself a crime at common law.—*R. v. FORTUIN* (1915), C. P. D. 757.—*S. AF.*

**g. ———.]—**Inciting to commit a crime is a substantive offence & a crime in itself under the common law, though it has not been made a substantive offence by Act 27 of 1914, s. 15 (2) (b).—*R. v. NLEHOVO*, [1921] App. D. 485.—*S. AF.*

*Punishable as at-*

**788. Knowledge of person inciting—Effect of means proposed.]—***R. v. BROWN*, No. 776, *ante*.

**789. To commit suicide.]—***R. v. LEDDINGTON*, No. 665, *ante*.

**790. Incitement by girl under sixteen—To have carnal knowledge.]—***R. v. TYRRELL*, No. 632,

**B. Forms of Incitement.**

**791. Sending libellous statements—Incitement to breach of peace.]—***HICKS'S CASE* (1618), Hob. 215; Poph. 139; 80 E. R. 362.

*Annotations*:—*Refd.* *R. v. Summer & Hillard* (1665), 1 Sid. 270; *R. v. Beere* (1698), 12 Mod. Rep. 218; *Butt v. Conant* (1820), 1 Brod. & Bing. 548; *R. v. Adams* (1888), 5 T. L. R. 85. *Mentd.* *Wilkes's Case* (1763), 19 State Tr. 982; *A.-G. v. Downing* (1767), Wilms. 1.

**792. ———.]—**An endeavour to provoke another to commit the misdemeanour of sending a challenge to fight is itself an indictable misdemeanour, particularly, where such provocation was given by a writing, containing libellous matter, & alleged in the prefatory part of the indictment to have been done with intent to do the party bodily harm, & to break the King's peace, the sending such writing being an act done towards procuring the commission of the misdemeanour meant to be accomplished.—*R. v. PHILIPPS* (1805), 6 East, 464; 2 Smith, K. B. 550; 102 E. R. 1365.

**793. Offer of bribe—To witness.]—**Agreeing to give a person a sum of money to prove that a deed was forged in order to secure a verdict is a criminal offence.—*R. v. JOHNSON* (1678), 2 Show. 1; 89 E. R. 753.

*Annotations*:—*Refd.* *R. v. Scofield* (1784), Cald. Mag. Cas. 397; *R. v. Higgins* (1801), 2 East, 5; *R. v. Ransford* (1874), 31 L. T. 488.

**794. ———.]—**If a man be indicted of perjury, & it do not appear what he swears, & that it was in a cause depending, & material to the point in issue, the indictment will be bad (*HOLT, C.J.*).

*Semble*: it is a common law offence to offer money to swear to a particular thing whether true or false.—*R. v. DARBY* (1702), 7 Mod. Rep. 100; 87 E. R. 1121.

*Annotation*:—*Mentd.* *R. v. Robinson* (1759), 2 Burr. 799.

**795. ——— To procure office.]—**Information lies for attempting to bribe a Privy Counsellor to procure an office.

*tempt.*)—To solicit or incite another to commit a crime is punishable as an attempt to commit the crime.—*R. v. KAPLAN* (1893), 10 S. C. 259; 3 C. T. R. 364.—*S. AF.*

**i. Incitement to incite.]—**The words "when the abetment of an offence is an offence" do not mean "when an abetment of an offence is actually committed," but that when the abetment of an offence is by definition or description an offence under the Penal Code, that is when an abetment of an offence is punishable under sect. 109 or sect. 116, or other provision of the Code then the abetment of such abetment is also an offence. Where S. instigated K., a bench-clerk in the Ct. of M., a Presidency Magistrate, to instigate the latter to accept an illegal gratification for acquitting an accused in a case pending before him, & granting sanction against the complainant in the case & K. received such gratification as a police spy & intending to get S. arrested, & did not in fact instigate M. to accept the same :—*Held*: S. was guilty of the abetment of bribery under Penal Code, s. 161, read with sect. 116. It is immaterial to the guilt of the abettor whether or not the person first abetted falls in with the plan of the former, knowing his criminal purpose, but intending to

cause its detection.—*SRIAL CHAMARIA v. R.* (1918), 1 L. R. 46 Cal. 607.—*IND.*

**k. ———.]—**In Roman-Dutch law it is a crime to endeavour to persuade another to commit a crime.—*R. v. SILBURN* (1903), 24 N. L. R. 527.—*S. AF.*

**l. Inciting after crime already being attempted.]—**A person may be convicted of an attempt to incite to commit a crime although his acts were done in response to the invitation of the person attempting to commit such crime. "To incite" does not necessarily mean to originate or to initiate.—*R. v. CRICHTON*, [1915] S. A. L. R. 1.—*AUS.*

**PART I. SECT. 6, SUB-SECT. 7.—B.**

**m. Offer of bribe—To procure evidence.]—**Deft. charged with offering money to a person to swear that A., B., or C. gave a certain sum of money to vote for a candidate at an election :—*Held*: the offence was not an attempt to commit the crime of subornation of perjury, but an incitement to give false evidence or particular evidence regardless of its truth or falsehood, & was a misdemeanour at common law.—*R. v. COLE* (1902), 22

I am clear that this is a misdemeanour & punishable as such (LORD MANSFIELD, C.J.).—*R. v. VAUGHAN* (1769), 4 Burr. 2494; 98 E. R. 308.

*Annotations*:—*Apld.* *R. v. Pollnan* (1809), 2 Camp. 229. *Consd.* *R. v. Whitaker*, [1914] 3 K. B. 1283. *Refd.* *R. v. Scofield* (1784), *Cald. Mag. Cas.* 397; *R. v. Higgins* (1801), 2 East, 5; *R. v. Philipps* (1805), 6 East, 464; *R. v. Brailsford*, [1905] 2 K. B. 730. *Mentd.* *R. v. Rowed* (1842), 11 L. J. M. C. 74.

**796.** — **To commit an offence.**—Comparison of handwriting, though lately admitted as evidence, if confirmed by the contents of correspondence, refused in the instance of a single letter for the purpose of commitment. Affidavit of a bribe, offered to a police officer, to assist in obtaining of a ward of the ct., ordered to be laid before the A.-G. Marriage of a ward of the ct. under gross circumstances punishable, beyond commitment, by indictment, as a conspiracy.

The endeavour to bribe a man to commit an offence is itself a very serious offence (LORD ELDON, C.).—*WADE v. BROUGHTON* (1814), 3 Ves. & B. 172; 35 E. R. 444, L. C.

**797.** — **Inciting to conspire.**—A servant who, in order to make a profit for himself, sells his master's goods at less than their proper market value, thereby defrauds his master of the sum which represents the difference between the value of the goods & the price at which the servant has sold them.

A person was indicted for soliciting a servant to conspire to cheat & defraud his master, & it was proved that such person had offered a bribe to the servant as an inducement to him to sell certain goods of his master at less than their value:—*Held*: he might properly be convicted of such offence.—*R. v. DE KROMME* (1892), 66 L. T. 301; 56 J. P. 682; 8 T. L. R. 325; 17 Cox, C. C. 492, C. C. R.

#### C. Communication of the Incitement.

**798. Actual communication necessary—Mind of person incited need not be affected—Incitement to murder—Offences against the Person Act, 1861 (c. 100), s. 4.**—Deft. was charged upon an indictment, which alleged that he, on July 28, unlawfully did solicit, endeavour to persuade, & did propose to one B. feloniously, wilfully, & of his malice aforethought, to kill & murder F., & that he on Aug. 6, unlawfully did solicit, endeavour to persuade, & did propose to the said B. feloniously, wilfully, & of his malice aforethought, to kill & murder the said F. The above-mentioned counts were all framed under sect. 4 of above Act. Deft. was also charged with the common law offence of attempting to commit the above misdemeanours. The case for the prosecution was based upon two letters alleged to have been sent on July 28, & on Aug. 6, by deft. to B. The evidence for the prosecution did not prove that either of these letters had ever reached B.:—*Held*: to constitute

the misdemeanour under sect. 4 of the above Act of soliciting, encouraging, persuading or endeavouring to persuade, or proposing to any person to murder any other person, the prosecution must show that there was some communication between the accused, & the person solicited, etc., though it is not necessary to show that the mind of the person solicited was affected thereby.—*R. v. KRAUSE* (1902), 66 J. P. 121.

*Annotation*:—*Distd.* *Horton v. Mead*, [1913] 1 K. B. 154.

**799.** — — — — —.]—The writing of letters to a boy who was known to the writer to have committed an act of gross indecency with another male person, reminding the boy of his meeting with the other man & sending him the other man's good wishes, constitutes an attempt to "procure the boy to commit an act of gross indecency" within Criminal Law Amendment Act, 1885 (c. 69), s. 11, & is none the less an attempt within the sect. notwithstanding the fact that the letters were not received & read by the boy to whom they were addressed.—*R. v. COPE* (1921), 86 J. P. 78; 38 T. L. R. 243; 66 Sol. Jo. 406; 16 Cr. App. Rep. 77, C. C. A.

**800.** — **Newspaper article.**—M. was indicted under Offences against the Person Act, 1861 (c. 100), s. 4. The encouragement & endeavour to persuade to murder, proved at the trial, was the publication & circulation by him of an article, written in German in a newspaper published in that language in London, resulting in the recent murder of the Emperor of Russia, & commending it as an example to revolutionists throughout the world. The jury were directed that if they thought that by the publication of the article M. did intend to, & did, encourage or endeavour to persuade any person to murder any other person, whether a subject of her Majesty or not, & whether within the Queen's dominions or not, & that such encouragement and endeavouring to persuade was the natural & reasonable effect of the article, they should find him guilty:—*Held*: such direction was correct, & the publication & circulation of a newspaper article might be an encouragement, or endeavour to persuade to murder, within sect. 4 of the Act, although not addressed to any person in particular.—*R. v. MOST* (1881), 7 Q. B. D. 244; 50 L. J. M. C. 113; 44 L. T. 823; 45 J. P. 696; 29 W. R. 758; 14 Cox, C. C. 583, C. C. R.

*Annotations*:—*Foldd.* *R. v. Antonelli & Barberi* (1905), 70 J. P. 4. *Refd.* *R. v. Krause* (1901), 66 J. P. 121; *R. v. Bowman* (1912), 76 J. P. 271. *Mentd.* *R. v. Labouchere, Vallombrosa's Case* (1884), 50 L. T. 177.

**801.** — **Advertisement.**—*R. v. BROWN*, No. 776, *ante*.

**802.** — **Intercepted letter—Conviction of attempt to incite.**—*R. v. BANKS*, No. 676, *ante*.

**803.** — — — — —.]—*R. v. RANSFORD*, No. 786, *ante*.

**804.** — — — — —.]—*R. v. KRAUSE*, No. 798, *ante*.

3 L. T. 132; 3 O. L. R. 389; 1 O. W. R. 117.—**CAN.**

**n. Public speeches—Incitement to violence.**—The crime of *geweld* is constituted when the acts of the accused are such as to disturb the peace & security or forcibly to invade the rights of other persons; it is unnecessary to allege specifically or to prove that any persons have been terrorised by such acts. The words: "As long as a man has a right arm to break a plate-glass window he need not starve; I won't starve, anyhow," used during a time of public excitement while a railway strike was in progress constitute an incitement to commit the crime of *geweld*.—*R. v.*

O'BRIEN (1914), T. P. D. 287.—**S. AF.**

#### PART I. SECT. 6, SUB-SECT. 7.—C.

**800 i. Actual communication necessary—Newspaper article.**—Upon a charge of incitement as preferred in the summons, where the incriminated matter was published in a newspaper, the production of a copy of the newspaper purchased from a firm of newsagents described in an advertisement in the paper as wholesale agents, & who were proved to have been supplied with the papers in pursuance of a wholesale order & which advertisement stated that the paper had agents for sale throughout Ireland:—*Held*: sufficient evidence of circulation to

prove that the incitement reached persons intended to be incited.—*R. v. MCCARTHY, HOLLAND & O'DWYER*, [1903] 2 I. R. 146.—**IR.**

**o.** — **Intercepted letter.**—Prisoner was indicted under 24 & 25 Vict. c. 100, s. 4, for that he "did solicit H. to murder K." & in a second count for that he "did endeavour to persuade H. to murder K." The prisoner wrote & posted a letter addressed to H. in which he requested H. to murder K. The letter fell by accident into the hands of a third person, & never reached H.:—*Held*: the evidence would not sustain a conviction on either of the counts.—*R. v. Fox* (1870), 19 W. R. 109.—**IR.**

**Sect. 6.—Degrees of criminal liability: Sub-sect. 8, A.]**

**SUB-SECT. 8.—CONSPIRACY.**

**A. Nature of Offence.**

**805. Definition in 33 Edw. 1, stat. 2 (Ordinacio de Conspiratoribus)—Not exhaustive.]—**Counsel attempted to restrict conspiracy to matters germane, at least to those referred in the above Act. It is obvious, however, that the statute does not give an exhaustive definition, & other matters beyond those enumerated in that Act, have been adjudged over & over again to be the subject of criminal conspiracies (LORD ALVERSTONE, C.J.).—*R. v. TIBBITS*, [1902] 1 K. B. 77; 71 L. J. K. B. 4; 85 L. T. 521; 66 J. P. 5; 50 W. R. 125; 18 T. L. R. 49; 46 Sol. Jo. 51; 20 Cox, C. C. 70, C. C. R.

*Annotation:—Mentd. R. v. Nield* (1909), *Times*, Jan. 27.

**806. Agreement to do unlawful act or lawful act by unlawful means—General rule.]—**An indictment alleged that S. sold B. a mare for £39, that, while the price was unpaid, B. & C. conspired by false & fraudulent representations made to S., that the mare was unsound, & that B. had sold her for £27, to induce S. to accept £27 instead of the agreed on price of £39, & thereby to defraud S. of £12:—*Held*: the indictment was good, & being supported by proof of the facts alleged, it warranted a conviction.

It is an indictable offence to conspire by unlawful means to accomplish a lawful object (ERLE, J.).—*R. v. CARLISLE* (1854), *Dears. C. C.* 337; 23 L. J. M. C. 109; 23 L. T. O. S. 84; 18 J. P. 280; 18 Jur. 386; 2 W. R. 412; 2 C. L. R. 478; 6 Cox, C. C. 366, C. C. R.

**807. ———.]—**(1) Defts. were indicted for a criminal conspiracy & found guilty on the first two counts of the indictment. The second count alleged that defts., who were directors, etc., of a new co., had conspired to deceive the members of the committee of the Stock Exchange, & to induce them, contrary to the intent of certain of their rules, to order a quotation of the shares of the co. in the official list of the Stock Exchange, & "thereby to persuade divers liege subjects, who should thereafter buy & sell the shares of the said co., to believe that the said co. was duly formed, & had complied with the said rules, so as to entitle the co. to have their shares quoted in the official list of the Stock Exchange." Defts. assigned error:—*Held*: the second count was good after verdict, & sufficiently alleged a criminal conspiracy, for it contained allegations, some accurately & some inaccurately stated, which, assuming them to have been found proved in a sense adverse to defts., showed that there was an agreement by them to cheat & defraud, by means of false pretences, those liege subjects who might buy shares in the co.

Every pleading, civil or criminal, must contain allegations of the existence of all the facts necessary to support the charge or defence set up by such pleading. An indictment must, therefore, contain an allegation of every fact necessary to constitute the criminal charge preferred by it. As in order to make acts criminal they must

always be done with a criminal mind, the existence of that criminality of mind must always be alleged. If, in order to support the charge, it is necessary to show that certain acts have been committed, it is necessary to allege that those acts were in fact committed. If it is necessary to show that those acts, when they were committed, were done with a particular intent, it is necessary to aver that intention. If it is necessary in order to support the charge that the existence of a certain fact should be negatived, that negative must be alleged (BRETT, J.A.).

If the second count in this indictment contains averments sufficiently stated which are enough to show sufficiently that the defts. unlawfully, *i.e.* with minds intending to do wrong, agreed by false pretences to cheat & defraud those who might buy shares in the co., it sufficiently alleges a criminal conspiracy within the rule enunciated below; for if any person were cheated by false pretences into purchasing a commodity which but for such falsehood he would not have purchased, it is undoubted that he could maintain some suit for relief or remedy founded on the falsehood & fraud thus perpetrated on him (BRETT, J.A.).

(2) The crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once, or at some future time, certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement. The conspirators may repent & stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless the crime is complete; it was completed when they agreed. It is not, of course, every agreement which is a criminal conspiracy. It is difficult perhaps, to enunciate an exhaustive or a complete definition; but agreements may be described which are undoubtedly criminal. An agreement to accomplish an end forbidden by law, though by means which would be harmless if used to accomplish an unforbidden end, is a criminal conspiracy. An agreement to accomplish, by means which are if done by themselves forbidden by law, an end which is harmless if accomplished by unforbidden means, is a criminal conspiracy. An agreement made with a fraudulent or wicked mind to do that which, if done, would give to prosecutor a right of suit founded on fraud, or on violence exercised on or towards him, is a criminal conspiracy (BRETT, J.A.).

(3) To support a charge of obtaining money, etc., by false pretences, it is necessary to show, & therefore, to allege, that prisoner, with a wicked or criminal mind, stated something which, if true, would be an existing fact; that he did so with intent to procure the possession of money, etc.; that he knew his statement was, that is to say, that so far as his mind was concerned he intended that his statement should be, false; that by the statement he did so act on the mind of prosecutor as that he did thereby obtain money, etc.; that the statement was in fact untrue, in the sense of being incorrect (BRETT, J.A.).—*R. v. ASPINALL* (1876), 2 Q. B. D. 48; 43 L. J. M. C. 145; 36

**PART I. SECT. 6, SUB-SECT. 8.—A.**

**p. General rule.]—**Conspiracy consists in a combination & agreement by persons to do some illegal act or to effect a legal purpose by illegal means; & the conspiracy is complete if two or more than two should agree to do an illegal thing. Conspiracy is not a sub-

stantive offence in India, but is incorporated in the law of abetment of offences. In order to constitute the offence of abetment by conspiracy, there must be a combining together of two or more persons in the conspiracy, & an act or illegal omission must take place in pursuance of that conspiracy & in order to the doing of that thing.—

*KALIL MUNDA v. R.* (1901), 1 L. R. 28 Calc. 797.—IND.

**q. ———.]—**Term conspiracy is divisible into three heads: (1) where the end to be attained is in itself a crime; (2) where the object is lawful, but the means to be resorted to are unlawful; (3) where the object is to

L. T. 297; 42 J. P. 52; 13 Cox, C. C. 563; *sub nom.* ASPINALL *v.* R., 25 W. R. 283, C. A.

*Annotations* :—*As to* (1) *Consd.* Bradlaugh *v.* R. (1878), B. D. 607; R. *v.* Strouger (1886), 17 Q. B. D. 327; Warner (1891), 65 L. T. 132. *Refd.* Scott *v.* Nab, Slaughter & May *v.* Brown, Doe-  
[1894] 2 Q. B. 724; R. *v.* Silverlock, [1894] 2 J. P. 100. *As to* (2) *Consd.* Salaman *v.* Warner (1891), 35 L. T. 132. *Refd.* R. *v.* Whitaker, [1914] 3 K. B. 1283. *As to* (3) *Consd.* R. *v.* Silverlock, [1894] 2 Q. B. 766. *Refd.* Scott *v.* Brown, Doering, McNab, Slaughter & May *v.* Brown, Doering, McNab, [1892] 2 Q. B. 724.

808. ———.]—(1) Where the object is injury, if injury is effected an action will lie for the malicious conspiracy which has effected it, & therefore, it may be that such a conspiracy, if it could be proved in fact, would be indictable. But where the object is not malicious the mere fact that the effect is injurious does not make the agreement either illegal or actionable, & therefore, it is not indictable (LORD COLERIDGE, C.J.).

(2) To hold that the very same acts which are expressly legalised by statute remain nevertheless crimes punishable by the common law is contrary to good sense & elementary principle (LORD COLERIDGE, C.J.).—CONNOR *v.* KENT, GIBSON *v.* LAWSON, CURRAN *v.* TRELEAVEN, [1891] 2 Q. B. 545; 61 L. J. M. C. 9; 65 L. T. 573; 55 J. P. 405. 17 Cox, C. C. 354; *sub nom.* CONNOR *v.* RITSON, GIBSON *v.* LAWSON, CURRAN *v.* TRELEAVEN, 7 T. L. R. 650, C. C. R.

*Annotations* :—*As to* (1) *Refd.* Allen *v.* Flood, [1898] A. C. 1; White *v.* Riley & Wood (1920), 36 T. L. R. 566. *As to* (2) *Refd.* Lyons *v.* Wilkins, [1896] 1 Ch. 811; Gozney *v.* Bristol Trade & Provident Soc., [1909] 1 K. B. 901. *Generally*, *Mentd.* Ware & De Freville *v.* Motor Trade Assocn., [1921] 3 K. B. 40.

809. ——— Independent action insufficient.]—A widespread strike having taken place in the L. manufacturing districts, bands of strikers went about forcing the hands to turn out, & all the mills in M. were stopped. At numerous meetings held during the strike speakers urged the people to remain out, & similar advice was given by a conference which met at M. C., the leader, & 58 others were indicted subsequently for a seditious conspiracy & other misdemeanours. The jury found some of defts., including C., guilty on the fifth count, & others on the fourth count as well. Judgment was afterwards arrested on the fifth count, & defts. convicted on the fourth count were not called up for judgment:—*Held*: (1) a combination of two or more persons to do, or cause others to do, an illegal act, or to bring about a legal act by illegal means was a criminal conspiracy; (2) to find defts. guilty on any count, they must be found guilty of one & the same conspiracy; it was not enough that defts. should have done the same illegal acts, they must have been associated in a common object; (3) any one of several defts. who had been indicted for misdemeanour & put upon their trial together, was a competent witness against the rest, provided that, at any time before verdict, a *nolle prosequi* in regard to him had been entered, or a verdict of acquittal taken.

A *nolle prosequi* is as good to the party as an acquittal (ROLFE, B.).—R. *v.* O'CONNOR (1843), 5 Q. B. 16; 4 State Tr. N. S. 935; 1 Dav. & Mer.

do an injury to a third  
though, if the wrong was in-  
duced by a single individual, it would  
be a wrong, but not a crime.—R. *v.*  
PARNELL (1881), 14 Cox, C. C. 508.—  
IR.

acting—  
persons charged with murder.]  
with others determined at a

public meeting to lynch certain persons  
then lying under a charge of murder &  
committed for trial, which purpose  
was subsequently carried out:—*He.*...  
an unlawful agreement come to at a  
public meeting may constitute a con-  
R. (No. 1) (1878),

s. Agreement to do unlawful act

761; 18 L. J. M. C. 33; 1 L. T. O. S. 203, 255; 7  
Jur. 719; 114 E. R. 1153.

*Annotations* :—*Generally*, *Refd.* R. *v.* O'Connell (1844), 5  
State Tr. N. S. 1. *Mentd.* R. *v.* Albert (1843), 7 Jur.  
741; R. *v.* Martin (1849), 13 J. P. 282.

810. ——— Mere intention insufficient.]—(1) 3  
& 4 Will. c. 91, makes a clear distinction between  
disqualification & exemption. Where, therefore,  
a jurymen was returned whose age exceeded  
sixty years, that fact only operated in his favour  
as an exception, but was not a ground for challenge  
as a personal disqualification.

(2) The statute directs a jurors' book to be  
made up in each year for use in the year following,  
& declares that such book shall be in use from  
Jan. 1, for & during one year. In Nov. 1865, at a  
sitting of a special commission, a panel was  
returned from the then existing jury book; the  
jurors were not then called, but the sitting was  
duly adjourned to Jan. 10 1866 at which time  
the trial took place, when the jurors named in  
the return of Nov. 1865, were called:—*Held*:  
this was not ground of challenge to the array.

(3) One of the jurors, who had been duly  
returned in November, 1865, was not on the list  
for 1866:—*Held*: this was not a ground of  
challenge to him.

(4) Conspiracy cannot exist without the consent  
of two or more persons, & their agreement is an  
act in advancement of the intention which each  
of

(5) Treason Felony Act, 1848 (c. 12), declares  
it to be felony to compass, imagine, invent, devise,  
& intend to deprive & depose the Queen, etc.  
In support of the charge of this offence under the  
Act, it is sufficient to allege as overt acts that  
defts. conspired, combined, confederated & agreed  
to commit the offence.

(6) Where there are several overt acts charged  
in a count, & a judgment is given on a general  
verdict of guilty on that count, such judgment  
will be sustained, though some of the matters  
alleged as overt acts may be improperly so alleged,  
provided that the count contains allegations of  
overt acts that are sufficient & are sufficiently  
alleged.

(7) The allegation, in one count, of several  
different overt acts of felony is not objectionable  
under Treason Felony Act, 1848 (c. 12).

(8) *Semble*: no objection to the caption of an  
indictment for an allegation that the grand jurors  
were "sworn & affirmed" can be sustained without  
showing that these who were sworn were persons  
who ought to have affirmed, or that those who  
were affirmed were persons who ought to have been  
sworn.

(9) A conspiracy consists not merely in the  
intention of two or more but in the agreement of  
two or more to do an unlawful act, or to do a  
lawful act by unlawful means (WILLES, J.).

(10) In the view which the judges take that  
the overt acts objected to were all properly laid,  
it is unnecessary to express any opinion as to  
whether alleged overt acts may be separately  
demurred to, though we do not doubt that one  
good overt act would sustain the judgment, nor  
need we say whether the judgment against pltf.

or lawful act by unlawful means.]—  
Conspiracy is agreeing among them-  
selves only, or together with others, &  
concurring with each other in a design  
to effect certain unlawful purposes, or  
at least to effect certain purposes  
whether in themselves unlawful or not,  
by unlawful means.—R. *v.* O'CONNELL  
(1844), 1 Cox, C. C. 401.—IR.

*Sect. 6.—Degrees of criminal liability: Sub-sect. 8, A.]*

in error upon the demurrer ought to have been final. Probably neither the form of the demurrer nor that of the joinder ought to affect the judgment of the ct., & a demurrer in abatement for matter in bar is to us a novelty. Pltf. in error, however, cannot complain of the course taken in allowing him to plead over, & it was substantially correct if regarded, in what perhaps is the proper view to take of it, as an amendment allowed to pltf. in error before final judgment, notwithstanding the failure of his demurrer; a course within the competence of the ct., though it seems it ought to have swept away the demurrer & the proceedings thereupon, & simply substituted the plea of not guilty (WILLES, J.).—*MULCAHY v. R.* (1868), L. R. 3 H. L. 306, H. L.; *affg.* (1867), 15 W. R. 446.

*Annotations:—As to (1), (2) & (3) Consd. Montreal Street Ry. v. Normandin, [1917] A. C. 170; Brown v. Esmonde (1870), 18 W. R. 711; Levinger v. R. (1870), L. R. 3 P. C. 282. As to (4) Consd. R. v. Parnell (1881), 14 Cox, C. C. 508; Quinn v. Leatham, [1901] A. C. 495; R. v. Tibbits, [1902] 1 K. B. 77; Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600; Davies v. Thomas, [1920] 2 Ch. 189. *Reid. Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598; R. v. Brailsford, [1905] 2 K. B. 730; Valentine v. R. (1868), L. R. 3 H. L. 306, H. L.; *affg.* (1867), 15 W. R. 446. *As to (5) Consd. R. v. Lynch* (1903), 51 W. R. 619. *As to (9) Consd. R. v. Parnell* (1881), 14 Cox, C. C. 508; Mogul S.S. Co. v. McGregor, Gow (1889), 23 Q. B. D. 598; Quinn v. Leatham, [1901] A. C. 495; R. v. Tibbits, [1902] 1 K. B. 77; Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600; Valentine v. Hyde, [1919] 2 Ch. 129; Davies v. Thomas, [1920] 2 Ch. 189. *Reid. R. v. Brailsford, [1905] 2 K. B. 730.**

**811. — One person not liable for act—Liability if act done in combination.**—*R. v. BARRY*, No. 2132, *post*.

**812. — — — — —.**—Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt (BOWEN, L.J.).—*MOGUL S.S. Co. v. MCGREGOR, GOW & CO.* (1889), 23 Q. B. D. 598; 58 L. J. Q. B. 465; 61 L. T. 820; 53 J. P. 709; 37 W. R. 756; 5 T. L. R. 658; 6 Asp. M. L. C. 455, C. A.; *affd.*, [1892] A. C. 25, H. L.

*Annotations:—Consd. Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600; Valentine v. Hyde, [1919] 2 Ch. 129. Reid. R. v. Whitchurch (1890), 24 Q. B. D. 420; Connor v. Kent, Gibson v. Lawson, Curran v. Treleaven, [1891] 2 Q. B. 545; Temperton v. Russell, [1893] 1 Q. B. 715; Allen v. Flood, [1898] A. C. 1; Huttley v. Simmons, [1898] 1 Q. B. 181; Quinn v. Leatham, [1901] A. C. 495; National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co., [1908] 1 Ch. 335; A-G. of Commonwealth of Australia v. Adelaide S.S. Co., [1913] A. C. 781; Pratt v. British Medical Assocn., [1919] 1 K. B. 244; Ware & De Freville v. Motor Trade Assocn., [1921] 3 K. B. 40. *Mentd. Re Apollinaris Co.'s Trade Mks. (1890), 63 L. T. 162; Jenkinson v. Nield (1892), 8 T. L. R. 540; Maxim-Nordenfelt Guns & Ammunition Co. v. Nordenfelt (1893), 41 W. R. 604; Wright v. Hennessey (1894), 11 T. L. R. 14; Trollope v. London Building Trades Federation (1895), 72 L. T. 342; Lyons v. Wilkins, [1896] 1 Ch. 811; Newton v. Amalgamated Musicians' Union (1896), 40 Sol. Jo. 716; Ajello v. Worsley, [1898] 1 Ch. 274; Boots, Cash Chemists, Lancashire v. Grundy (1900), 16 T. L. R. 457; Elliman v. Carrington (1901), 84 L. T. 858; Glamorgan Coal Co. v. South Wales Miners' Federation, [1903] 2 K. B. 545; South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. 239; Denaby & Cadeby Main Collieries v. Yorkshire Miners' Assocn., [1906] A. C. 384; Conway v. Wade, [1908] 2 K. B. 844; Hyams v. Stuart King, [1908] 2 K. B. 696; United Shoe Machinery Co. of Canada v. Brunet, [1909] A. C. 330; North-Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439; *Re Bowman, Secular***

*Soc. v. Bowman, [1915] 2 Ch. 447; Larkin v. Long, [1915] A. C. 814; Evans v. Heathcote, [1918] 1 K. B. 418; Montefiore v. Menday Motor Components Co., [1918] 2 K. B. 241; Thomas v. Moore, [1918] 1 K. B. 555; Davies v. Thomas, [1920] 2 Ch. 189; *Re Wallace, Champion v. Wallace, [1920] 2 Ch. 274; Rawlings v. General Trading Co., [1921] 1 K. B. 635; Reynolds v. Shipping Federation (1923), 39 T. L. R. 710; Sorrell v. Smith, [1923] 2 Ch. 32.**

**813. — — — — —.**—A woman who, believing herself to be with child, but not being with child, conspires with other persons to administer drugs to herself, or to use instruments on herself, with intent to procure abortion, is liable to be convicted of conspiracy to procure abortion.

Prisoner is charged with the offence of conspiracy, that is a combination to commit a felony, & I cannot entertain the slightest doubt that if three persons combine to commit a felony they are all guilty of conspiracy, although the person on whom the offence was intended to be committed could not, if she stood alone, be guilty of the intended offence (LORD COLERIDGE, C.J.).—*R. v. WHITCHURCH* (1890), 24 Q. B. D. 420; 59 L. J. M. C. 77; 62 L. T. 124; 54 J. P. 472; 6 T. L. R. 177; 16 Cox, C. C. 743, C. C. R.

*Annotation:—Consd. R. v. Mackenzie & Higginson (1910), 75 J. P. 159.*

**814. — — — — —.**—(1) A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful & harmful towards another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means (LORD BRAMPTON).

(2) It has often been debated whether, assuming the existence of a conspiracy to do a wrongful & harmful act towards another & to carry it out by a number of overt acts, no one of which taken singly & alone would, if done by one individual acting alone & apart from any conspiracy, constitute a cause of action, such acts would become unlawful or actionable if done by the conspirators acting jointly or severally in pursuance of their conspiracy, & if by those acts substantial damage was caused to the person against whom the conspiracy was directed; my own opinion is that they would (LORD BRAMPTON).

(3) An illegal agreement, whether carried out or not, is the essential element in a criminal case (LORD LINDLEY).—*QUINN v. LEATHEM*, [1901] A. C. 495; 70 L. J. P. C. 76; 85 L. T. 289; 65 J. P. 708; 50 W. R. 139; 17 T. L. R. 749, H. L.

*Annotations:—As to (1) Consd. Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600; National Phonograph Co. v. Edison Bell Consolidated Phonograph Co., [1908] 1 Ch. 335; Larkin v. Long, [1915] A. C. 814; Pratt v. British Medical Assocn., [1919] 1 K. B. 244; Valentine v. Hyde, [1919] 2 Ch. 129; Hodges v. Webb, [1920] 2 Ch. 70; Ware & De Freville v. Motor Trade Assocn., [1921] 3 K. B. 40; Sorrell v. Smith, [1923] 2 Ch. 32. *Distd. Reynolds v. Shipping Federation (1923), 39 T. L. R. 710. Reid. Read v. Friendly Soc. of Operative Stonemasons of England, Ireland & Wales, [1902] 2 K. B. 732; Glamorgan Coal Co. v. South Wales Miners' Federation, [1903] 1 K. B. 118; South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. 239; Denaby & Cadeby Main Collieries v. Yorkshire Miners' Assocn., [1906] A. C. 384; Long v. Smithson (1918), 88 L. J. K. B. 223; Davies v. Thomas, [1920] 2 Ch. 189; Said v. Butt, [1920] 3 K. B. 497. As to (2) Consd. Conway v. Wade, [1908] 2 K. B. 844; Ware & De Freville v. Motor Trade Assocn., [1921] 3 K. B. 40. *Reid. Glamorgan Coal Co. v. South Wales Miners' Federa-***

**811i. — Person not liable for act—Liability if act done in combination.**—In order to constitute what is meant by conspiracy as an indictable offence, the indictment must plainly show that

there has been a corrupt agreeing together of two or more persons to do by concerted action, something unlawful either by the means to be employed or by the end in contemplation: in

other words, the unlawful thing must either be such as would be indictable if performed by one person only, or if it be not such, it must be of a nature to injure the public, or some individual

tion, [1903] 2 K. B. 545; *Hodges v. Webb*, [1920] 2 Ch. 70. *As to* (3) *Reid*. *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600; *R. v. Brailsford*, [1905] 2 K. B. 730. *Generally*, *Mentd.* *Bulcock v. St. Anne's Master Builders' Federation* (1902), 19 T. L. R. 27; *West Ham Union v. L. C. C.* (1902), 71 L. J. K. B. 299; *Gaskell v. Lancashire & Cheshire Miners' Federation* (No. 2), (1912), 56 Sol. Jo. 719; *In the Goods of Hall*, *Hall v. Knight & Baxter* (1913), 109 L. T. 587; *Santen v. Busnach* (1913), 29 T. L. R. 214; *Vacher v. London Soc. of Compositors*, [1913] A. C. 107; *Re Ainsworth, Finch v. Smith*, [1915] 2 Ch. 96; *Croft v. Blay*, [1919] 1 Ch. 277; *Welldon v. Butterley Co.*, [1920] 1 Ch. 130; *Tinline v. White Cross Insee*, [1921] 3 K. B. 327; *White v. Riley*, [1921] 1 Ch. 1; *Jasperson v. Dominion Tobacco Co.*, [1923] A. C. 709.

### 815. Combination to make charge against person—Whether indictment & acquittal necessary.]—

(1) Where several combine to charge a man with robbery, & to cause him to be indicted, & in execution of their conspiracy, they cause him to be apprehended, & to be bound to appear at assizes, & then they prefer a bill of indictment for robbery against him, which indictment is ignored by the grand jury, the party so grieved may have an action against them.

(2) No writ of conspiracy lies, unless the party is indicted & lawfully acquitted; but a false conspiracy is punishable although nothing be put in execution.—*POULTERERS' CASE* (1610), 9 Co. Rep. 55 b; 77 E. R. 813; *sub nom.* *STONE v. WALTER, Moore*, K. B. 813.

*Annotations* :—*As to* (1) *Consd.* *Wale v. Hill* (1610), 1 Bulst. 149. *Reid.* *A. G. v. Starling* (1663), 1 Keb. 650, 675; *Savill v. Roberts* (1698), 12 Mod. Rep. 208; *Mogul S.S. Co. v. McGregor, Gow* (1889), 58 L. J. Q. B. 465. *As to* (2) *Reid.* *Wale v. Hill* (1610), 1 Bulst. 149; *R. v. Daniell* (1704), 6 Mod. Rep. 99.

### 816. Combination to deprive person of office—In illegal company.]—*R. v. STRATTON* (1809), 1 Camp. 549, n., N. P.

**817. Civil trespass—Sporting on another's land.]—**An indictment will not lie for conspiring to commit a civil trespass upon property by agreeing to go into, & by going into, a preserve for hares, the property of another, for the purpose of snaring them, though alleged to be done in the night by defts., armed with offensive weapons for the purpose of opposing resistance to any endeavours to apprehend or obstruct them.

I should be sorry to have it doubted whether persons agreeing to go & sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment (*LORD ELLENBOROUGH, C.J.*).—*R. v. TURNER* (1811), 13 East, 228; 104 E. R. 357.

*Annotations* :—*Consd.* *R. v. Bradshaw* (1835), 7 C. & P. 233; *R. v. Kenrick* (1843), 5 Q. B. 49. *Dtd.* *R. v. Rowlands* (1851), 17 Q. B. 671. *As to Turner's Case* I have no doubt whatever that it was wrongly decided; going into the prosecutor's close against his will, armed with offensive weapons for the purpose of opposing any persons who should endeavour to apprehend, obstruct or prevent them, would in itself be an indictable offence; & the conspiring to commit such an offence must be an indictable conspiracy (*LORD CAMPBELL, C.J.*). *Expld.* *R. v. Carlisle* (1854), 6 Cox, C. C. 366. *Dtd.* *R. v. Whitchurch* (1890), 62 L. T. 124. *Consd.* *Boots v. Grundy* (1900), 82 L. T. 769. *Reid.* *R. v. Jones* (1832), 1 Nev. & M. K. B. 78; *R. v. Seward* (1834), 1 Ad. & El. 706; *R. v. O'Connell* (1844), 5 State Tr. N. S. 1. *Mentd.* *Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598.

### 818. Associations to prosecute for offences.]—*R. v. MURRAY* (1823), *Matthews' Digest of Criminal Law*, 90.

**819. Incitement to disaffection.]—**Conspiracy to incite to disaffection is criminal; & so is the

use or show of physical force; but petitioning to bring about an alteration of the law is not unlawful.—*R. v. VINCENT* (1839), 9 C. & P. 91; 3 State Tr. N. S. 1037.

*Annotations* :—*Mentd.* *R. v. O'Connell* (1844), 5 State Tr. N. S. 1; *O'Kelly v. Harvey* (1883), 15 Cox, C. C. 435.

**820. Unlawful assembly—Persons present merely from curiosity—Not guilty of conspiring.]—**(1) The overt acts of a conspiracy are no part of the offence itself, though it is desirable that they should be put into the indictment, in order to give the parties accused an opportunity of knowing the facts upon which the Crown seek to rely in order to prove the conspiracy; but they are no part of the offence. That offence consists in combining & acting together to do an illegal act (*ALDERSON, B.*).

(2) There are many people present at an unlawful assembly who, though it is very imprudent on their part to be present, ought not to be convicted of an offence. Many will attend there simply from curiosity (*ALDERSON, B.*).—*R. v. RANKIN* (1848), 7 State Tr. N. S. 711.

**821. Agreement to make privileged statements.]—**A magistrate if he refuses to commit or bail the person charged is bound under Vexatious Indictments Act, 1859 (c. 17), s. 2, to take the recognisance of prosecutor, if the information discloses any of the offences mentioned in the statute; but he has a discretion to refuse if no indictable offence is disclosed. Where, therefore, the offence charged is that of conspiracy, by three persons, two of whom are members of the House of Lords, to deceive the House, & so to prevent the due course of justice, & injure, & prejudice a third person, by making statements in the House, which they knew to be false, the magistrate is right in refusing to take any proceedings, as members of either House of Parliament are not civilly or criminally liable for any statements made in the House, nor for a conspiracy to make such statements.—*Ex p. WASON* (1869), L. R. 4 Q. B. 573; 10 B. & S. 580; 38 L. J. Q. B. 302; 17 W. R. 881.

*Annotations* :—*Consd.* *R. v. Adamson, etc.*, Tynemouth JJ. & Spence (1875), 24 W. R. 250; *Ex p. Reid* (1885), 49 J. P. 600. *Reid.* *Ex p. Lewis* (1888), 21 Q. B. D. 191. *Mentd.* *Re Boaler, Re Vexatious Actions Act*, 1896, [1914] 1 K. B. 122.

**822. Act amounting to civil wrong—Combination to do it criminal.]—**(1) A fraudulent agreement by a member of a partnership with third persons, wrongfully to deprive his partner by false entries & by false documents of all interest in some of the partnership property on taking accounts for the division of the property on the dissolution of the partnership, is a conspiracy, although the offence was completed before the passing of Larceny Act, 1868 (c. 116), by which a partner can be criminally convicted for feloniously stealing partnership property.

(2) It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, i.e. amount to a civil wrong (*COCKBURN, C.J.*).

The facts of this case thus fall within the rule that when two fraudulently combine, the agreement may be criminal, although if the agreement were carried out no crime would be committed,

by reason of the combination.—*R. v. DOWNIE* (1885), 13 R. L. O. S. 429.—*CAN.*

t. *When a substantive offence.]—*Where a crime is attempted or committed by any person in pursuance of a conspiracy between two or more J.—VOL. XIV.

persons, they are all indictable as principals for the attempt to commit the crime, or for committing the crime itself, as the case may be. But a bare conspiracy to commit a crime is not a substantive & indictable offence, except where such conspiracy is declared

by special law to be a crime, as, for instance, a conspiracy against the safety of the State.—*H. v. FEBRUARY & MEI* (1841), 10 S. C. 382.—*S. AF.*

a. —.]—*R. v. KAPLAN* (1893), 10 S. C. 259.—*S. AF.*



**Sect. 6.—Degrees of criminal liability; Sub-sect. 8, A., B., C. & D.]**

but a civil wrong only would be inflicted on a third party (COCKBURN, C.J.).—*R. v. WARBURTON* (1870), L. R. 1 C. C. R. 274; 40 L. J. M. C. 22; 23 L. T. 473; 35 J. P. 116; 19 W. R. 165; 11 Cox, C. C. 584, C. C. R.

**Annotations:—***As to (1) Consd. R. v. Whitaker*, [1914] 3 K. B. 1283. *Reid. R. v. Aspinall* (1876), 2 Q. B. D. 48; *Emma Silver Mining Co. v. Lewis* (1878), 48 L. J. Q. B. 257. *As to (2) Consd. Huttley v. Simmons*, [1898] 1 Q. B. 181. *Reid. R. v. Whitechurch* (1890), 62 L. T. 124; *Boots v. Grundy* (1900), 82 L. T. 769; *Quinn v. Leatham*, [1901] A. C. 495.

**B. When Offence complete.**

**823. When agreement is made—Though nothing is done in pursuance of it.]—**An indictment lies for conspiring only, without other act done.—*R. v. KIMBERTY & NORTH* (1862), 1 Lev. 62; 83 E. R. 297; *sub nom. CHILD v. NORTH & TIMBERLEY*, 1 Keb. 203; *sub nom. R. v. TYMBERLY*, 1 Keb. 254.

**Annotation:—***Distd. Mogul S.S. Co. v. McGregor*, Gow (1889), 23 Q. B. D. 598.

**824. ———.]—**An information lies against persons for conspiracy to impoverish excise men & so prevent them paying their rent to the King, thus diminishing the King's revenue, although no act was done.—*R. v. STERLING* (1663), 1 Lev. 125; 1 Sid. 174; 83 E. R. 331; *sub nom. A.-G. v. STARLING*, 1 Keb. 650.

**Annotations:—***Consd. R. v. Daniell* (1704), 6 Mod. Rep. 99; *R. v. Eccles* (1783), 1 Leach, 274; *Mogul S.S. Co. v. McGregor*, Gow (1889), 23 Q. B. D. 598. *Reid. R. v. Burks* (1796), 7 Term Rep. 4; *Allen v. Flood*, [1898] A. C. 1.

**825. ———.]—**Conspiracy is indictable though nothing be done in consequence thereof.—*SAVILLE v. ROBERTS* (1698), Carth. 416; 1 Ld. Raym. 374; 1 Salk. 13; 3 Salk. 16; *Holt, K. B.* 150, 193; 5 Mod. Rep. 394; 12 Mod. Rep. 208; 91 E. R. 1147; *sub nom. ROBERTS v. SAVILL*, *Holt, K. B.* 8; 5 Mod. Rep. 405.

**Annotations:—***Consd. Walters v. Green*, [1899] 2 Ch. 696. *Reid. Subley v. Mott* (1747), 1 Wils. 210; *The Ville de Varsovie* (1817), 2 Dods. 174; *Cotterell v. Jones* (1851), 11 C. B. 713. *Mentd. Anon.* (1703), 6 Mod. Rep. 25; *Jones v. Gwynn* (1714), 10 Mod. Rep. 214; *Chambers v. Robinson* (1726), 2 Stra. 691; *Way v. Nickson* (1729), 1 Barn. K. B. 268; *Smith v. Hixon* (1734), 2 Stra. 977; *Reynolds v. Kennedy* (1748), 1 Wils. 232; *Golding v. Crowle* (1751), Say. 1; *Chapman v. Pickersgill* (1762), 2 Wils. 145; *Sutton v. Johnstone* (1786), 1 Term Rep. 493; *Purton v. Honnor* (1798), 1 Bos. & P. 205; *Pureoll v. Macnamara* (1808), 9 East, 361; *Sinclair v. Eldred* (1811), 3 E. & E. 709; *Dawkins v. Paulet* (1869), 18 W. R. 336; *Wren v. Weild* (1869), L. R. 4 Q. B. 730; *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q. B. D. 674; *Mogul S.S. Co. v. McGregor*, Gow (1888), 21 Q. B. D. 544; *Allen v. Flood*, [1898] A. C. 1; *Wiffen v. Bailey & Romford U. C.*, [1915] 1 K. B. 600.

**826. ———.]—(1)** An illegal conspiracy is indictable, though nothing is done in pursuance of it.

**PART I. SECT. 6, SUB-SECT. 8.—B.**

**823 i. When agreement is made—Though nothing is done in pursuance of it.]—**The mere agreement to commit an offence is a conspiracy although no act is done in execution of the scheme.—*R. v. O'CONNELL* (1844), 7 I. L. R. 338; 11 Cl. & Fin. 155; 9 Jur. 25.—**IR.**

**b. ——— Though crime not carried out.]—**A conspiracy to defraud is indictable, even though the conspirators are unsuccessful in carrying out the fraud.—*R. v. FRAWLEY* (1894), 25 O. R. 431.—**CAN.**

—It is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be

(2) An indictment will lie for conspiring to charge a man with being the father of a child likely to be born a bastard.—*R. v. BEST* (1705), 2 Ld. Raym. 1167; *Holt, K. B.* 151; 6 Mod. Rep. 137, 185; 1 Salk. 174; 92 E. R. 272.

**Annotations:—***As to (1) Consd. R. v. Seward* (1834), 1 Ad. & El. 706. *Reid. O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *Boots v. Grundy* (1900), 82 L. T. 769. *As to (2) Consd. R. v. Seward* (1834), 1 Ad. & El. 706. *Reid. R. v. Edwards* (1726), 2 Stra. 707. *Generally, Mentd. R. v. Kinnersley & Moore* (1719), 1 Stra. 193; *Way v. Nickson* (1729), 1 Barn. K. B. 268; *R. v. Baxter* (1731), 2 Stra. 918.

**827. ———.]—***R. v. ASPINALL*, No. 807, ante.

**828. ——— Withdrawal from combination.]—**BRIDGEWATER CASE (prior to 1880), cited in 57 L. J. Q. B. at p. 545.

**Annotation:—***Reid. Mogul S.S. Co. v. McGregor*, Gow (1888), 21 Q. B. D. 544.

**829. ——— Overt act—No part of the offence.]—***R. v. RANKIN*, No. 820, ante.

**830. ——— Committed abroad.]—**On an indictment against a foreigner, who was ship's carpenter on board a foreign merchant ship, for conspiring in this country, with the foreign owner & master, to destroy or cast away the vessel, with intent to prejudice the owners of goods on board, or the insurers of the ship or cargo, the counts charging an intent to defraud, it being admitted that prisoner was party to the scuttling the ship on the high seas, the jury were directed to consider whether the prisoner was a party in this country to a previous plan or conspiracy to destroy the ship, not limited to its destination on the high seas, the principal offence not being triable in this country.

The conspiracy in this country to commit the offence is criminal by our law. The offence of conspiracy would be committed by any persons conspiring together to commit an unlawful act to the prejudice or injury of others, if the conspiracy was in this country, although the overt acts were abroad (WILLES, J.).

For the principal offence committed, the destroying or casting away the vessel, prisoner could not be indicted in this country as he is a foreigner, & the ship was foreign, & the offence was committed on the high seas (WILLES, J.).—*R. v. KOHN* (1864), 4 F. & F. 68.

**C. Parties to Conspiracy.**

**831. One against two, is void, for one alone cannot conspire.]—**HARRISON v. ERRINGTON (1627), Poph. 202; 79 E. R. 1292.

**Annotation:—***Reid. R. v. Plummer*, [1902] 2 K. B. 339.

**832. ———.]—**Where three persons are indicted for conspiracy, & two are acquitted, the third cannot be convicted, for one cannot conspire alone.—*DESLY v. DESLY* (1647), Sty. 57; 82 E. R. 527.

caused. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.—*KALIL MUNDA v. R.* (1901), 1 L. R. 28 Calc. 797.—**IND.**

**d. ———.]—**A person may be guilty of criminal conspiracy even though the illegal act, which he has agreed to do, has not been done, for the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means.—*AMRITA LAL HAZRA v. R.* (1915), 1 L. R. 42 Calc. 487.—**IND.**

**e. ——— Withdrawal from active participation in crime.]—***R. v. HARRIS* (1902), 33 S. C. R. 23.—**CAN.**

**f. ——— Crime carried out in foreign**

**jurisdiction.]—**Prisoners were indicted for that they did, at a place in the Province of Ontario & in a given month conspire to commit the crime of abortion, by conspiring to procure the miscarriage of a certain woman (naming her), thereby committing an indictable offence, contrary to the Criminal Code:—*Held*: the finding of the jury that the prisoners conspired to procure the abortion in the Province of Ontario was warranted by the evidence; there being evidence upon which any jury might find that the prisoners had conspired to procure the abortion in Ontario; but finding it difficult to do so there, went to a foreign country.—*R. v. BACHACK* (1915), 28 O. L. R. 32; 4 O. W. N. 615; 11 D. L. R. 522.—**CAN.**

833. —.]—*MULCAHY v. R.*, No. 810, *ante*.

834. *Effect of framing indictment*.—"Cum multis aliis."—The indictment was that H. with A. *et multis aliis* did conspire to accuse B. that he did attempt to commit sodomy. The grand jury found the bill as to H. with an *ignoramus* as to A. H. was convicted, & then it was moved in arrest of judgment, that there being an *ignoramus* as to A., H. could not be guilty of conspiring with him:—*Held*: it was sufficient, being found that he *cum multis aliis* did conspire.—*R. v. HERNE* (1709), cited in 1 *Str.* at p. 195; 93 E. R. 469.  
*Annotation*:—*Reid. v. Thompson, Tillotson & Maddock* (1851), 15 Jur. 654.

*See, further*, Sub-sect. 8, J., *post*.

835. *Husband & wife*—May be tried for conspiracy with others.]—*R. v. COPE*, No. 400, *ante*.

836. — May be tried for conspiracy entered into before marriage.]—If a man & woman marry in the name of another, for the purpose of raising a specious title to the estate of the person whose name is assumed, it is a conspiracy.—*ROBINSON'S CASE* (1746), 1 *Leach*, 37.

*Annotation*:—*Mentd. Boost v. Grundy* (1900), 82 L. T. 769.  
—.]—*See, also*, No. 11,405, *post*.

837. *Person incapable of committing substantive offence*—May be guilty of conspiracy to commit it—*Procuring miscarriage*.]—*R. v. WHITCHURCH*, No. 813, *ante*.

838. — — — —.]—A woman was jointly indicted with others for conspiring to procure her miscarriage by unlawful means. There was no evidence of her being with child so as to render the acts criminal if done by herself alone:—*Held*: she might nevertheless rightly be convicted of conspiracy to commit a felony.—*R. v. CROSS* (1890), 38 W. R. 336, C. C. R.

839. — — — *Abduction of child*.]—A magistrate granted a warrant against a mother for conspiring with others to abduct her child out of the custody of its guardians. One of the persons was convicted of conspiracy, but the mother had not been arrested. On an application to the magistrate to withdraw the warrant against the mother, he declined to do so, on the ground that it had not been decided that the mother had not committed an offence against the law:—*Held*: the ct. would not interfere, as the magistrate had exercised a judicial discretion.

*Semble*: where it is clear that on the admitted facts no criminal offence had been committed by a person against whom a warrant has been issued, the ct. has power to order the withdrawal of such warrant.—*R. v. CROSSMAN, Ex p. CHETWYND* (1908), 98 L. T. 760; 72 J. P. 250; 24 T. L. R. 517; 21 Cox, C. C. 605, D. C.

840. — — — *Procuring female*.]—(1) Under Criminal Law Amendment Act, 1885 (c. 69), s. 2 (1), the man who has the carnal connection, though he cannot himself be convicted under the sub-sect. may be convicted of aiding & abetting, & of conspiring with the procurer.

(2) The offence of procuring is continuous, & therefore if the actual carnal knowledge takes

place in this country there is jurisdiction in this country to try an indictment therefor, though the offence was commenced in another country.—*R. v. MACKENZIE & HIGGINSON* (1910), 75 J. P. 159; 6 Cr. App. Rep. 64, C. C. A.

841. — *Other person may be guilty of conspiring with her*.]—Assuming that immunity from prosecution is given to the mother of a child by the proviso contained in Offences against the Person Act, 1861 (c. 100), s. 56, such immunity has no bearing upon the question whether a conspiracy between her & another person to do an act which is unlawful under the sect. is an offence against the criminal law, & the other person may therefore be convicted for conspiring with the mother to commit an offence under the sect.—*R. v. DUGUID* (1906), 75 L. J. K. B. 470; 94 L. T. 887; 70 J. P. 294; 22 T. L. R. 506; 50 Sol. Jo. 465; 21 Cox, C. C. 200, C. C. R.

*Annotation*:—*Reid. R. v. Crossman, Ex p. Chetwynd* (1908), 98 L. T. 760.

842. *Conspiring with persons unknown*.]—*R. v. WOLIS* (1910), 75 J. P. Jo. 28, C. C. A.

843. *Person joining conspiracy already formed*—*Equally guilty with original conspirators*.]—If a conspiracy be formed, & a person joins it afterwards, he is equally guilty with the original conspirators.—*R. v. MURPHY* (1837), 8 C. & P. 297.

*Annotations*:—*Apld. R. v. O'Connell* (1844), 5 State Tr. N. S. 1. *Mentd. R. v. Blake* (1844), 6 Q. B. 126.

*D. Conspiracy to violate Provisions of Statute.*

844. *General rule*.]—(1) In an indictment for a conspiracy to violate the provisions of an Act of Parliament, it is sufficient, after verdict, if that which it is alleged defts. conspired to do is described in the words of an Act which make the doing that an indictable offence.

Where, therefore, an indictment charged a conspiracy, by unlawfully molesting workmen, to force them to depart from their employment:—*Held*: after verdict, the indictment showed with sufficient certainty that the conspiracy was to violate the provisions of the 6 Geo. 4, c. 129, s. 3, & was an indictable conspiracy.

(2) It will perhaps be thought on the part of the Crown that the ends of justice are satisfied if a *nolle prosequi* be entered as to two defts. & the verdict stand as to the rest. We agree in thinking that counts 16, 17, & 19 are open to objection as being too vague. We give no final opinion; but on these counts there will be a rule *nisi* to arrest the judgment, unless a *nolle prosequi* be entered (*LORD CAMPBELL, C.J.*).—*R. v. ROWLANDS* (1851), 17 Q. B. 671; 2 Den. 364; 21 L. J. M. C. 81; 18 L. T. O. S. 346; 16 J. P. 243; 16 Jur. 268; 5 Cox, C. C. 466; 117 E. R. 1439, C. C. R.

*Annotations*:—*As to* (1) *Reid. R. v. Whitechurch* (1890), 62 L. T. 124. *Generally, Mentd. Hilton v. Eckersley* (1855), 6 E. & B. 47; *Walsby v. Anley* (1861), 30 L. J. M. C. 121; *R. v. Boulton* (1871), 12 Cox, C. C. 87; *Mogul S.S. Co. v. McGregor, Gow* (1885), 15 Q. B. D. 476; *Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598; *Boots v. Grundy* (1900), 82 L. T. 769; *Quinn v. Leatham*, [1901] A. C. 495; *Glamorgan Coal Co. v. South Wales Miners' Federation*, [1903] 1 K. B. 118; *Ware & De Freville v. Motor Trade Assocn.*, [1921] 3 K. B. 40.

N. could not under the indictment be guilty of conspiring with Z. to aid the enemy by aiding & assisting Z. to leave Canada & join the enemy forces, & there being no evidence of N. conspiring with any person other than Z. N. as well as his wife should be acquitted.—*R. v. NERLICH* (1915), 34 O. L. R. 298; 8 O. W. N. 592; 25 D. L. R. 138.—*CAN.*

*k. Corporation*.]—An incorporate company cannot be presented on a charge of conspiracy to defraud.—*R. v. KELLOW*, [1912] V. L. R. 162.—*AUS.*

#### PART I. SECT. 6, SUB-SECT. 8.—C.

842 *1. Conspiring with persons unknown*.]—A charge of conspiracy with certain named persons & other unknown, or some or one of them, is not too indefinite.—*R. v. CLARKE* (1908), 9 W. L. R. 243; 1 Alta. L. R. 358; 14 Can. Crim. Cas. 46, 57.—*CAN.*

*g. Conspiring with persons known & unknown*.]—Where the accused were charged with conspiracy with persons "known & unknown":—*Held*: if the persons were "known" they should be named in the charge.—*R. v. LALIT*

*MOHAN CHUCKERBUTTY* (1911), 1 L. R. 38 Cal. 559.—*IND.*

*h. Conspiring with "others"—Person not included among "others"*.]—Two defts., N. & his wife, were indicted for that they did "maliciously & traitorously conspire with each other & with others to aid & comfort the enemy of the King by inciting & assisting Z., a German subject & a public enemy now at war with the King, to leave the Dominion of Canada & join the enemy forces, returned verdict of "not to wife & "guilty" as to



*Sect. 6.—Degrees of criminal liability: Sub-sect. 8, 7., H. & I.]*

**845.** —.]—An indictment for conspiracy at common law will lie against two or more persons for conspiring to commit an offence for which special provision is made by statute.—*R. v. BUNN* (1872), 12 Cox, C. C. 316.

*Annotation:—Dtd. Connor v. Kent, Gibson v. Lawson, Curran v. Treleaven, [1891] 2 Q. B. 545.*

**846.** —.]—*CONNOR v. KENT, GIBSON v. LAWSON, CURRAN v. TRELEAVEN*, No. 808, *ante*.

**847. Offence before repeal—Indictment after repeal.**—(1) By 3 & 4 Will. 4, c. 53, s. 120, all suits, indictments, or informations exhibited for any offence against any Act relating to the customs, in any of His Majesty's cts. of record at Westminster should be sued within three years after the offence committed, did not apply to an indictment found by the grand jury of a county at the assizes.

(2) An indictment for a conspiracy to violate the provisions of a statute will lie, after the repeal of such statute, for an offence committed before the repeal.

(3) A. was indicted for conspiring with Y. & Z. & other persons to the jurors unknown. The evidence was confined to A., Y. & Z.; & the jury were of opinion that A. conspired with either Y. or Z., but said that they did not know with which. Y. & Z. were thereupon both acquitted:—*Held*: A. was entitled to be acquitted also.—*R. v. THOMPSON* (1851), 16 Q. B. 832; 20 L. J. M. C. 183; 17 L. T. O. S. 72; 15 J. P. 484; 15 Jur. 654; 5 Cox, C. C. 166; 117 E. R. 1100, C. C. R.

*Annotations:—As to (3) Consd. R. v. Manning* (1883), 12 Q. B. D. 241; *R. v. Plummer*, [1902] 2 K. B. 339. *Refd. R. v. Stoddart* (1909), 73 J. P. 348.

**848. Servants' Characters Act, 1792 (c. 56)—False character not in writing.**—Applt. was indicted with B. for conspiring together that B. should give false characters to applt. in contravention of the above Act:—*Held*: where any person knowingly & wilfully pretended or falsely asserted in writing that any servant had been hired or retained or discharged from his service at any other time than such servant was hired or retained or discharged, such person was guilty of an offence under the above Act, even although the false pretence as to character was made orally & by conduct & not in writing.—*R. v. COSTELLO & BISHOP*, [1910] 1 K. B. 28; 79 L. J. K. B. 90; 101 L. T. 784; 54 Sol. Jo. 13; 22 Cox, C. C. 215; *sub nom. R. v. CONNOLLY*, 74 J. P. 15; 26 T. L. R. 31; 3 Cr. App. Rep. 27, C. C. A.

#### *E. Conspiracy to injure a Person.*

**849. General rule.**—*QUINN v. LEATHEM*, No. 814, *ante*.

**850. In respect of trade or business—Damaging materials of trade.**—*R. v. COPE*, No. 400, *ante*.

—.]—*See, further*, Sub-sect. 8, K., *post*; **TRADE & TRADE UNIONS.**

**Depriving owner of copyright.**—*See COPYRIGHT & LITERARY PROPERTY*, Vol. XIII., p. 229, No. 701.

**851. In respect of profession or occupation—Hissing play.**—*R. v. LEIGH* (1775), 1 Car. & Kir. 28, n.; *sub nom. MACKLIN'S CASE*, 2 Camp. 372, n.

**852.** —.]—The audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment, & nobody has ever hindered, or would ever question, the exercise of that right. But if any body of men were to go to a theatre with the

settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate & preconcerted scheme would amount to a conspiracy, & that the persons concerned in it might be brought to punishment (*MANSFIELD, C.J.*).—*CLIFFORD v. BRANDON* (1809), 2 Camp. 358, N. P.

*Annotations:—Refd. R. v. Stainer* (1870), 39 L. J. M. C. 54; *Quinn v. Leatham* (1901), 70 L. J. P. C. 76. *Mentd. R. v. Coney* (1882), 8 Q. B. D. 534; *Mogul S.S. Co. v. McGregor*, Gow (1889), 23 Q. B. D. 698; *Allen v. Flood*, [1898] A. C. 1; *Said v. Butt*, [1920] 3 K. B. 497.

**853. In respect of reputation—Charging person as father of bastard child.**—*TIMBERLEY v. CHILDR* (1662), 1 Sid. 68; 82 E. R. 974.

**854.** —.]—An indictment for a conspiracy in charging one with being father of a child is good, without averring that the child was in fact a bastard.—*R. v. BASS* (1705), 11 Mod. Rep. 55; 88 E. R. 881.

**855.** —.]—**Charging person with keeping a bastard child.**—*R. v. ARMSTRONG & HARRISON* (1677), 1 Vent. 304; 86 E. R. 196.

**856. In respect of liberty—Malicious prosecution.**—On a motion for a new trial by deft. who had had a verdict given against him in an action for malicious prosecution:—*Held*: the motion would be refused.

A prosecution thus aimed at the life of pltf. & proceeding from such wicked motives must evidence a most depraved & corrupted heart: for which, had deft. had an associate, both might have been indicted for conspiracy, & received the most infamous, called emphatically, the villainous judgment (*per CUR.*).—*LEITH v. POPE* (1779), 2 Wm. Bl. 1327; 96 E. R. 777.

**857.** —.]—**Bringing false charge.**—Getting money out of a man by conspiring to charge him with a false fact, is indictable, whether the fact charged be, or be not, criminal in itself.—*R. v. RISPAL* (1762), 1 Wm. Bl. 368; 3 Burr. 1320; 96 E. R. 206.

*Annotation:—Refd. R. v. Higgins* (1801), 2 East, 5.

**858. In respect of property—Committing civil trespass.**—*R. v. TURNER*, No. 817, *ante*.

**859.** —.]—**Depriving life-boat crew of share of salvage.**—An indictment will lie for a conspiracy to prevent certain persons, who were in a life-boat, from rendering assistance to a brig, which had struck upon a sand, in order to obtain a salvage for themselves, & to deprive the life-boat's crew of a share.—*R. v. STEBBENS* (1822), 2 Hag. Adm. 337, n.

**Conspiracy to indict.**—*See Part XX., Sect. 8, post.*

**Conspiracy to murder.**—*See Part XXXIII., Sect. 3, post.*

**Civil conspiracy.**—*See TORT; TRADE & TRADE UNIONS.*

#### *F. Acts tending to Public Mischief.*

**860. Agreement to indemnify bail.**—An agreement by an accused person to indemnify his bail is illegal in that it tends to produce a public mischief, & the parties to the agreement are, therefore, guilty of the offence of conspiracy, although they may have entered into the agreement without any wrongful intent.—*R. v. PORTER*, [1910] 1 K. B. 369; 79 L. J. K. B. 241; 102 L. T. 255; 74 J. P. 159; 26 T. L. R. 200; 22 Cox, C. C. 295; 3 Cr. App. Rep. 237, C. C. A.

*Annotation:—Mentd. Laidler v. Laidler* (1920), 90 L. J. P. 28.

#### **PART I. SECT. 6, SUB-SECT. 8.—F.**

**1. To defeat justice.**—A conspiracy

to defeat the course of justice is not an indictable offence.—*R. v. FEBRUARY & MEI* (1841), 10 S. C. 382.—**S. AF.**

m. —.]—*R. v. KAPLAN* (1893) 10 S. C. 259.—**S. AF.**

**861. Passport obtained by fraud—Whether act tends to public mischief—Question of law.]—**(1) A combination by two or more persons to obtain by false representations from the Foreign Office, a passport in the name of one person with the intent that it should be used by another person, is an act tending to bring about a public mischief, & is therefore an indictable misdemeanour at common law.

(2) It is for the ct. & not for the jury to say whether a particular tends to the public mischief. It is not an issue of fact upon which evidence can be given.—*R. v. BRAILSFORD*, [1905] 2 K. B. 730; 75 L. J. K. B. 64; 93 L. T. 401; 69 J. P. 370; 54 W. R. 283; 21 T. L. R. 727; 49 Sol. Jo. 701; 21 Cox, C. C. 16, D. C.

*Annotation:—As to (2) Apd.* *R. v. Porter*, [1910] 1 K. B. 369.

**862. Deceiving Home Secretary—Expulsion order against alien.]—***R. v. WOLIS*, No. 842, *ante*.  
*See, also*, Part XX., Sect. 8, *post*.

#### G. In respect of Public Offices.

**863. Resignation of army officers—East India Company.]—**A conspiracy among the officers of the army of the East India Co. to resign their commissions together is criminal.—*VERTUE v. CLIVE (LORD)* (1769), 4 Burr. 2472; 98 E. R. 296.

*Annotations:—Mentd.* *R. v. Cuming, Ex p. Hall* (1887), 19 Q. B. D. 13; *Hearson v. Churchill* (1892), 61 L. J. Q. B. 569.

**864. Bribery of army officer—Servant of regimental canteen.]—**It is a misdemeanour at common law for a public officer, whether judicial or ministerial, to conspire with others that he shall receive a bribe as an inducement to him to show favour or forbear to show disfavour to any person towards whom an impartial discharge of the officer's duty demands that he should show disfavour.

A colonel of a regiment accepted from a firm of caterers sums of money paid to induce him to accept their representative as tenant of the regimental canteen:—*Held*: that he was guilty of the misdemeanour at common law of conspiracy to bribe.—*R. v. WHITAKER*, [1914] 3 K. B. 1283;

L. J. K. B. 225; 112 L. T. 41; 79 J. P. 28; 30 T. L. R. 627; 58 Sol. Jo. 707; 24 Cox, C. C. 472; 10 Cr. App. Rep. 245, C. C. A.

curing from the Lords of the Treasury the appointment of a person to an office in the Customs, is a misdemeanour at common law.

(2) If a banker permits a sum of money to be lodged at his house, to be paid over for corruptly procuring an appointment under Govt., he may be indicted for a conspiracy along with those who are to procure the appointment & to receive the money.—*R. v. POLLMAN* (1809), 2 Camp. 229.

*Annotation:—Generally, Mentd.* *R. v. O'Connell* (1844), 5 State Tr. N. S. 1.

#### H. Acts contrary to Public Morals or Decency.

**866. Preventing burial of person—Dying in workhouse.]—***R. v. YOUNG* (1784), 4 Wentworth's System of Pleading, 219.

**867. Procuring girl to have illicit connection with a man.]—**It is an indictable offence to conspire with others to carry off a woman under age from her father's house in order to live in fornication with her even if it be with the woman's

approval.—*GREY'S (LORD) CASE* (1682), 9 State Tr. 127; *Skin*. 61; 90 E. R. 29.

*Annotations:—Refd.* *R. v. Mears & Chalk* (1851), 4 Cox, C. C. 423; *R. v. Prince* (1875), L. R. 2 C. O. R. 154. *Mentd.* *Moore v. Watts* (1699), 1 Ld. Raym. 613; *Boots v. Grundy* (1900), 82 L. T. 769.

**868. —.]—**A conspiracy by false pretences to procure an infant female to have illicit carnal connection with a man, is an indictable misdemeanour at common law.—*R. v. MEARS & CHALK* (1851), 2 Den. 79; T. & M. 414; 4 New Sess. Cas. 574; 20 L. J. M. C. 59; 16 L. T. O. S. 515; 15 J. P. 81; 15 Jur. 66; 4 Cox, C. C. 423, C. C. R.

**869. Procuring a woman to become a prostitute.]—**An information will be granted for a conspiracy fraudulently to assign a female apprentice for the purpose of prostitution.—*R. v. DELAVAL* (1763), 3 Burr. 1434; 1 Wm. Bl. 439; 97 E. R. 913.

*Annotations:—Refd.* *R. v. Mears & Chalk* (1851), 2 Den. 79. *Mentd.* *R. v. Blake* (1832), 4 B. & Ad. 355; *R. v. Greenhill* (1836), 4 Ad. & El. 624; *Re Lloyd* (1841), 3 Man. & G. 547; *R. v. Clarke* (1857), 7 E. & B. 186; *St. Pancras Parish v. Clapham Parish* (1860), 24 J. P. 613; *Re Andrews* (1873), L. R. 8 Q. B. 153; *Re Edwards* (1873), 42 L. J. Q. B. 99; *Thomasset v. Thomasset*, [1894] P. 295.

**870. —.]—**Prisoners were found guilty of conspiring to solicit, persuade & procure an unmarried girl, of the age of seventeen, to become a common prostitute, & with having, in pursuance of that conspiracy, solicited, incited & endeavoured to procure the girl to become a common prostitute:—*Held*: although common prostitution was not an indictable offence, it was unlawful, & the indictment, therefore, good, without averring that prosecutrix was a chaste woman at the time of the conspiracy.—*R. v. HOWELL* (1864), 4 F. & F. 160.

#### I. Relating to Marriage.

**871. Marrying a ward of the court.]—**An information was granted for taking away a young woman from her guardian & marrying her.—*R. v. OSSULSTON (LORD)* (1739), 2 Stra. 1107; 93 E. R. 1063; *sub nom.* *R. v. PIERSON*, Andr. 310.

*Annotation:—Refd.* *R. v. Green* (otherwise *Schreiber*) (1781), 3 Doug. K. B. 36.

**872. —.]—**The marrying of a ward of the ct., in which there was a combination, was considered a conspiracy & a sufficient punishment, an i

692; 21 E. R. 401, L. C. **873. —.]—***WADE v. BROUGHTON*, No. 796, *ante*.

**874. —.]—**Upon a marriage of a ward of the ct., under flagrant circumstances, the husband obtaining licence upon a false oath, that she was of age, the clergyman was ordered to attend, & reprimanded: the husband was committed, & ordered to be indicted.—*MILLET v. ROWSE* (1802), 7 Ves. 419; 32 E. R. 169.

*Annotations:—Consd.* *Ball v. Coutts* (1812), 1 Ves. & B. 292. *Mentd.* *Birkett v. Hibbert* (1834), Coop. temp. Brough. 459.

**875. Abduction of heiress.]—***WAKEFIELD'S CASE* (1827), 2 Lew. C. C. 1; 2 Town. St. Tr. 112.

*Annotations:—Refd.* *R. v. Barratt* (1840), 9 C. & P. 387. *Mentd.* *Field's Marriage Annuling Bill* (1848), 2 H. L. Cas. 48; *R. v. London Corpn.* (1886), 16 Q. B. D. 772; *Moss v. Moss* (otherwise *Archer*) (1897), 77 L. T. 220; *Public Prosecutions Director v. Blady* (1912), 106 L. T. 302.

**876. Inveigling young man into disgraceful marriage.]—**A father has the guardianship of his son & heir apparent until he attains the age of 21 years: & therefore the ct. will grant an

#### PART I. SECT. 6, SUB-SECT. 8.—G.

n. *Procuring election of candidate to legislative assembly—Not an offence.]*

*R. v. SINCLAIR* (1906), 7 Terr. L. R. 424; 4 W. L. R. 374.—*CAN.*

o. *Bribery of members of legislative assembly.]—*A conspiracy to bribe

members of the legislative assembly is a misdemeanour at common law, & as such is indictable.—*R. v. BUNTING* (1885), 7 O. R. 524.—*CAN.*

*Sect. 6.—Degrees of criminal liability: Sub-sect. 8,*

information for maliciously conspiring to inveigle a young man, heir to a considerable estate, & under the age of eighteen, out of the custody & government of his father, & seducing him into a disgraceful marriage.—*R. v. THORP* (1697), 5 Mod. Rep. 218; Carth. 384; 1 Com. 27; Comb. 456; Holt, K. B. 333; 87 E. R. 618.

**877. Contriving marriage without due publication of banns.]**—Upon a marriage of a ward of the ct. under flagrant circumstances, the clergyman & clerk were ordered to attend, the husband was committed, & the L. C. directed the proceedings to be laid before the A.-G., expressing his opinion, that contriving a marriage without a due publication of banns is a conspiracy at common law.—*PRIESTLEY v. LAMB* (1801), 6 Ves. 421; 31 E. R. 1124, L. C.

*Annotations:—***Refd.** *Wynn v. Davies & Weaver* (1835), 1 Curt. 69. **Mentd.** *Ex p. Van Sandau* (1846), 1 Ph. 605.

**878. Procuring marriage of pauper.—To charge settlement.]**—A conspiracy by parish officers to marry a female pauper settled in the parish of B., in order to bring a charge upon the parish of B., is an indictable offence; but the indictment must aver that the parties were legally settled in their respective parishes. To say they were inhabitants only, is not sufficient.—*R. v. EDWARDS* (1726), 8 Mod. Rep. 320; 11 Mod. Rep. 386; 1 Sess. Cas. K. B. 336; 2 Stra. 707; 88 E. R. 229.

*Annotation:—***Refd.** *O'Connell v. R.* (1844), 11 Cl. & Fin. 155.

**879. ———.]**—An information was granted against overseers, for conspiring to procure a marriage to charge a settlement.—*R. v. HERBERT* (1759), 2 Keny. 466; 96 E. R. 1246.

**880. ———.]**—An indictment does not lie for conspiring merely to exonerate one parish from the charge of a pauper, & to throw it on another, nor for conspiring to cause a male pauper to marry a female pauper, for that purpose, it not being stated that the conspiracy was to effect such marriage by force, threat, or fraud, or that it was so effected in pursuance of the conspiracy.

It is unnecessary to allege overt acts, if the indictment charge what is in itself an unlawful conspiracy; but if not, the indictment must show some illegal act done in pursuance of the conspiracy. Persuading a male pauper settled in one parish to marry a female pauper settled in & chargeable to another, is not such an overt act.—*R. v. SEWARD* (1834), 1 Ad. & El. 706; 3 Nev. & M. K. B. 557; 2 Nev. & M. M. C. 318; 3 L. J. M. C. 103; 110 E. R. 1377.

**PART I. SECT. 6, SUB-SECT. 8.—N.**

**p. Whether overt acts need be stated.—In Information.]**—An Information alleged that M. D. & others did conspire to pervert the course of justice. This information was demurred to on the ground that it did not state the facts on which the charges were founded.—**Held:** Information was good.—*R. v. DEAN & MEAGHER* (1896), 17 N. S. W. L. R. 132; 12 N. S. W. N. 141.—**AUS.**

**881 i. ——— In indictment.]**—Indictment charging that defts. H. C., & D., were township councillors of N., & F., treasurer, & that defts. intending to defraud the council of £300 unlawfully conspired to obtain, & did, in pursuance of such conspiracy, get into their hands £300 of the council, then being in the hands of T. as such treasurer.—**Held:** bad on writ of R. (1859), 16

**q. ——— Sufficiency of.]**—It is enough in charging conspiracy to state

that the pannel had presided over a body "formed for the illegal purposes libelled" without charging him to have done so in pursuance of the common intent laid in the major.—**H.M. ADVOCATE v. CUMMING** (1848), J. Shaw, Just. 17.—**SCOT.**

**r. Whether penal offence must be shown.]**—*It. v. ROY* (1867), 11 L. C. J. 89.—**CAN.**

**s. ———.]**—Defts. were indicted for unlawfully conspiring & agreeing together & with each other to deprive one W. G. of the necessities of life, to wit, proper medical care & nursing whereby his death was caused.—**Held:** this count did not charge defts. with a conspiracy to commit any indictable offence known to the law, & should have been quashed. A second count charged that defts. did unlawfully conspire & agree together & with each other to effect the cure of W. G. of a sickness endangering life, by unlawful & improper means, thereby causing the death of W. G.—**Held:** this count was equally bad & was

*J. Relating to Trade Disputes.*

See **TRADE & TRADE UNIONS.**

*K. Relating to Trade.*

See **PART XXXI., Sect. 1, post.**

*L. Seditious Conspiracy.*

See **PART XVIII., Sect. 2, post.**

*M. Treasonable Conspiracy.*

See **PART XVII., Sect. 1, post.**

*N. Indictment and Trial.*

**881. Whether overt acts need be stated in indictment.]**—An indictment for conspiring to impoverish a man by preventing him working at his trade need not state the overt acts used.—*R. v. ECCLES* (1783), 1 Leach, 274; 3 Doug. K. B. 337; 99 E. R. 684, C. C. R.

*Annotations:—***Apld.** *R. v. Gill* (1818), 2 B. & Ald. 204. **Refd.** *R. v. Kenrick* (1843), 5 Q. B. 49. **Mentd.** *R. v. Turner* (1811), 13 East, 228; *Mogul S.S. Co. v. McGregor*, Gow (1885), 15 Q. B. D. 476; *Mogul S.S. Co. v. McGregor*, Gow (1889), 23 Q. B. D. 598; *Quinn v. Leatham*, [1901] A. C. 495.

**882. ———.]**—An indictment charged that defts. conspired by divers false pretences, & subtle means & devices, to obtain from A. divers large sums of money, & to cheat & defraud him thereof.—**Held:** the gist of the offence being the conspiracy, it was quite sufficient only to state that fact & its object & not necessary to set out the specific pretences.—*R. v. GILL* (1818), 2 B. & Ald. 204; 106 E. R. 341.

*Annotations:—***Distd.** *R. v. Richardson* (1834), 1 Mood. & R. 402. **Consd.** *R. v. Parker* (1842), 3 Q. B. 292. **Foldd.** *It. v. Gompertz* (1846), 9 Q. B. 821; *Sydesert v. R.* (1847), 11 Q. B. 245. **Refd.** *R. v. Seward* (1834), 1 Ad. & El. 706; *R. v. Kenrick* (1843), 5 Q. B. 49; *R. v. Blake* (1844), 6 Q. B. 126; *It. v. King* (1844), 7 Q. B. 782; *R. v. Aspinall* (1876), 2 Q. B. D. 48; *Taylor v. R.*, [1895] 1 Q. B. 25.

**883. ———.]**—*R. v. SEWARD*, No. 880, ante.

**]**—An indictment for a conspiracy to cheat & defraud a party of the fruits & advantages of a verdict obtained is too general, & bad in point of law.

The allegation is too general & does not convey any specific idea which the mind can lay hold of to judge whether an unlawful act has been done or attempted. The terms used do not import in what manner prosecutor was to be deprived of the fruits & advantages of his verdict (**LORD DENMAN, C.J.**).—*R. v. RICHARDSON* (1834), 1 Mood. & R. 402, N. P.

*Annotations:—***Consd.** *White v. R.* (1876), 13 Cox, C. C. 318. **Refd.** *R. v. Kenrick* (1843), 5 Q. B. 49. **Mentd.** *R. v. Rowlands* (1851), 21 L. J. M. C. 81.

properly quashed.—*R. v. GOODFELLOW* 1906, 11 O. L. R. 359; 7 O. W. R. 2.—**CAN.**

**t. ———.]**—The indictment in all cases of conspiracy must in the first place charge the conspiracy, but in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed.—*AMRITA LAL HAZRA v. R.* (1915), 1 L. L. 42 Calc. 957.—**IND.**

**a. ———.]**—An indictment charging N. W. & others with conspiring by false pretences to defraud of large sums of money all such persons as should apply to or negotiate with them for a loan of money is bad for vagueness & uncertainty.—*WHITTE v. R.* (1876), 1 R. 10 C. L. 523.—**IR.**

**b. Amendment.—Addition of "with person unknown."]**—In a case where three accused persons are indicted for "that they did amongst themselves conspire, etc.," the judge on the completion of the prosecution's opening speech & before any evidence was

**885.** —.]—(1) An indictment charging that A. & B. conspired, by false pretences & subtle means & devices to obtain from F. divers large sums of money, of the money of F., & to cheat & defraud him thereof. The means of the alleged conspiracy were not stated, except as to above:—*Held*: the indictment was sufficient.

(2) A. & B. having pleaded not guilty to an indictment for conspiracy, B. died between the *venire & distringas*. A. was tried alone, & found guilty:—*Held*: not a mis-trial.—R. v. KENRICK (1843), 5 Q. B. 49; 1 Dav. & Mer. 208; 12 L. J. M. C. 135; 1 L. T. O. S. 336; 7 J. P. 463; 7 Jur. 848; 114 E. R. 1166, C. O. R.

*Annotations*:—As to (1) *Refd.* R. v. Garlick (1847), 1 Den. 276; R. v. Hilton (1847), 2 Cox, C. C. 318; R. v. Bates & Fugh (1848), 3 Cox, C. C. 201; R. v. Carlisle (1854), 6 Cox, C. C. 366; R. v. Eagleton (1855), 26 L. T. O. S. 7; R. v. Roebuck (1856), 7 Cox, C. C. 126; R. v. Bryan (1857), 7 Cox, C. C. 312; R. v. Martin (1867), 36 L. J. M. C. 20; R. v. De Kromme (1892), 66 L. T. 301. *Generally, Mentd.* R. v. Abbott (1847), 9 L. T. O. S. 394; R. v. Woolley (1850), 4 Cox, C. C. 193; R. v. Rowlands (1851), 17 Q. B. 671; R. v. Sherwood (1857), Deares. & B. 251; Goss's Case (1860), Bell, C. C. 208; R. v. Moreton (1913), 109 L. T. 417; R. v. Sanders, [1919] 1 K. B. 550.

**886.** —.]—A count in conspiracy, charging that defts. "being evil disposed persons, etc. on etc. with force & arms, at etc. unlawfully, falsely, fraudulently, & deceitfully, did conspire, combine, confederate, & agree together, by divers false pretences, & indirect means, to cheat & defraud R. of his money to the great damage, fraud, & deceit of R. to the evil example, etc. *et contra pacem*, etc." is good.—R. v. GOMPERTZ (1846), 9 Q. B. 824; 16 L. J. Q. B. 121; 8 L. T. O. S. 469; 11 Jur. 204; 2 Cox, C. C. 145; 11 J. P. Jo. 350; 115 E. R. 1491.

*Annotations*:—*Consd.* R. v. Aspinall (1876), 2 Q. B. D. 48. *Refd.* R. v. Gamble (1847), 16 M. & W. 384; Sydserff v. R. (1847), 11 Q. B. 245. *Mentd.* Holmes v. Sixsmith (1852), 7 Exch. 802; Ponsford v. Walton (1868), L. R. 3 C. P. 167.

**887.** —.]—R. v. RANKIN, No. 820, *ante*.

**888.** —.]—Conspiracy to violate provisions of a statute.—R. v. ROWLANDS, No. 844, *ante*.

**889.** —.]—Particulars ordered.—If the counts of an indictment for a conspiracy be framed in a

general form, a judge will order that prosecutor shall furnish defts. with a particular of the charges, & that particulars should give the same information to defts. that would be given by a special count. But the judge will not compel prosecutor to state in his particular the specific acts with which defts. are charged, & the times & places at which those acts are alleged to have occurred.—R. v. HAMILTON (1836), 7 C. & P. 448.

*Annotation*:—*Consd.* R. v. O'Connell (1844), 5 State Tr. N. S. I.

**890.** —.]—Where an indictment for conspiracy charges the offence in general terms, the deft. is entitled to particulars of the charge, although there has been a previous committal by a magistrate.

Where an indictment contained counts charging a conspiracy to cheat tradesmen of goods, without mentioning any specific case, or name, time, or place:—*Held*: deft. was entitled to such particulars.—R. v. RYCKROFT (1852), 6 Cox, C. C. 76.

**891.** —.]—Effect of particulars.—R. v. ESDALE, R. v. BROWN, R. v. STAPLETON (1857), 6 W. R. 60; 8 Cox, C. C. 69; 21 J. P. Jo. 772.

**892.** Only one conspiracy may be charged in count.—Finding involving two conspiracies is bad.—Where several defts. were charged in the same count with conspiracy to do several unlawful acts, forming together one conspiracy, & the jury found one of them guilty of conspiracy, with some of his co-defts., to do one of these acts, & with others to do another of them:—*Held*: a bad finding, inasmuch as the indictment charged but one conspiracy, & the deft. was convicted of two.

On a count in an indictment against eight defts., charging one conspiracy, a verdict is bad, finding three of them guilty generally, & four guilty of conspiring for certain of the objects alleged, but not for others; the verdict of guilty against the three was a finding that they were guilty of the entire offence charged, that is, of conspiracy with the other five defts. for all the objects stated in the count, & of some of which the latter have been acquitted.—O'CONNELL v. R. (1844), 11 Cl. & Fin. 155; 3 L. T. O. S. 429; 9 Jur. 25; 1 Cox, C. C.

given, allowed the indictment to be amended by adding the words " & with another person whose name to the said prosecutor is unknown:—*Held*: judge had no power to make the amendment & conviction quashed.—R. v. HILL (1909), 9 S. R. N. S. W. 563.—AUS.

**c. Effect of withdrawal of charge against one of two conspirators.**—Where two persons are charged before justices with conspiring with one another to defraud, if the prosecution withdraw the charge against one, for the purpose of using his evidence against the other, the justices have a right to refuse to receive such evidence against the other, or to proceed with the charge.—R. v. ALLEY, *Ex p.* MUNDELL (1886), 12 V. L. R. 13.—AUS.

**d. New trial—Must be granted to all.**—Where several defts. were convicted upon an information charging them with conspiracy, a new trial if granted must be to all.—R. v. FELLOWS (1859), 19 U. C. R. 48.—CAN.

**e. Trial of one on indictment of two conspirators.**—One of two conspirators can be tried on an indictment against him alone, charging him with conspiring with another to defraud, the other conspirator being known in the indictment.

**f. Right of reply by Crown.**—In a prosecution for conspiracy, although

evidence was called by only one of the defts., it might have enured to the benefit of both, & the right to a general reply was with the counsel for the Crown.—R. v. CONNOLLY (1894), 25 O. R. 151.—CAN.

**g.** —.]—Prisoners were indicted for that they did, at a place in the Province of Ontario & in a given month conspire, combine, confederate, & agree together to commit a certain indictable offence, to wit, the crime of abortion, by then & there conspiring, combining, confederating, & agreeing together to procure the miscarriage of a certain woman (naming her), thereby committing an indictable offence, contrary to the Criminal Code:—*Held*: the form of the indictment was sufficient.—R. v. BACHRACK (1913), 28 O. L. R. 32; 4 O. W. N. 615; 11 D. L. R. 522.—CAN.

**h.** —.]—Order for particulars.—The offences enumerated in Criminal Code, s. 498 (a) (c) & (d), are not governed by the definition in s. 496, & it is not necessary where a charge is laid under any of these sub-sections, to allege or prove an "unlawful" act. It is within the discretion of the trial judge to order particulars or not, & where there are several counts, to direct whether they shall be tried together or not.—R. v. CLARKE (1908), 9 W. L. R. 243; 1 Alta. L. R. 358.—CAN.

**k. Trial of one conspirator separately.**—Where several indicted.—One of several prisoners indicted for a conspiracy may be tried separately, &

upon conviction, judgment may be passed on him, although the others, who have appeared & pleaded, have not been tried.

Where three persons have been jointly indicted for a conspiracy to murder, & severally pleaded not guilty, but have severed in their challenges, & the Crown has, consequently, proceeded to try one of such prisoners:—*Held*: upon conviction of such prisoner, judgment must follow, although the others have not been tried, & the possibility of the other prisoners being found not guilty (although such a verdict would be a ground for reversing the judgment), is not a sufficient reason for holding such judgment, & all the legal consequences of such conviction of such prisoner, irregular.—R. v. AHPARNE (1852), 6 Cox, C. C. 6.—IR.

**l. Whether all prisoners tried together.**—Several persons, who were railway officials, were indicted in one indictment with one count, with several other persons, for conspiring to defraud a railway co.:—*Held*: the indictment was correctly framed to try the whole number of conspirators, & there was no injustice on trying them together.—R. v. QUINN (1898), 33 I. L. T. 154.—IR.

**m.** —.]—If all the known conspirators named in the charge are not placed on their trial, the trial of some, separately, without the others is not vitiated.—AMRITA LAL HAZRA v. R. (1915), 1 L. R. 42 Cal. 957.—IND.

## Sect. 6.—Degrees of criminal liability: Sub-sect. 8,

413; 8 E. R. 1061; *sub nom.* R. v. O'CONNELL, 5 State Tr. N. S. 1, H. L.

**Annotations:—***Consd.* Castro v. R. (1881), 6 App. Cas. 229. *Apld.* R. v. Manning (1883), 12 Q. B. D. 241. *Consd.* R. v. Quinn (1898), 19 Cox, C. C. 78. *Distd.* R. v. Plummer, [1902] 2 K. B. 339. *Refld.* King v. R. (1845), 9 Jur. 832; R. v. Downing & Powys (1845), 1 Cox, C. C. 156; R. v. Gompertz (1847), 9 Q. B. 824; Douglas v. R. (1848), 17 L. J. M. C. 176; Gregory v. R. (1848), 15 Q. B. 957; Shea v. R., Dwyer v. R. (1848), 3 Cox, C. C. 141; Ryalls v. R. (1849), 11 Q. B. 781; Wright v. R. (1849), 14 Q. B. 148; *Ex p.* Purdy (1850), 9 C. B. 201; R. v. Rowlands (1851), 2 Den. 364; Latham v. R. (1864), 5 B. & S. 635; Burton v. Low (1867), 16 L. T. 385; R. v. Stephens (1888), 4 T. L. R. 479; Sykes v. Barraclough, [1904] 2 K. B. 675. *Mentd.* Campbell v. R. (1846), 11 Q. B. 799; Gregory v. Brunswick (1846), 3 C. B. 481; *Re* Dunn (1847), 5 C. B. 215; A.-G. v. Vernon (1848), 12 J. P. 251; A.-G. v. Warren (1848), 10 L. T. O. S. 445; R. v. Gregory (1848), 12 J. P. Jo. 771; Irvine (or Douglas) v. Kirkpatrick (1850), 17 L. T. O. S. 32; Holloway v. R. (1851), 17 Q. B. 317; *Ex p.* Rose (1852), 18 Q. B. 751; Kendall v. Wilkinson (1855), 24 L. J. M. C. 89; R. v. Eagleton (1855), 24 L. J. M. C. 158; New River Co. v. Hertford Land Tax Comrs. (1857), 2 H. & N. 129; A.-G. v. Sillem (1864), 2 H. & C. 581; R. v. Heane (1864), 4 B. & S. 947; Irwin v. Grey (1867), 15 W. R. 593; R. v. Murphy (1869), L. R. 2 P. C. 535; Anderson v. Morice (1876), 1 App. Cas. 713; Mackenochie v. Penzance (1881), 6 App. Cas. 424; Combe v. De La Bere (1882), 22 Ch. D. 316; Enraght v. Penzance (1882), 7 App. Cas. 240; R. v. Bradlaugh (1883), 15 Cox, C. C. 217; Mogul S.S. Co. v. McGregor, Gow (1885), 15 Q. B. D. 476; R. v. Pierce (1887), 3 T. L. R. 586; Mogul S.S. Co. v. McGregor, Gow (1889), 23 Q. B. D. 598.

**893.** — Some found guilty generally & some only as to particular objects alleged—Finding bad.]—O'CONNELL v. R., No. 892, *ante*.

**894.** Effect of conviction of one alone—If other tried & acquitted.]—If two be indicted for a con- & one be acquitted, the bill shall abate.—MARSH v. VAUHAN (1599), Cro. Eliz. 701; 78 E. R. 937.

—[—HARRISON v. ERRINGTON, No. 831, *ante*.

**896.** — — — — —.]—If one be acquitted in an action of conspiracy, the other cannot be guilty; but where one is found guilty, & the other comes not in upon process, or if he dies hanging the suit, yet judgment shall be upon the verdict against the other (HALE, C.J.).—THODIE'S (OR THODY'S) CASE (1674), 1 Vent. 234; 86 E. R. 157.

**897.** — — — — —.]—If two be indicted for a conspiracy, the acquittal of one is the acquittal of the other.—R. v. GRIMES (1688), 3 Mod. Rep. 220; 87 E. R. 142.

**898.** — — — — —.]—Where two persons are indicted for conspiring together & they are tried together, both must be acquitted or both convicted.—R. v. MANNING (1883), 12 Q. B. D. 241; 53 L. J. M. C. 85; 51 L. T. 121; 48 J. P. 536; 32 W. R. 720, D. C.

**Annotations:—***Consd.* R. v. Plummer, [1902] 2 K. B. 339. *Mentd.* Mogul S.S. Co. v. McGregor, Gow (1889), 58 L. J. Q. B. 468.

**899.** — — — — —.]—Acquittal on alibi or mistaken identity.]—If deft. jointly charged with another for conspiracy sets up an alibi or mistaken identity, the jury must not be allowed to assume that the former must be convicted, if the latter is convicted; there must be a direction that the

**894 i.** Effect of conviction of one alone—If other tried & acquitted.]—Two persons were charged with attempting to defraud underwriters, "both acting in concert":—*Held*: it was competent, under this indictment to convict one of the accused while acquitting the other.—H.M. ADVOCATE v. CAMERONS, [1911] S. C. (J.) 110; 48 Sc. L. R. 804; 2 S. L. T. 108; 6 Adam, 456.—SCOT.

**n.** Effect of conviction of more than two.]—Where the jury acquitted two

co-deft. may be convicted of conspiracy with a person unknown.—R. v. HIGGINS (1919), 14 Cr. App. Rep. 28, C. C. A.

**900.** — — — — —.]—If two others are tried & acquitted.]—DERSLY v. DERSLY, No. 832, *ante*.

**901.** — — — — —.]—Though jury thought one guilty.]—R. v. THOMPSON, No. 548, *ante*.

**902.** — — — — —.]—Plea of guilty by third.]—On the trial of an indictment charging three persons jointly with conspiring together, if one pleads guilty & has judgment passed against him, & the other two are acquitted, the judgment passed against the one who pleaded guilty is bad & cannot stand.—R. v. PLUMMER, [1902] 2 K. B. 339; 71 L. J. K. B. 805; 86 L. T. 836; 66 J. P. 647; 51 W. R. 137; 18 T. L. R. 659; 46 Sol. Jo. 587; 20 Cox, C. C. 269, C. C. R.

**903.** — — — — —.]—THODY'S CASE, No. 530, *ante*.

**904.** — — — — —.]—Fellow-conspirator dead.]—One conspirator may be convicted after the other is dead.—R. v. NICCOLLS (1745), 2 Stra. 1227; 13 East, 412, n.; 93 E. R. 1148.

**Annotations:—***Refld.* R. v. Plummer, [1902] 2 K. B. 339. *Mentd.* R. v. Rattislaw (1837), 1 J. P. 136; *Re* National Patent Steam Fuel Co., *Ex p.* Worth (1859), 4 Drew. 529.

**905.** — — — — —.]—R. v. KENRICK, No. 885, *ante*.

**906.** — — — — —.]—Fellow-conspirator not on trial.]—ANON. (1350), Jenk. 27; 145 E. R. 20.

**907.**

No. 111, *ante*.

**909.** — — — — —.]—On an indictment against four for a conspiracy, two pleaded not guilty, one pleaded in abatement, to which plea there was a demurrer, & the fourth never appeared. Before the argument of the demurrer, the record was taken down to trial. One of those who pleaded not guilty was acquitted, & the other was found "guilty of conspiring with him who pleaded in abatement." The demurrer was afterwards argued, & judgment of *respondat ouster* given, whereupon a plea of not guilty was pleaded:—*Held*: the ct. might, before the trial of that deft., pronounce judgment upon the one that had been found guilty.—R. v. COOKE (1826), 5 B. & C. 538; 7 Dow. & Ry. K. B. 673; 3 Dow. & Ry. M. C. 510; 108 E. R. 201, C. C. R.

**Annotations:—***Consd.* R. v. Manning (1883), 12 Q. B. D. 241. *Refld.* R. v. Plummer, [1902] 2 K. B. 339.

**910.** — — — — —.]—Provided jury are satisfied other is guilty.]—One of two co-conspirators may be convicted of conspiracy in the absence of the other, if the jury are satisfied that the other conspirator was also guilty & would have been convicted if he had been before the ct.—BEECHRY v. R. (1915), 85 L. J. P. C. 32; 114 L. T. 1; 25 Cox, C. C. 217, P. C.

**911.** — — — — —.]—Fellow-conspirator immune from prosecution.]—R. v. DUGUID, No. 841, *ante*.

## O. Evidence and Proof.

## (a) In General.

**912.** Evidence of existence of conspiracy—Admissible before showing connection of accused.]

of the prisoners & convicted six:—*Held*: there was no repugnance on the face of the record sufficient to justify the judge in arresting judgment. It is sufficient to sustain the verdict if more than two are found guilty.—R. v. QUINN (1898), 33 L. T. 154.—IR.

**c.** Conviction of some of one conspiracy & others of another—Where all charged with same conspiracy.]—Where several persons are charged with the same conspiracy it is a legal impossibility that some should be found

guilty of one conspiracy & some of another, & any accused not shown to be a member of that conspiracy is entitled to demand an acquittal.—R. v. LALIT MOHAN CHUCKERBUTTY (1911), 1 L. R. 38 Cal. 559.—IND.

## PART I. SECT. 6, SUB-SECT. 8.—O. (a).

**912 i.** Evidence of existence of conspiracy—Admissible before showing connection of accused.]—It was proposed to show witness a pamphlet said to

—*R. v. SIDNEY* (1833), 9 State Tr. 817; Post. 198.

*Annotations*.—*Mentd.* *R. v. Hayes* (1884), 10 State Tr. 307; *R. v. Crosby* (1895), 12 Mod. Rep. 72; *R. v. Hensey* (1758), 2 Keny. 386; *Eagleton v. Kingston* (1803), 8 Ves. 438; *R. v. Watson* (1817), 2 Stark. 116; *Doe d. Mudd v. Suckermore* (1836), 5 Ad. & El. 703; *R. v. Lovett* (1839), 9 C. & P. 462; *R. v. Duffy* (1849), 4 Cox, C. C. 294.

**913.** ——.]—On an indictment for high treason there are two cases in which the acts & declarations of some of the alleged parties to the conspiracy are evidence against others; firstly, a conspiracy having been proved, to prove the overt acts stated in the indictment; secondly, by way of foundation, to prove the existence of the conspiracy with a view to showing afterwards that prisoner adopted, & became a party to, it.

One of the overt acts being that prisoner led an armed force against the town, evidence of the presence of such a force in the neighbourhood the night before, was given:—*Held*: this was provisionally admissible before showing that prisoner was connected with it.—*R. v. Frost* (1840), 9 C. & P. 129, 162; 2 Mood. C. C. 140; 4 State Tr. N. S. 85; 1 Town. St. Tr. 1; Gurney's Rep. 749, C. C. R.

*Annotations*.—*Mentd.* *Redford v. Birley* (1822), 1 State Tr. N. S. 1071; *R. v. Tyrrell* (1843), 2 L. T. O. S. 175; *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *R. v. Cuffey* (1848), 7 State Tr. N. S. 467; *R. v. Smith O'Brien* (1848), 7 State Tr. N. S. 1; *R. v. Duffy* (1849), 7 State Tr. N. S. 795; *R. v. Bird* (1851), 5 Cox, C. C. 20; *Mansell v. R.* (1857), 8 E. & B. 54; *R. v. Bernard* (1858), 8 State Tr. N. S. 887; *R. v. Burke* (1867), 10 Cox, C. C. 519; *Dillon v. O'Brien & Davis* (1887), 16 Cox, C. C. 245; *R. v. Crippen*, [1911] 1 K. B. 149; *R. v. Broadhurst, Meanley & Bliss Hill* (1918), 13 Cr. App. Rep. 125.

**914.** ——.]—In an indictment for conspiracy, prosecutor may go into general evidence of its nature, before it is brought home to defts.—*R. v. HAMMOND & WEBB* (1799), 2 Esp. 719, N. P. *Annotation*.—*Mentd.* *Mogul S.S. Co. v. McGregor Gow* (1889), 58 L. J. Q. B. 465.

**915.** ——.]—It was proved that on the evening which had been fixed by the conspirators for a general outbreak, a large number of armed men were found assembled in a public-house. None of these men had been previously connected by the evidence with the conspiracy, neither did it appear that the house had ever been recognised as a place of meeting:—*Held*: that which was done & found in the house, was admissible in evidence.—*R. v. CUFFEY* (1848), 7 State Tr. N. S. 467; 12 J. P. 648, 807; *sub nom. R. v. LACEY*, 3 Cox, C. C. 517.

**916.** ——.]—*R. v. HUNT* (1820), 3 B. & Ald. 566; 2 Chit. 130; 1 State Tr. N. S. 171; 106 E. R. 768.

*Annotations*.—*Consd.* *R. v. Hinley* (1844), 2 L. T. O. S. 287; *R. v. O'Connell* (1844), 1 Cox, C. C. 401; *R. v. Lacey* (1848), 3 Cox, C. C. 517. *Refd.* *R. v. Frost* (1839), 9 C. & P. 129; *Jones v. Tarleton* (1842), 9 M. & W. 675; *Boosey v. Davidson* (1849), 13 Q. B. 257. *Mentd.* *R. v. Fursey* (1833), 6 C. & P. 81; *R. v. Holden* (1833), 5 B. & Ad. 347; *R. v. Hunt* (1837), 6 Dowl. 5; *R. v. Newton* (1837), 2 Nev. & P. K. B. 121; *A.-G. v. Churchill* (1841), 8 M. & W. 171; *Binns v. Moseley & Cobbett* (1857), 5 W. R. 533; *R. v. Barrett* (1870), 18 W. R. 671; *R. v. Sheldon* (1875), 32 L. T. 27.

**917.** ——. Although accused not connected with conspiracy.]—D. & others were charged under the

have been published by an assocn. of which pannels were members:—*Held*: this was competent without first proving that prisoners were present at the meeting where the matter was discussed, reserving to them the right of showing that they were not concerned therewith.—*H.M. ADVOCATE v. CUMMING* (1848), J. Shaw, Just. 17.—**SCOT.**

p. —. Not necessary to admit admissions by accused.]—On an indict-

ment for a conspiracy, the admissions of prisoner may be given in evidence against him before the existence of a conspiracy has been proved.—*M'KENNA'S CASE* (1842), Ir. Cr. Rep. 461.—**IR.**

q. Proof—Sufficiency of.]—An indictment for conspiracy at common law is not supported by proof of having obtained money under false pretences, although the prisoner was assisted by two other persons.—*MAGRATH'S CASE*

*Treason Felony Act, 1848* (c. 12), s. 3, with being in the possession of certain instruments & explosive materials, with intent to use them for the purpose of carrying out the objects of certain treasonable combinations existing in the United Kingdom & abroad:—*Held*: for the purpose of showing a treasonable object on the part of prisoners, & negating any private object, evidence might be given of the existence, down to a period nearly approaching the date of the alleged acts, in the country from which the explosive & instruments were brought, of a treasonable conspiracy having for its object the alteration of the existing form of govt. by violent means, although such evidence did not establish that prisoners were members of or directly connected with, such conspiracy.—*R. v. DEASY* (1883), 15 Cox, C. C. 334.

**918.** Evidence of nature of conspiracy admissible.]—On the trial of an indictment for a conspiracy to procure large numbers of persons to assemble, for the purpose of exciting terror in the minds of Her Majesty's subjects, evidence was given of several meetings at which defts. were present, & it was proposed to ask a witness, who was a superintendent of police, whether persons complained to him of being alarmed by these meetings:—*Held*: the evidence was receivable, & it was not necessary to call the persons who made the complaints.—*R. v. VINCENT, FROST & EDWARDS* (1840), 9 C. & P. 275; 4 State Tr. N. S. App. 1366.

*Annotation*.—*Mentd.* *R. v. O'Connell* (1844), 5 State Tr. N. S. 1.

**919.** ——.]—To show the object & character of a meeting & the justification for defts.' conduct, evidence was admitted of statements made by persons on their way to, or at, the meeting, tending to show the objects of the meeting.—*REDFORD v. BIRLEY* (1822), 3 Stark. 76; 1 State Tr. N. S. 1071, N. P.

*Annotations*.—*Refd.* *R. v. O'Connell* (1845), 1 Cox, C. C. 403. *Mentd.* *R. v. Williams & Vernon* (1848), 6 State Tr. N. S. 775.

**920.** ——.]—Evidence that A. was privy to a plot to murder B. by explosive machines, is sufficient to go to the jury on counts charging A. with the murder of C., accidentally killed by the explosion, & with conspiring to murder him, & as an accessory to the murder.—*R. v. BERNARD* (1858), 1 F. & F. 240; 8 State Tr. N. S. 887.

*Annotations*.—*Refd.* *R. v. Lomas* (1913), 110 L. T. 239. *Mentd.* *R. v. Kohn* (1861), 4 F. & F. 68.

**921.** Conspiracy may be inferred from acts proved.]—On information for conspiracy, the fact of conspiring need not be proved, but may be collected from other circumstances.—*R. v. PARSONS* (1763), 1 Wm. Bl. 392, 401; 96 E. R. 222, 229.

**922.** ——.]—In an indictment for an ordinary conspiracy, there is no necessity to prove a conspiracy, in the first instance between defts.; but prosecutor may give in evidence the acts of defts. before attempting to connect them in one common design, for the acts of each are evidence against himself only, & they may be the only sources

(1841), Ir. Cir. Rep. 74.—**IR.**

r. One prisoner pleading guilty—Admissibility of his evidence against other.]—Where two prisoners were jointly charged with conspiracy, & on being arraigned one pleaded guilty & the other not guilty, prisoner who had pleaded guilty could not be admitted as a witness against the other prisoner.—*R. v. ASHER & AWANUI* (1888), 6 N. Z. L. R. 592.—**N.Z.**



*v. (u), (v) & (c).]*

from which the jury may be called on to infer the conspiracy.—*R. v. BRITAIN & SHACKELL* (1848), 11 L. T. O. S. 48; 12 J. P. 199; 3 Cox, C. C. 76.

**923.** —]—The essence of the offence is the to carry out an unlawful purpose, & combination & conspiracy is to be the conduct of the parties. If take several steps, all tending to-vious purpose, it is for the jury to those persons had not combined bring about that end which their appears adapted to effectuate. (1851), 5 Cox, C. C. 404; *subse-*quent proceedings, *sub nom.* *R. v. ROWLANDS*, 5 ox, C. C. 466.

(b) *Concert.*

**924. Evidence of concert necessary—Fraud in le of horse.]**—*R. v. PYWELL* (1816), 1 Stark. 12. N. P.

*Kenrick* (1843), 5 Q. B. 49.  
911 K. R. 550. 222.

On an indictment against M. by selling a glandered horse as a sound the evidence was, that A. having previously d M. by selling him a kicking horse, defts. B., C., D., & E., obtained that horse from M. in exchange for a glandered horse, which he subsequently sold. A., accompanied by G., afterwards sold M. another horse, in which transaction the latter was again defrauded. Some evidence was given to show that A., was frequently in company with some of the other defts., that he was aware of a previous sale of a glandered horse by them, but there was no other evidence to connect him with its sale to M.:—*Held*: in the absence of any evidence clearly leading to the conclusion that A. was a party to that sale, there was no evidence of a conspiracy to go to the jury against him.—*R. v. READ* (1852), 8 Cox, C. C. 134.

**926. — Raising price of goods.]**—On motion for criminal information against two persons for endeavouring to raise the price of oil, it must appear distinctly that they combined together, as it is no offence for an individual separately so to endeavour.—*R. v. HILBERS* (1818), 2 Chit. 163.

**927. — False representation as to solvency.]**—A party may be convicted of a conspiracy to cheat & defraud by means of a false & fraudulent representation as to the solvency or the trade of another, although the representation was oral; but the question will be not merely whether the representation was false & fraudulent, but whether it was made in collusion with co-deft. for the purpose of cheating prosecutor. Evidence, however, that at the time it was made, deft. knew it to be false, coupled with any circumstances showing that he had an object in view in making it, will be evidence to go to the jury in support of the charge.—*R. v. TIMOTHY* (1858), 1 F. & F. 39.

**928. — Transfer of railway ticket.]**—On an

l. 8,

indictment for conspiracy for the sale & transferring of a railway excursion ticket not transferable:—*Held*: prisoners must be acquitted unless there was a previous concert between them to obtain the ticket for the purpose of its being fraudulently used.—*R. v. ABSOLON & CLARK* (1859), 1 F. & F. 498.

**929. — Larceny.]**—Prisoners were indicted for conspiring to commit larceny. The evidence was that prisoners were seen by a policeman to sit together on some doorsteps near a crowd, & when a well-dressed person came up to see what was going on, one of the prisoners made a sign to the others, & two got up & followed the person into the crowd. One was seen to lift the tail of the coat of a man, as if to ascertain if there was anything in the pocket, but making no visible attempt to pick the pocket, & to place a hand against the dress of a woman but no actual attempt to insert the hand into the pocket was observed. Then they returned to the doorstep & resumed their seats. They repeated this two or three times. There was no proof of any preconcert, other than this, not to be

**930. —]**—On an indictment for conspiracy, it is not proper to include defts. who have not been privy to the acts relied upon as proof of the alleged conspiracy, & whose offences, whatever they may have been, are wholly separate & distinct. If the proof of the alleged conspiracy consists of proof that the substantive crime has been committed, however legal such a course may be, it is not satisfactory.—*R. v. BOULTON* (1871), 12 Cox, C. C. 87.

**931. — Obtaining goods by fraud.]**—A. obtained goods on credit at B.'s suggestion, in order that A. might sell them to B. below their value, B. aiding A. as a referee, & giving him a character. The evidence was such that B. must have known that A. was getting the goods without any intention of paying for them:—*Held*: B. was guilty of conspiring with A. to defraud.—*R. v. ORMAN & BARBER* (1880), 14 Cox, C. C. 381.

**932. — Direction to jury.]**—On a charge of conspiracy it is misdirection to discuss the case of each deft. separately without reference to the alleged concert.—*R. v. BAILEY & UNDERWOOD* (1913), 9 Cr. App. Rep. 94, C. C. A.

**933. — Injury to person.]**—When violence has been used by conspirators, each one must be distinctly affected with the knowledge of the design to hurt.

If there was a conspiracy to commit arson, & one party, without the knowledge of the other, decided to resort to murder, they were not all guilty of conspiracy to murder (*AVORY, J.*).—*R. v. KERR* (1921), 15 Cr. App. Rep. 165, C. C. A.

**934. Agreement with particular objects of conspiracy.]**—If several persons join in the same conspiracy, some intending by the means employed to force the Govt. to change their measures, whilst the object of others is to sever Ireland from England, each is responsible for both intents.—*R. v. DOWLING* (1848), 7 State Tr. N. S. 381; 12 J. P. 678; 3 Cox, C. C. 509.

*Annotation.*—*Refd.* *R. v. Meany* (1867), 15 W. R. 1032.

450; 14 O. L. R. 295.—*CAN.*

**924 iii.** —]—In order to constitute the offence of abetment by conspiracy there must be a combining together of two or more persons in the conspiracy, & an act or illegal omission must take place in pursuance of that conspiracy & in order to the doing of that thing.—*KALLI MUNDA v. R.* (1901), 1 L. R. 28 Calo. 197.—*IND.*

O. (b).

**924 i. Evidence of concert necessary.]**—Upon an indictment for conspiracy to procure by fraud the return of one F. as a member of the Legislative Assembly:—*Held*: that it was clearly unnecessary to prove that all the defts. or any two of them, actually

met together & concerted the proceeding carried out; it was sufficient if the jury was satisfied from their conduct & from all the circumstances, that they were acting in concert.—*R. v. FELLOWES* (1859), 19 U. C. R. 48.—*CAN.*

**924 ii.** —]—*R. v. MASTER PLUMBERS & STEAM FITTERS CO-OPERATIVE ASSOCN.* (1905), 9 O. W. R.

(c) *Acts and Words of Co-Conspirators.*

**935. Acts & words of each conspirator evidence against others—If connected with common purpose.]—***R. v. Stone* (1796), 25 State Tr. 1155; 6 Term Rep. 527; 101 E. R. 684.

*Annotations:—Reid. R. v. Meany* (1867), 15 W. R. 1082. *Mentd. R. v. Edwards* (1872), 4 Taunt. 309; *R. v. O'Connell* (1844), 5 State Tr. N. S. 1; *Conway & Lynch v. R.* (1845), 1 Cox, C. C. 210.

**936. ———.]—***R. v. Hardy* (1794), 24 State Tr. 199.

*Annotations:—Consd. R. v. McCafferty* (1867), 15 W. R. 1022. *Reid. R. v. Stone* (1796), 25 State Tr. 1155; *R. v. Watson* (1817), 2 Stark. 116; *Redford v. Birley* (1822), 3 Stark. 76; *R. v. O'Connell* (1844), 5 State Tr. N. S. 1; *A.-G. v. Briant* (1846), 15 M. & W. 169; *R. v. Grant, Ranken & Hamilton* (1848), 7 State Tr. N. S. 507; *Mulcahy v. R.* (1867), 15 W. R. 446; *R. v. Meany* (1867), 15 W. R. 1082; *Marks v. Beyfus* (1890), 25 Q. B. D. 494. *Mentd. R. v. Edwards* (1812), 4 Taunt. 309; *R. v. Barber & Dorey* (1844), 8 J. P. 644; *R. v. Blake* (1844), 6 Q. B. 126; *Conway & Lynch v. R.* (1845), 1 Cox, C. C. 210; *R. v. Garbett* (1847), 2 Cox, C. C. 448; *R. v. Smith O'Brien* (1848), 7 State Tr. N. S. 1; *R. v. Duffy* (1849), 7 State Tr. N. S. 795; *R. v. Petcherini* (1855), 7 Cox, C. C. 79.

**937. ———.]—**Where there is evidence of several persons having engaged in a conspiracy, what is said by any of them at another time & place, respecting the object of the conspiracy, is evidence against the others.—*R. v. Salter* (1804), 5 Esp. 125.

**938. ———.]—**Evidence of an admission made by one of several defts. in trespass, will not,

it is true, establish the others to be co-trespassers; but if they be established to be co-trespassers by other competent evidence, the declaration of the one as to the motive & the circumstances of the trespass will be evidence against all who are proved to have combined together for the common object (*LORD ELLENBOROUGH, C.J.*).—*R. v. Hardwick (Inhabitants)* (1809), 11 East, 578; 103 E. R. 1129.

*Annotations:—Reid. Perham v. Raynal* (1824), 2 Bing. 306; *Daniels v. Potter* (1830), 4 C. & P. 262. *Mentd. R. v. Vickery* (1848), 12 Q. B. 478; *R. v. Petcherini* (1855), 7 Cox, C. C. 79.

**939. ———.]—***R. v. Watson*, No. 952, *post*.

**940. ———.]—**A. was charged with having conspired with J. & others unknown, to raise insurrection & obstruct the laws. It was proved that A. & J. were members of a chartist lodge, & that A. & J. were at the house of the latter on a certain day, on the evening of which A. directed people assembled at that house to go to the race course at P., whither J. & other persons had gone:—*Held*: on the trial of A., evidence was receivable that J. had, at an earlier part of the same day, directed other persons to go to the race course; & it being proved that J. & an armed party of the persons assembled went from the race course to an inn, evidence might be given of what J. said at the inn, it being all one transaction.—*R. v. Shellard* (1840), 9 C. & P. 277.

PART I. SECT. 6, SUB-SECT. 8.—  
O. (c).

**935 i. Acts & words of each conspirator evidence against others—If connected with common purpose.]—**On a trial for conspiracy to defraud by means of the fraudulent & collusive transfer of a pretended promissory note & the institution & prosecution in the civil cts. of an oppressive suit at law based on the note, a deposition made in such civil suit by pltf. therein, one of the accused, may be received & read to the jury as evidence not only against him but also against his co-deft.—*R. v. Murphy* (1891), 17 Q. L. R. 305.—*CAN.*

**935 ii. ———.]—***L. C. & Co., a firm of contractors in Q., tendered to harbour comrs. for work to be done with the approval of the govt., sending in three tenders, one in their own name, & two in the names of others, with a common mistake as to price of a portion of the work in all three. Deft. McQ., whose brother had been admitted to the firm as a partner without the payment of any capital, was both a member of Parliament & of the harbour commission. The three tenders with others were received & opened by the comrs., deft., McG., being present, & were then forwarded to govt. at Ottawa. Deft., McG., went to Ottawa & succeeded in obtaining from govt. engineer particulars of the calculations & results of all the tenders sent in, of which he advised his brother by letters. When the mistake in the price was notified by the govt. engineer to the three tenderers, one tender was withdrawn, one was varied, so as to make it higher than others, & the firm's was allowed to remain as it was with the manifest error, & so became the lowest tender, & was thus accepted. One govt. engineer was given a situation on the harbour commission, & the chief engineer of the Public Works Department received a valuable present from the firm. As soon as the contract was executed, promissory notes to an amount of many thousand dollars were signed by the firm & given to the deft., McG.:—*Held*: (1) the transactions, conversations, & written communications between the conspirators were receivable in evidence in the circumstances. If at first not*

available against both defts. they became so when the proof had so far advanced & cumulated as to indicate the existence of a common design; (2) entries in the books of the firm were evidence against deft., C., & statements prepared therefrom by an accountant were good secondary evidence in the absence of the books withheld by defts.—*R. v. Connolly* (1894), 25 O. R. 151.—*CAN.*

**935 iii. ———.]—**Before the acts of alleged conspirators can be given in evidence there must be some preliminary proof of an acting together, but it is not necessary that a conspiracy should first be proved.—*R. v. Hutchinson* (1904), 11 B. C. R. 24.—*CAN.*

**935 iv. ———.]—**The acts, conduct, & statements of a co-conspirator are admissible if they relate to the common design, being in fact a part of the *res gestae* in the execution of the purpose of the conspiracy with L., which failed, or an attempt to commit the crime of arson itself, the intent of arson being the intent of a conspiracy to commit it:—*Held*: also, that the evidence of L., though of a single act of the deft., was admissible in proof of the intent to defraud, notwithstanding that that intent scarcely needed proof, as it must be inferred from proof of a conspiracy to burn a building which is insured.—*R. v. Wilson* (1911), 19 W. L. R. 657; 1 W. W. R. 272.—*CAN.*

**935 v. ———.]—**Where a crime is charged, & in proving facts leading up to it, the evidence shows that the accused was a party to a criminal conspiracy relating thereto, the evidence of the acts & statements of each conspirator is admissible.—*R. v. Kelly* (1916), 35 W. L. R. 46; 11 W. W. R. 46.—*CAN.*

**935 vi. ———.]—**Statements made in the absence of the accused by persons engaged in an unlawful act are not evidence against the accused who had given directions for such act, unless it appear that all the parties were engaged on such act with a common unlawful object.—*R. v. Petcherini* (1855), 7 Cox, C. C. 79.—*IR.*

**935 vii. ———.]—**An indictment alleged a conspiracy by three persons

to defraud certain persons named, creditors of one of the accused, F., he being then insolvent & in contemplation of bankruptcy, by a pretended sale & pretended payments. Shortly after the alleged pretended sale & payments the accused, F., was adjudicated a bankrupt on a creditor's petition, & F. was subsequently publicly examined in regard to his transactions with the other two accused. The statements made by him on his public examination were admitted on the trial for conspiracy as evidence against all three accused:—*Held*: the crime was complete before the bankruptcy, & that it could not be said that the statements made by F. on his public examination were made in pursuance of the conspiracy to commit it, & that they ought therefore not to have been admitted.—*R. v. Farrell* (1896), 14 N. Z. L. R. 605.—*N.Z.*

**935 viii. ———.]—***H.M. Advocate v. Reid* (1858), 3 Irv. 235; 31 Sc. Jur. 176.—*SCOT.*

**935 ix. ———.]—**The accused was charged under Act 16 of 1908, s. 7, with conspiracy, in that between Nov. 1909, & Feb. 1910, at Johannesburg, he conspired with one C. at San Francisco to commit the crime of uttering in the Transvaal forged banknotes.

The Crown then sought to put to the jury a letter from Cox, San Francisco, to the accused here, dated July 19, 1910, in which Cox writes that he "gave it up for a bad job, as I could not do anything without the fiver, & I have not received the fiver you speak about in your letter. . . . Now I can get the job done in Seattle, but if you are going to send the five note, register the letter. . . . So if you mean what you say, get the N. & I will do the work. . . .":—*Held*: having regard to the distance between the parties, & all the circumstances, that the letter was sufficiently connected with the time laid in the indictment & the subject-matter of accused's two letters to Cox to permit its going to the jury.—*R. v. Gordon* (1910), T. P. D. 272.—*S. AF.*

**s. ——— Documents found in possession of accused or of others.]—**On a charge of seditious conspiracy,



*Sect. 6.—Degrees of criminal liability: Sub-sect. 8, O. (c); sub-sect. 9. Part II. Sect. 1: Sub-sect. 1, A. (a) & (b) i. & ii.]*

**941.** ———.]—Evidence of the acts of a conspirator is admissible against a co-conspirator, if there be evidence to connect the deft. with such acts, & a declaration accompanying an act is a part of the act itself.—*A.-G. v. SELLERS* (1846), 7 L. T. O. S. 187; 10 J. P. 376.

**942.** ———.]—**Not if unconnected with common purpose.**—A count for conspiracy charged that T. & B. conspired to cause certain goods which had been & were imported & brought into the port of London from parts beyond the seas, & in respect whereof certain duties were then & there due & payable to the Queen, to be carried away from the port & delivered to the owners without payment of a great part of the duties, with intent thereby to defraud the Queen. It was proved that B. received the proceeds of a cheque drawn by T. after the goods were passed. The counterfoil of this cheque was offered in evidence, on which an account was written by T., showing, as was suggested, that the cheque was drawn for half the aggregate proceeds of several transactions, one of which corresponded in amount with the difference between the duty paid & the duty really due on the above goods:—*Held*: not evidence against B. The evidence must be rejected on the principle that a mere statement made by one conspirator to a third party, or any act of such conspirator not done in pursuance of the conspiracy, is not evidence for or against another conspirator (LORD DENMAN, C.J.).—*R. v. BLAKE* (1814), 6 Q. B. 126; 13 L. J. M. C. 131; 8 J. P. 596; 8 Jur. 666; 115 E. R. 49.

*Annotations:—Mentd.* Redford v. Birley (1822), 1 State Tr. N. S. 1071; It. v. Hamilton (1846), 10 Jur. 1028; Nash v. R. (1864), 4 B. & S. 935; R. v. McCafferty (1867), 10 Cox, C. C. 603; Mulcahy v. R. (1868), L. R. 3 H. L. 306; R. v. Watkinson (1872), 26 L. T. 853.

**943.** ———.]—Statements of one conspirator are not admissible against another unless they be in furtherance of the conspiracy.—*R. v. PEPPER*, *R. v. PLATT*, [1921] 3 K. B. 167; 90 L. J. K. B. 1152; 85 J. P. 264; 37 T. L. R. 863; 65 Sol. Jo. 715; 16 Cr. App. Rep. 12, C. C. A.

*Annotation:—Mentd.* R. v. Hales (1923), 17 Cr. App. Rep. 193.

**944.** ———.]—**Offence committed in pursuance of conspiracy—Evidence of common purpose.**—A number of persons were charged with murder committed by an act done in the course of a conspiracy for the purpose of liberating a prisoner, of which conspiracy he was cognisant:—*Held*: acts of that prisoner, within the prison, & articles found upon him, were admissible in evidence against the persons so charged.—*R. v. DESMOND* (1868), 11 Cox, C. C. 146.

after the fact of conspiracy between the parties has in the opinion of the judge been *prima facie* established, the acts & declarations of one conspirator in regard to the common design are evidence against the others. On such a charge documents found in the hands of the accused are admissible in evidence & are *prima facie* evidence against him. Documents found in the hands of other persons charged with being parties to the conspiracy & relating to it are also admissible against an accused. Documents found in the hands of parties other than those charged with being parties to the conspiracy are admissible against accused if they relate to the actions & conduct of the persons charged with the conspiracy or to the spread of seditious propaganda as one of the purposes of the conspiracy & can be traced as

coming from a party to the conspiracy. Letters connecting the party to the conspiracy with the act of sending seditious literature is evidence against him & his co-conspirators.—*R. v. RUSSELL*, [1920] 1 W. W. R. 624; 51 D. L. R. 1.—CAN.

**t.** ———.]—**Against conspirator joining later.**—A letter written by one conspirator to another, upon the subject of the conspiracy, may be read in evidence against a third person who had not joined in the conspiracy until after the letter was written.—*BLACKWOOD v. GREGG* (1831), Hayes, 277.—IR.

**Letter written before alleged commencement of conspiracy.**—*Held*: (1) a letter could not be read in support of the charge of conspiracy, libelled as commencing at a date sub-

**945.** ———.]—*R. v. JESSOP* (1887), 16 Cox, C. C. 204.

*Annotation:—Refd.* R. v. Abbott (1903), 67 J. P. 161.

**946.** ———.]—**Explosive Substances Act, 1883 (c. 3), s. 4**, provides that any person who makes or has in his possession & under his control any explosive substance under certain circumstances, shall be liable to penal servitude:—*Held*: if several persons are connected in a common design to have articles, amounting to an explosive substance within the above Act, made for an unlawful purpose, each of the confederacy is responsible in respect of such articles as are in the possession of others connected in the carrying out of their common design.—*R. v. CHARLES* (1892), 17 Cox, C. C. 499.

**947.** ———.]—*R. v. CHAPPLE & BOLINGBROKE* (1892), 66 L. T. 124; 56 J. P. 360; 17 Cox, C. C. 455, C. C. R.

**948.** ———.]—**No evidence offered against one prisoner.**—*R. v. GARDNER & HUMBLER* (1862), 9 Cox, C. C. 332.

**949.** ———.]—*R. v. STANSFIELD, KIRKWOOD & DALE* (1831), 1 Lew. C. C. 118, 145, C. C. R.

**950.** ———.]—**Telephone conversations.**—*R. v. LEWIS & HICKMAN* (1920), 84 J. P. 64.

**951. Acts & words of each conspirator evidence against others—If connected with common purpose.**—*R. v. HORNE TOOKE* (1794), 25 State Tr. 1.

*Annotations:—Refd.* R. v. Stone (1796), 25 State Tr. 1155; Redford v. Birley (1822), 3 Stark. 76; R. v. Parry, Rea & Wright (1837), 7 C. & P. 836; R. v. Meany (1867), 15 W. R. 1082. *Mentd.* Eagleton v. Kingston (1893), 8 Ves. 438; R. v. Lambert (1810), 31 State Tr. 335; R. v. Watson (1817), 32 State Tr. 1; R. v. Smith (1828), 8 B. & C. 341; R. v. Frost (1839), 4 State Tr. N. S. 85; R. v. Zulueta (1843), 1 Car. & Kir. 215; Conway & Lynch v. R. (1845), 5 L. T. O. S. 458; R. v. Grant, Ranken & Hamilton (1848), 7 State Tr. N. S. 507; Mansell v. R. (1857), 8 E. & B. 54.

**952. Papers found at house of conspirator admissible.**—Papers found in the lodgings of a co-conspirator at a period subsequent to the apprehension of prisoner may be read in evidence, although no absolute proof be given of their previous existence, where strong presumption exists that the lodgings had not been entered by any one in the interval between the apprehension & the finding, & where the papers are intimately connected with the objects of the conspiracy as detailed in evidence.

*Qu.*: whether seditious questions & answers found in the possession of a co-conspirator, but not published, may not from their close connection with the nature & object of the conspiracy be read in evidence, although no positive & direct proof be given that use was made of this or any other such instrument, in furtherance of the design. If such positive evidence were to be

sequent to that of the letter.

(2) Where the letter relating to the alleged common design had been directed to one of the panels & found in possession of another it was competent evidence against both although it was not shown that the writer was a conspirator or that the contents were true, or that it was ever seen by the to whom it was addressed.—*ADVOCATE v. CUMMING* (1848), J. Shaw, Just. 17.—SCOT.

**b.** ———.]—**Letter not proved not to be written by conspirator—Found in possession of co-conspirator.**—In a conspiracy a letter evidently relating to the business of the conspiracy, addressed to one of the panels & found in her house three or four days after his apprehension although there is not sufficient proof that it was written

given, the document would certainly be admissible.—*R. v. WATSON* (1817), 2 Stark. 116; 32 State Tr. 1.

*Annotations*.—*Consd. R. v. Blake* (1844), 6 Q. B. 126. *Refd. A.-G. v. Briant* (1846), 15 M. & W. 169. *Mentd. Redford v. Birley* (1822), 1 State Tr. N. S. 1071; *Tooth v. Bagwell* (1825), 2 C. & P. 187; *R. v. Duffy* (1849), 7 State Tr. N. S. 795; *Mulcahy v. R.* (1867), 15 W. R. 446; *R. v. McCafferty* (1867), 10 Cox, C. C. 603; *Marks v. Beyfus* (1890), 63 L. T. 733.

**953. Correspondence between conspirators—As evidence for defence.**—On indictment for a conspiracy, the letters of one of defts. to the other are under certain circumstances admissible in evidence in his favour, to show that he was the dupe of the

other, & not himself a participator in any fraud.—*R. v. WHITEHEAD* (1824), 1 C. & P. 67.

**954. Answers in Chancery by accused admissible.**—On the trial of an indictment for a conspiracy, the answers in Chancery of defts., made on oath by them in a suit instituted against them by prosecutor, are receivable in evidence on the part of the prosecution.—*R. v. GOLDSHEDE* (1844), 1 Car. & Kir. 657.

*Annotation*.—*Apld. R. v. Coote* (1873), L. R. 4 P. C. 599.

#### SUB-SECT. 9.—MISPRISION.

See Part XXI., Sect. 1, *post*.

## Part II.—Original Criminal Jurisdiction.

### SECT. 1.—COURTS OF CRIMINAL JURISDICTION.

#### SUB-SECT. 1.—HIGH COURT OF PARLIAMENT.

##### A. House of Lords.

###### (a) In General.

**955. Petition not maintainable.**—*Fox's (JUSTICE) CASE* (1805), 45 Lords Journals 181, 319, H. L.

###### (b) Trial of Peers.

###### i. When triable.

**956. Treason & felony.**—At the common law, in these four cases only, a peer shall be tried by his peers, in treason, felony, misprision of treason, & misprision of felony, & the statute law which gives such trial, hath reference unto these, or to other offences made treason or felony, his trial by his peers shall be as before. But in this case of a *premunire*, the same being only in effect but a contempt, no trial shall be here in this of a peer by his peers (*FLEMMING, C.J.*).—*R. v. VAUX (LORD)* (1612), 1 Bulst. 197; 12 Co. Rep. 93; 80 E. R. 885.

**957. —.**—*R. v. NORRIS (LORD)* (1616), 1 Roll. Rep. 297; 81 E. R. 498.

**958. Not for contempt.**—*R. v. VAUX (LORD)*, No. 956, *ante*.

**959. Not for breach of the peace.**—*R. v. CARMARTHEN (MARQUIS)* (1720), Fortes. Rep. 359; 92 E. R. 890.

**960. Right of Irish peer.**—*MACGUIRE'S (LORD) CASE* (1845), 4 State Tr. 653.

*Annotations*.—*Refd. R. v. Martin* (1848), 6 State Tr. N. S. 925. *Mentd. Wensleydale Peerage Case* (1856), 8 State Tr. N. S. 479.

**961. —.**—*R. v. GRAVES (LORD)* (1887), 4 State Tr. N. S. 609, n.

**962. Whether right of trial can be waived.**—On the trial of Lord D. before his peers:—*Held*: (1) prisoner had no right of challenge because the panel was made by the Seneschal; (2) no special number of peers was necessary provided there were more than twelve; (3) at least twelve must agree to find prisoner guilty; (4) the High Steward could not speak to the peers in the absence of prisoner; (5) prisoner could not waive his right to trial by his peers & be tried by the country.—*R. v.*

*DACRES (LORD)* (1535), Kel. 56; cited in Moore, K. B. at p. 622; 72 E. R. 798

*Annotations*.—*As to* (2) & (3) *Refd. Audley's Case* (1631), 3 State Tr. 401. *As to* (4) *Refd. Morley's Case* (1666), 6 State Tr. 769. *As to* (5) *Refd. R. v. Knowles* (1694), 12 Mod. Rep. 55; *Generally, Mentd. Calvin's Case* (1609) 7 Co. Rep. 1 a; *Anon.* (1613), 12 Co. Rep. 130; *R. v. Warmole* (1619), Palm. 35; *Stanley's Case* (1663), Kel. 88; *R. v. Plummer* (1701), 12 Mod. Rep. 627; *R. v. Borthwick* (1779), 1 Doug. K. B. 207.

**963. —.**—*AUDLEY'S (LORD) CASE* (1632), 3 State Tr. 401; Hut. 115; 123 E. R. 1140, H. L.

*Annotations*.—*Mentd. Grigg's Case* (1660), T. Raym. 1; *Morley's Case* (1666), 6 State Tr. 769; *Brown's Case* (1673), 1 Vent. 243; *R. v. Warden of the Fleet* (1699), 12 Mod. Rep. 337; *R. v. Azire* (1725), 1 Stra. 633; *R. v. Reading* (1734), Cunn. 140; *R. v. Serjeant* (1826), Ry. & M. 352; *R. v. Story* (1849), 13 J. P. 766; *Reeve v. Wood* (1864), 5 B. & S. 364.

**964. —.**—*R. v. GRAVES (LORD)* (1887), 4 State Tr. N. S. 609, n.

###### ii. Procedure.

**965. Mode of trial—Before Lord High Steward.**

—The name, style & title of office in the case of a proceeding in the Ct. of the High Steward & before the King in Parliament is the same, but the offices, powers & pre-eminences annexed to them differ very widely, & so does the constitution of the cts. where the offices are executed.

In the Ct. of the High Steward he alone is judge in all points of law & practice. The peers triers are merely judges of fact, & are summoned by virtue of a precept from the High Steward to appear before him on the day appointed by him for the trial, *ut rei veritas melius sciri poterit*.

The High Steward's commission, after reciting that an indictment has been found against a peer by the grand jury of the proper county, empowers him to send for the indictment, to convene prisoner before him at such day & place as he shall appoint, then & there to hear & determine the matter of such indictment, to cause the peers triers *tot et tales per quos rei veritas melius sciri poterit* at the same day & place to appear before him, *veritateque inde comperta*, to proceed to judgment according to the law & custom of England, & thereupon to award execution.

The sole right of judicature is in cases of this kind vested in the High Steward, it resides solely

by a co-conspirator is an admissible article of evidence.—*H.M. ADVOCATE v. HUNTER* (1838), 2 Swin. 1.—*SCOT.*

*c. Statements at & after arrest.*—Where a statement of fact made by one of several persons charged with conspiracy is repeated by a detective to another of them & the latter under advice declines to say anything, evidence is inadmissible against

Evidence of a statement made by one of such persons to the prosecutor ought not to be allowed to go to the jury without a caution that it must be disregarded unless they convict the person making it.

A statement made by one of such persons when in custody after the conspiracy is at an end is admissible against others, if it was made for the purpose of protecting the plunder

obtained or of giving a confederate an opportunity to escape.—*R. v. ECCLES* (1881), 7 V. L. R. 36.—*AUS.*

#### PART II. SECT. 1, SUB-SECT. 1.—A. (b) ii.

*d. Trial of peers & commoners—Whether peers sworn to try may object.*—*R. v. LOUDOUN (EARL)* (1834), 10 State Tr. 989.—*SCOT.*

**Sect. 1.—Courts of criminal jurisdiction: Sub-sect. 1, A. (b) ii. & B.; sub-sect. 2, A.]**

in his person, & consequently without this commission, which is but in the nature of a commission, of oyer & terminer, no one step can be taken in order to a trial, & when his commission is dissolved, which he declares by breaking his staff, the ct. no longer exists.—**FERRERS' (EARL) CASE** (1760), *Post*. 138; 19 *State Tr.* 885, H. L.

*See, further, COURTS, Vol. XVI., pp. 133, 134, Nos. 312-320.*

**966. Trial for treason or felony—By indictment.]**—The trial of a peer of the realm for treason or felony is by indictment, & upon this indictment, he shall be arraigned before the constable of England or the High Steward, & he shall be tried by his peers upon their honours, not upon their oaths. There must be twelve peers at least, & the lowest peer shall give his verdict first, & so *seriatim*.—**ANON.** (1399), *Jenk.* 73; 145 *E. R.* 52.

**967. ———.]**—**DIGBIE'S (LORD) CASE** (1626), *Hut.* 131; 123 *E. R.* 1152.

**968. Trial for murder—On coroner's inquisition.]**—**PEMBROKE'S (EARL) CASE** (1678), 6 *State Tr.* 1309, H. L.

**969. Removal of trial—From Central Criminal Court—By certiorari.]**—(1) *Sect. 57 of Offences against the Person Act, 1861 (c. 100)*, extends to a case where the second marriage is celebrated beyond the King's dominions.

(2) Earl R. was arrested & charged with bigamy, subsequently the grand jury found a true bill, & the recorder wrote to the House of Lords informing their lordships that a true bill had been found against Earl R., a peer of the realm. It was moved in the House that the bill of indictment for felony found by the grand jury be removed before the House by writ of *certiorari*. This was done, & Earl R. was allowed to enter into recognisances with no sureties to appear before the House at any time he should be so ordered.—**R. v. RUSSELL (EARL)**, [1901] *A. C.* 446; 70 *L. J. K. B.* 998; 85 *L. T.* 253; 17 *T. L. R.* 685; 20 *Cox, C. C.* 51, H. L.

*Annotations:—As to (1) Rejd. R. v. Audley, [1907] 1 K. B. 383; R. v. Wheat, R. v. Stocks, [1921] 2 K. B. 119. As to (2) Consd. Re Kinross (1905), 74 L. J. P. C. 137.*

**970. Number of peers necessary.]**—**ANON.**, No. 966, *ante*.

**971. ———.]**—**R. v. DACRES (LORD)**, No. 962, *ante*.

**972. ——— Parliament prorogued.]**—(1) On the trial by commission of an indictment for high treason Lord D. pleaded that he ought to be tried by the whole body of the House of Peers in Parliament, because Parliament was still continuing, being under a prorogation, & not dissolved, & because there was some agitation of the matter concerning the prosecution, upon his petition, in the House of Lords:—*Held*: the ct. had jurisdiction & the plea must be overruled.

(2) At the close of the case for the prosecution he applied for an adjournment until the next day, to enable him to review the notes he had taken & prepare his defence:—*Held*: the case must proceed.—**DELAMERE'S (LORD) CASE** (1686), 11 *State Tr.* 510.

*Annotations:—As to (2) Rejd. R. v. Kinloch (1746), 18 State Tr. 395. Generally, Mentd. R. v. Kinnear (1819), 2 B. & Ald. 462; R. v. Winsor (1865), 10 Cox, C. C. 276, 327.*

**973. Right of Lords Spiritual to sit.]**—**R. v. KILMARNOCH (EARL)** (1746), *Post*. 247; 18 *State Tr.* 441, H. L.

**974. Right to bail.]**—A peer of the realm committed by the House of Lords, on an impeachment carried up against him by the Commons, may, on the session being prorogued, or Parliament dissolved, be bailed by the Ct. of K. B., to appear at the Bar of the House of Lords on the first day of the ensuing session, or meeting of Parliament.—**R. v. DANBY (EARL)** (1685), 2 *Show.* 335; *Skin.* 56, 162; 11 *State Tr.* 600; 89 *E. R.* 973.

*Annotations:—Consd. R. v. Paty (1705), 2 Ld. Raym. 1105. Mentd. Anon. (1729), 1 Barn. K. B. 225.*

**975. No right of challenge.]**—**R. v. DACRES (LORD)**, No. 962, *ante*.

**976. ———.]**—**NORTHUMBERLAND'S (DUKE) CASE** (1553), 1 *State Tr.* 765.

**977. ———.]**—**R. v. ESSEX & SOUTHAMPTON (EARLS)** (1600), *Moore, K. B.* 620; 1 *State Tr.* 1334; 72 *E. R.* 797.

*Annotations:—Mentd. Shrewsbury's Case (1612), 12 Co. Rep. 94; Regicides' Case (1660), Kel. 7, 21; Messenger's Case (1668), 6 State Tr. 879; Harding's Case (1690), 2 Vent. 315; R. v. Soleguard (1738), Andr. 231.*

**978. ———.]**—**AUDLEY'S (LORD) CASE** (1632), 3 *State Tr.* 401; *Hut.* 115; 123 *E. R.* 1140, H. L.

*Annotations:—Mentd. Grigg's Case (1660), T. Raym. 1; Morley's Case (1666), 6 State Tr. 769; Brown's Case (1673), 1 Vent. 243; R. v. Warden of the Fleet (1699), 12 Mod. Rep. 337; R. v. Azire (1725), 1 Stra. 633; R. v. Reading (1734), Lee temp. Hard. 79; R. v. Serjeant (1826), Ry. & M. 352; R. v. Story (1849), 13 J. P. 766; Reeve v. Wood (1864), 11 Jur. N. S. 201.*

**979. ———.]**—(1) Lord M. was tried in the Ct. of the High Steward, on an indictment for murder, & by a majority found guilty of manslaughter. He claimed the benefit of the clergy, which was allowed, & he was discharged.

(2) In case the peers who are triers after the evidence given, & prisoner withdrawn, & they gone to consult of their verdict, should desire to speak with any of the judges to have their opinion upon any point of law, if the Lord Steward spoke to the judges to go, they should go to them; but when the Lords asked the judges any question, they should not deliver any opinion, but let them know they were not to deliver any private opinion, without conference with the rest of the judges, & that to be openly done in ct.—**R. v. MORLEY (LORD)** (1666), 1 *Sid.* 277; *Kel.* 53; 6 *State Tr.* 769; 82 *E. R.* 1103.

*Annotations:—As to (1) Rejd. R. v. Mawgridge (1706), Kel. 119; Oneby's Case (1726), 17 State Tr. 29. Generally, Mentd. R. v. Yandell (1792), 4 Term Rep. 521; R. v. Perry (1796), 6 Term Rep. 573; Scaife's Case (1851), 2 Den. 281.*

**980. Questions to Peers in absence of prisoner.]**—**R. v. DACRES (LORD)**, No. 962, *ante*.

**981. ———.]**—**R. v. MORLEY (LORD)**, No. 979, *ante*.

**982. Verdict—How given.]**—**ANON.**, No. 966, *ante*.

**983. ——— May be by majority.]**—**R. v. MORLEY (LORD)**, No. 979, *ante*.

**984. ———.]**—**PEMBROKE'S (EARL) CASE** (1678), 6 *State Tr.* 1309.

**985. ——— Twelve must agree.]**—**R. v. DACRES (LORD)**, No. 962, *ante*.

**B. House of Commons.**

*See PARLIAMENT.*

**SUB-SECT. 2.—HIGH COURT OF JUSTICE.**

**A. King's Bench Division.**

**986. Inherits powers of Court of King's Bench.]**—The present K. B. Div. of the High Ct. stands in

**PART II. SECT. 1, SUB-SECT. 2.—A.**

**a. Newfoundland Supreme Court—**  
*Possesses powers of Court of Queen's*

*Bench in England.]*—The Supreme Ct. of Newfoundland possesses all the powers of the Ct. of Q. B. in England, & can therefore legally order a new

trial in a criminal case.—**R. v. ST. JOHN** (1861), 4 *Nfld. L. R.* 698.—**NFLD.**

**1. Power to quash convictions—**  
*In High Court of Justice—Powers*

the place of the three Ancient Superior Cts. of Common Law, & besides representing the powers & exercising the authority of the Cts. of C. P. & Exch., inherits all the jurisdiction & powers of the Ct. of K. B. (WILLS, J.). The Central Criminal Ct. under Central Criminal Ct. Act, 1834 (c. 36), s. 1, sits by virtue of a general commission & by Jud. Act, 1873 (c. 66), ss. 18, 29, it became a branch of the High Ct. (WILLS, J.).—*R. v. DAVIES*, [1906] 1 K. B. 32; 75 L. J. K. B. 104; 93 L. T. 772; 54 W. R. 107; 22 T. L. R. 97; 50 Sol. Jo. 77, D. C.

*Annotations*.—*Reid*. *R. v. Clarke, Ex p. Crippen* (1910), 103 L. T. 636; *R. v. Daily Mail, Ex p. Farnsworth*, [1921] 2 K. B. 733.

**987. Court of oyer & terminer.**—*R. v. EYRE*, No. 1451, *post*.

**988. Not "court of ordinary criminal jurisdiction"**—*Within Army Act, 1881* (c. 58), s. 190 (31).—The High Ct. is not a ct. of "ordinary criminal jurisdiction" within the provisions of sect. 190 (31) of the above Act.—*FLINT v. A.-G.*, [1918] 2 Ch. 50; 87 L. J. Ch. 488; 118 L. T. 477; 34 T. L. R. 415; 62 Sol. Jo. 535, C. A.

**989. Offences by members of the House of Commons—Offences committed in the House.**—Information against three members of the House of Commons for conspiring to disturb the public tranquility by accusing the administration of an intention to subvert the liberties of the subject & the privileges of Parliament, & for an assault by detaining the speaker forcibly in the chair, to prevent an adjournment of the house, etc.:—*Held*: the Ct. of K. B. might try & punish crimes & misdemeanours committed by members in the House of Commons.—*R. v. ELLIOT* (1830), Cro. Car. 181, 605; 79 E. R. 759, 1121; *revid.* on other grounds (1868), 3 State Tr. 294, H. L.

*Annotations*.—*Folld*. *Bradlaugh v. Gossett* (1884), 12 Q. B. D. 271. *Reid*. *Barnardiston v. Soam* (1874), 3 Keb. 365, 428.

**990.** ———.—*I know of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice* (STEPHEN, J.).—*BRADLAUGH v. GOSSETT* (1884), 12 Q. B. D. 271; 53 L. J. Q. B. 209; 50 L. T. 620; 32 W. R. 552, D. C.

**Privilege of Parliament.**—*See, generally*, PARLIAMENT.

**991. Indictments against corporations—Found at assizes.**—A corpn. aggregate may be indicted by their corporate name for disobedience to an order of justices requiring such corpn. to execute works pursuant to a statute, & if such indictment, be preferred at assizes or sessions, where parties cannot appear by attorney, the proper course is to remove it into this ct. by *certiorari*, & compel appearance by distress infinite. On motion to quash such indictment, as not maintainable against a corpn., the ct. refused to quash, but directed them to demur, reserving leave for them, if judgment should be given against them on the

demurrer, to plead over.—*R. v. BIRMINGHAM & GLOUCESTER RY. CO.* (1842), 3 Q. B. 223; 3 Ry. & Can. Cas. 148; 2 Gal. & Dav. 236; 11 L. J. M. C. 134; 6 Jur. 804; 114 E. R. 492.

*Annotations*.—*Reid*. *R. v. G. N. of England Ry.* (1846), 9 Q. B. 315; *London Joint Stock Bank v. London Corpn.* (1875), 1 C. P. D. 1; *Pharmaceutical Soc. v. London Supply Assoon.* (1879), 4 Q. B. D. 813; *R. v. Tyler & International Commercial Co.*, [1891] 2 Q. B. 588. *Mentd.* *R. v. Tryddyn* (1852), Ball Ct. Cas. 19; *R. v. Stainhall* (1858), 1 F. & F. 363; *R. v. Puck* (1912), 28 T. L. R. 197.

**992. Found at quarter sessions.**—An indictment against a corpn. found at quarter sessions may be removed by *certiorari* into this ct. at the instance of prosecutor without prosecutor entering into the recognisances required by Criminal Procedure Act, 1853 (c. 30), s. 5.

A corporate body cannot appear, in person or by attorney, in the ct. below (COLERIDGE, J.).—*R. v. MANCHESTER CORPN.* (1857), 7 E. & B. 453; 26 L. J. M. C. 65; 28 L. T. O. S. 369; 21 J. P. 165; 3 Jur. N. S. 839; 5 W. R. 373; 119 E. R. 1315, D. C.

*Annotation*.—*Reid*. *Southern Counties Deposit Bank v. Boaler* (1895), 59 J. P. 536.

*See, generally*, CORPORATIONS, Vol. XIII., pp. 408 et seq.

**993. Indictments found by grand jury in Central Criminal Court—Removed by certiorari.**—An indictment was found by the grand jury in the Central Criminal Ct. for perjury committed in the Central Criminal Ct. The perjuries assigned in one count were in respect of an oath taken before a Comr. in Ch., in the City of London, & in the other count, in respect of an oath taken in the Ct. of C. P., in Middlesex. The indictment was removed by *certiorari* into the Ct. of Q. B. & Middlesex was specified as the county in which the indictment should be tried & the jury were taken from that county:—*Held*: the ct. of Q. B. had a discretion to name in the *certiorari* the county or jurisdiction in which the trial was to take place & by the jurors summoned from that jurisdiction the same issues could be tried that would have been tried in the Central Criminal Ct. had the indictment not been removed.—*R. v. CASTRO* (1874), L. R. 9 Q. B. 350; 43 L. J. Q. B. 105; 30 L. T. 320; 38 J. P. 342; *affd.* on other grounds, *sub nom.* *CASTRO v. R.* (1881), 6 App. Cas. 229, H. L.

*Annotations*.—*Mentd.* *R. v. Cox & Railton* (1884), 1 T. L. R. 181; *Dixon v. Farrer* (1886), 17 Q. B. D. 658; *R. v. Poole Corpn.* (1887), 19 Q. B. D. 602, 683; *R. v. Thompson*, [1914] 2 K. B. 99.

—*See, further*, CROWN PRACTICE, Vol. XVII., p. 401, Nos. 2446–2449.

**994. Offences committed abroad—General rule.**—Offences committed out of England are not cognisable by the Ct. of K. B. unless there is a special Act of Parliament for the purpose of giving them jurisdiction. But if any part of the offence has been completed in England, the Ct. of K. B. then has jurisdiction.

It appears that the several false charges made by deft. by which he has defrauded the Govt.

were treated as a substantive motion to quash the conviction.—*R. v. BEEMER* (1888), 15 O. R. 266.—CAN.

**g. Jurisdiction of Court of King's Bench—Criminal matters.**—All matters of crime that come before the Ct. of King's Bench are *prima facie* properly cognisable by it. The absence of any record of any election having been made by accused before the magistrate under Code, s. 501, where accused had the right of such election, does not preclude the ct. from trying him. It is for accused to show that he was not

*analogous to old courts of common law.*]

—The jurisdiction to quash convictions was at the time of the passing of Ontario Jud. Act in the Cts. of Queen's Bench & Common Pleas respectively, & was exercised & exercisable by them respectively sitting in term; the cts. or divisions of the High Ct. of Justice mentioned in sect. 3 (3) of above Act can respectively exercise all the jurisdiction of the high ct. in the name of the high ct. sitting of these respective cts. or divisions are analogous to & represent the sittings of the former cts. of term, & it is to the

sittings of these cts. or divisions that application to quash convictions must be made. The cts. or divisions are not to be confounded with the div. cts., which are a distinct organisation under Jud. Act, & invested thereby with special functions. Sect. 28 of the Act, upon which the supposition that a single judge sitting in ct. had jurisdiction to quash a conviction was founded, refers to civil actions & proceedings only, & where a single judge sitting in ct. heard & determined a motion to quash a conviction, an appeal to the judges of Q. B. Div., from his decision, refusing to quash such

*Sect. 1.—Courts of criminal jurisdiction: Sub-sect. 2, A. & B.; sub-sect. 3, A. & B.; sub-sect. 4.]*

have been in the several returns made by him from Antigua to the Navy Office in London. There is thereby an offence committed in London where such false returns were received, & where the fraud has been complete by their having been there allowed, upon which the jurisdiction of the ct. attaches (LORD KENYON, C.J.).—*R. v. MUNTUN* (1793), 1 Esp. 62.

*Annotation:—Apld. R. v. Oliphant, [1905] 2 K. B. 67.*

**995.** ———. *By public officials.*—*R. v. HOLLOND* (1794), 5 Term Rep. 607; 101 E. R. 340.

*Annotations:—Mentd. R. v. Morley* (1827), 1 Y. & J. 221; *Gwynne v. Burnell* (1840), 6 Bing. N. C. 453; *R. v. O'Connor* (1843), 7 Jur. 719; *R. v. Gomperzt* (1845), 2 Dow. & L. 1001.

**996.** ———. *—*—*—*.—*R. v. PICTON* (1805), 30 State Tr. 225.

*Annotations:—Distd. Anderson v. Gorrie, [1895] 1 Q. B. 668. Refd. Scott v. Seymour* (1862), 1 H. & C. 219; *Re Eyre* (1868), 16 W. R. 754. *Mentd. Lacon v. Higgins* (1822), 3 Stark. 178; *Rowe v. Brenton* (1828), 3 Man. & Ry. K. B. 133; *Barnes v. Stuart* (1834), 1 Y. & C. Ex. 119; *De Bode's Case* (1846), 8 Q. B. 208.

**997.** ———. *Criminal Jurisdiction Act, 1802 (c. 85).*—A deft. indicted here for misdemeanours committed by him in the West Indies in a public capacity under the above Act is not entitled under the statute, upon an affidavit in the common form for putting off a trial upon the absence of a material witness, to put off his trial till return made to writs of *mandamus* to the cts., etc. abroad, to examine witnesses, which are directed to be issued in such cases at the discretion of the Ct. of K. B., but he must lay before the ct. such special grounds by affidavit as may reasonably induce them to think that the witnesses sought to be examined are material to his defence. But the prosecution in such case is of course entitled to writs of *mandamus* for the like purpose.—*R. v. JONES* (1806), 8 East, 31; 103 E. R. 256.

**998.** ———. *—*—*—*.—The above Act for trying & punishing in Great Britain persons holding public employments for offences committed abroad, does not extend to felonies.—*R. v. SHAW* (1816), 5 M. & S. 403; 105 E. R. 1098.

**999.** ———. *—*—*—*.—*R. v. EYRE*, No. 1451, *post*.

**1000.** ———. *—*—*—*.—*R. v. TURNER* (1889), 24 L. Jo. 469, N. P.

**1001. Treason committed abroad—By British subject—Naturalised in enemy state in time of war.**—On a trial for treason the crime charged being an enormous crime the ct. will not entertain a motion to quash the indictment as defective before plea pleaded but will leave prisoner to his remedy by motion in arrest of judgment or by writ of error.

Naturalisation Act, 1870 (c. 14), s. 6, does not empower a British subject to become naturalised in an enemy state in time of war; & the act of becoming naturalised under such circumstances is itself an act of treason, & ineffectual to afford protection against an indictment for treason in subsequently joining the military forces of the enemy.—*R. v. LYNCH*, [1903] 1 K. B. 444; 72 L. J. K. B. 167; 88 L. T. 26; 67 J. P. 41; 51 W. R. 619; 19 T. L. R. 163; 20 Cox, C. C. 468.

*Annotations:—Consd. R. v. Casement, [1917] 1 K. B. 98; R. v. Middlesex Regiment (Commanding Officer) 30th*

given the opportunity to exercise his option.—*R. v. RUSSELL* (1920), 1 W. W. R. 164; 50 D. L. R. 629.—**CAN.**

**h. Jurisdiction of Supreme Court of Canada—Criminal Matters.**—Except for the purpose of inquiry into commitments in a criminal case under an Act of the Parliament of Canada a

judge of the supreme ct. of Canada possesses none of the original powers of the ordinary cts. of common law, whether arising under the common law itself or conferred by Imperial or Provincial statutes. Not only have they not been conferred on the supreme ct., a purely statutory ct. both in its

*Battalion, Ex p. Freyberger, [1917] 2 K. B. 129; Fasbender v. A.-G., [1922] 1 Ch. 232. Refd. Tingley v. Müller* (1917), 86 L. J. Ch. 625; *Re Chamberlain's Settlement, [1921] 2 Ch. 533; Fasbender v. A.-G., Kramer v. A.-G., [1922] 2 Ch. 850.*

**1002.** ———. *—*—*—*.—*Held:* (1) (by C. C. A.) if a British subject be adherent to the King's enemies in his realm by giving to them aid or comfort in his realm or if he be adherent to the King's enemies elsewhere by giving them aid or comfort elsewhere, he is equally adherent to the King's enemies & if he is adherent to the King's enemies he commits treason as defined by Treason Act, 1351 (c. 2); (2) (by K. B. Div.) if a British subject does an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, or which weakens or tends to weaken the power of the King & of the country to resist or attack the enemies of the King & country he gives aid & comfort to the King's enemies within the meaning of the Act.

The United Kingdom being at war with the Empire of Germany, where a British subject went to Germany & there endeavoured to persuade other British subjects, who were prisoners of war in Germany, to join the armed forces of the enemy, & took part in an attempt to land arms & ammunition in Ireland for the use of the enemy:—*Held:* (3) (by C. C. A.) he was guilty of high treason & could be tried in this country.

(4) On a motion to quash the indictment on the ground that it disclosed no offence known to the English law:—*Held:* (by K. B. Div.) the point should be raised at the close of the case for the prosecution.

(5) Counsel retained by the prisoner but not assigned as one of his counsel was heard as *amicus curiæ* in the K. B. Div.—*R. v. CASEMENT*, [1917] 1 K. B. 98; 86 L. J. K. B. 467; 115 L. T. 267, 277; 32 T. L. R. 601, 667; 60 Sol. Jo. 656; 25 Cox, C. C. 480, 503; 12 Cr. App. Rep. 99; 80 J. P. Jo. 316, C. C. A.

#### *B. Chancery Division.*

**1003. General rule.**—*WAKEMAN v. SMITH* (circa 1600), Toth. 12; 21 E. R. 108.

**1004.** ———. *Protection of infants.*—The publication of a libel is a crime, & I have no jurisdiction to prevent the commission of crimes, excepting, of course, such cases as belong to the protection of infants, where a dealing with an infant may amount to a crime—an exception arising from that peculiar jurisdiction of this ct. (LORD ELDON, C.).—*GEE v. PRITCHARD* (1818), 2 Swan. 402; 36 E. R. 670, L. C.

*Annotations:—Folld. Austria (Emperor) v. Day & Kossuth* (1861), 3 De G. F. & J. 217. *Consd. Springhead Spinning Co. v. Riley* (1868), L. R. 6 Eq. 551; *Labouchere v. Hess* (1897), 77 L. T. 559. *Mentd. Albert (Prince) v. Strange, A.-G. v. Strange* (1849), 2 De G. & Sm. 652; *Re Thomson* (1855), 24 L. J. Ch. 599; *Mulkern v. Ward* (1872), L. R. 13 Eq. 619; *Prudential Assce. Co. v. Knott* (1875), 10 Ch. App. 142; *Macmillan v. Dent*, [1907] 1 Ch. 107; *Philip v. Pennell*, [1907] 2 Ch. 577.

**1005.** ———. *—*—*—*.—*AUSTRIA (EMPEROR) v. DAY & KOSSUTH* (1861), 3 De G. F. & J. 217; 30 L. J. Ch. 690; 4 L. T. 494; 7 Jur. N. S. 639; 9 W. R. 712; 45 E. R. 861, L. C. & L. J. J.

*Annotations:—Expld. Springhead Spinning Co. v. Riley* (1868), L. R. 6 Eq. 551. *Consd. Stevens v. Chown, Stevens v. Clark*, [1901] 1 Ch. 894. *Refd. Mulkern v. Ward* (1872), L. R. 13 Eq. 619; *Pattison v. Gifford* (1874), L. R. 18 Eq. 259; *Prudential Assce. v. Knott*

constitution & its jurisdiction, either explicitly or by necessary implication; but the implication from the terms of The Supreme Ct. Act, s. 62, negating their existence is irresistible.—*Re ROBERTS*, [1923] S. C. R. 152; 1 W. W. R. 745; [1923] 1 D. L. R. 629 39 Can. Crim. Cas. 99.—**CAN.**

(1875), 10 Ch. App. 142. **Mentd.** Portugal v. Russell (1861), 31 L. J. Ch. 34; A.-G. v. Sillem (1863), 2 H. & C. 431; Ainsworth v. Walmsley (1866), L. R. 1 Eq. 518; U. S. A. v. McRae (1867), L. R. 4 Eq. 327; Hole v. Bradbury (1879), 12 Ch. D. 886; Levy v. Walker (1879), 16 Ch. D. 436; *Re Rivière's Trade Mk.* (1884), 26 Ch. D. 48; Foster v. Globe Venture Syndicate (1900), 82 L. T. 253; Slack v. Leeds Industrial Co-op. Soc., [1923] 1 Ch. 431.

SUB-SECT. 3.—COURTS OF ASSIZE, OYER AND TERMINER, AND GAOL DELIVERY.

A. In General.

**1006. Part of High Court—Judicature Act, 1873 (c. 66), s. 16.]**—*R. v. DUDLEY & STEPHENS*, No. 334, *ante*.

**1007. ——— Commissioner of assize.]**—(1) By sects. 16 & 29 of the above Act, the ct. of a comr. of assize is made a branch of the High Ct. (WILLS, J.).

(2) The fact that the Central Criminal Ct. had become, by virtue of sects. 16 & 29 of the above Act, a branch of the High Ct. was not called to the attention of the Ct. The Central Criminal Ct. stands upon precisely the same footing, for the present purpose, as the assize cts. (WILLS, J.).—*R. v. PARKE*, [1903] 2 K. B. 432; 72 L. J. K. B. 839; 89 L. T. 439; 67 J. P. 421; 52 W. R. 215; 19 T. L. R. 627, D. C.

*Annotations*:—**Refd.** *R. v. Davies*, [1906] 1 K. B. 32; *R. v. Puck* (1912), 28 T. L. R. 197. **Mentd.** *R. v. Clarke*, *Ex p. Crippen* (1910), 103 L. T. 636.

**1008. Extent of commission.]**—LAUGHTON'S CASE (1596), 3 Co. Inst. 55; cited 1 Hale, P. C. 413.

*Annotations*:—**Refd.** Foxley's Case (1601), 5 Co. Rep. 109 a; Bengal Advocate General v. Surinmoye Dossce (1863), 9 Moo. Ind. App. 391.

**1009. — Of gaol delivery.]**—Deft., in a case of misdemeanour, for which he was indicted at the quarter sessions, & in which he was entitled to traverse, did traverse:—**Held**: this traverse was to the next sessions, & not to assizes, which came before the next sessions, & deft. being imprisoned in the gaol on this charge, the judge, at the assizes, would not discharge him on his own recognisance.

If prisoner be committed to the gaol for trial at the quarter sessions which are to be held after assizes, the judge at assizes will discharge him on his own recognisance if there be no indictment preferred against such prisoner at the assizes.

The judge's commission of gaol delivery applies only to untried prisoners in the gaol, & not to untried prisoners in houses of correction.—*R. v. ARLETT* (1848), 2 Car. & Kir. 596; 3 Cox, C. C. 431.

**1010. Division into more than one court.]**—Under a commission of oyer & terminer, not only may the general ct. be divided into as many cts. as convenience may require, but each separate ct. is to be considered as held not only before the judge actually sitting, but also, constructively, before all the members of the commission then acting under it (COCKBURN, C.J.).

The Legislature, in establishing the Central Criminal Ct., to exercise jurisdiction in criminal matters, not only over the area of the City of London, but also over a large district taken from the adjoining counties, intended that the administration of justice should be conducted in the ct. thus established according to the universal practice of all other cts. of oyer & terminer (COCK-

BURN, C.J.).—**LEVERSON v. R.** (1869), L. R. 4 Q. B. 394; 10 B. & S. 404; 38 L. J. M. C. 97; 20 L. T. 485; 33 J. P. 485; 18 W. R. 251; 11 Cox, C. C. 286.

**1011. Whether general gaol delivery is an assize.]**—*R. v. RAMSDEN* (1843), 2 L. T. O. S. 288, n.

**1012. Status of clerk of assize & clerk of arraigns.]**—*MILWARD v. THATCHER* (1787), 2 Term Rep. 81; 100 E. R. 45.

*Annotations*:—**Mentd.** *R. v. Bristol Corpn.* (1822), 1 Dow. & Ry. K. B. 389; *R. v. Jones* (1831), 1 B. & Ad. 677; *R. v. Patteson* (1832), 4 B. & Ad. 9; *R. v. Poole* (1837), 1 Jur. 942.

B. Central Criminal Court.

**1013. Part of High Court—Judicature Act, 1873 (c. 66), ss. 16, 29.]**—*R. v. PARKE*, No. 1007, *ante*.

**1014. —.]**—*R. v. DAVIES*, No. 986, *ante*.

**1015. On same footing as assize courts.]**—*R. v. PARKE*, No. 1007, *ante*.

**1016. — May sit as more than one court.]**—*LEVERSON v. R.*, No. 1010, *ante*.

**Whether certiorari lies—To transfer indictment to High Court for quashing.]**—*See CROWN PRACTICE*, Vol. XVI.,

SUB-SECT. 4.—COURTS OF QUARTER SESSIONS.

**1017. Jurisdiction limited by statute.]**—*R. v. YARRINGTON* (1710), 1 Salk. 406; 91 E. R. 353.

*Annotations*:—**Refd.** *R. v. Gibbs* (1801), 1 East, 173; *Ex p. Bartlett* (1843), 7 Jur. 649.

**1018. —.]**—*R. v. ALSOP* (1691), 4 Mod. Rep. 49; 87 E. R. 256.

**1019. —.]**—*R. v. BUGGS* (1694), 4 Mod. Rep. 379; 87 E. R. 454; *sub nom.* *R. v. BRIGGS*, Comb. 252.

**1020. —.]**—*R. v. SMITH* (1705), 2 Ld. Raym. 1144; 2 Salk. 680; 92 E. R. 257.

**1021. —.]**—*R. v. COCK* (1815), 4 M. & S. 71; 105 E. R. 762.

**1022. — Larceny on high seas.]**—Prisoner having stolen some watches on board a British ship on the high seas, was afterwards apprehended in the borough of S. & tried for the offence at the quarter sessions for that borough:—**Held**: he was rightly tried there under the provisions of Larceny Act, 1861 (c. 96), s. 115.—*R. v. PEEL* (1862), L. & C. 231; 1 New Rep. 66; 32 L. J. M. C. 65; 7 L. T. 336; 26 J. P. 757; 8 Jur. N. S. 1185; 11 W. R. 40; 9 Cox, C. C. 220, C. C. R.

**1023. — Conspiracy.]**—An indictment at quarter sessions alleged that defts., contriving & intending to defraud B. of his money, unlawfully, knowingly, & designedly did amongst themselves combine, conspire, confederate & agree together by divers false pretences against the form of the statute in that case made & provided, B. of his money to defraud, against the form of the statute:—**Held**: the quarter sessions had jurisdiction to try this.—*LATHAM v. R.* (1864), 5 B. & S. 635; 4 New Rep. 329; 33 L. J. M. C. 197; 10 L. T. 571; 28 J. P. 727; 10 Jur. N. S. 1145; 12 W. R. 908; 9 Cox, C. C. 516; 122 E. R. 968.

*Annotation*:—**Mentd.** *R. v. Paul* (1890), 25 Q. B. D. 202.

**1024. — Person living on earnings of prostitution—Criminal Law Amendment Act, 1912 (c. 20),**

PART II. SECT. 1, SUB-SECT. 3.—A.

**1009i. Extent of commission—Of gaol delivery.]**—The commission authorises the judges to deliver the gaols, not of this or that prisoner, but *de prisonariis in ea existentibus*, of all prisoners & malefactors therein. There is no exception of any crime or of any J.—VOL. XIV.

offender; the gaols are to be delivered of all offenders therein.—*R. v. M'CARTIE* (1859), 11 I. C. L. R. 216.—IR.

PART II. SECT. 1, SUB-SECT. 4.  
**k. Jurisdiction limited by statute—Uttering forged note.]**—Deft. was con-

victed at the quarter sessions on an indictment for uttering a promissory note purporting to be made by F. for £4 10s. with intent to defraud, knowing it to be forged. Some boys had been amusing themselves with writing promissory notes & imitating persons' signatures, & among them



1.—*Courts of criminal jurisdiction: Sub-sects. 4 & 5.]*

s. 7 (5).—On an indictment for the offence of knowingly living on the earnings of prostitution, a male person after a previous conviction for a similar offence can, under sect. 7, sub-sect. 5 of the above Act, be tried by a ct. of quarter sessions.—*R. v. HILL, R. v. CHURCHMAN*, [1914] 2 K. B. 386; 83 L. J. K. B. 820; 110 L. T. 831; 78 J. P. 303; 24 Cox, C. C. 150; 10 Cr. App. Rep. 56, C. C. A.

**1025. Right to find indictment for offence not triable at sessions.]**—Where an indictment had been found at sessions for an offence, which, by Quarter Sessions Act, 1842 (c. 38), the sessions is incompetent to inquire into, a *certiorari* to remove the indictment into this ct. & a *habeas corpus* to bring up deft. from the Queen's prison to take his trial, were granted by order of the ct.—*R. v. PHILLIPS* (1846), 8 L. T. O. S. 4; 2 Cox, C. C. 114.

**1026.** —[*R. v. STURT* (1846), 10 J. P. Jo. 788.

See Part VI., Sect. 5, *post*.

**1027. Power to respite judgment from one session to another.]**—A ct. of quarter sessions has power to respite a judgment from one session to another without adjourning the session.—*KEEN v. R.* (1847), 10 Q. B. 928; 2 New Mag. Cas. 271; 3 New Sess. Cas. 25; 16 L. J. M. C. 180; 9 L. T. O. S. 313; 12 J. P. 4; 11 Jur. 1060; 2 Cox, C. C. 341; 116 E. R. 352.

*Annotations:—Consd. R. v. Westmoreland JJ.* (1868), L. R. 3 Q. B. 457. *Refd. Campbell & Haynes v. R.* (1847), 2 Cox, C. C. 463; *R. v. Belton* (1848), 12 J. P. 232; *R. v. Staffordshire JJ.* (1857), 3 Jur. N. S. 1148; *R. v. McLain, R. v. Barr* (1922), 91 L. J. K. B. 562.

**1028. Power to pass sentence at subsequent sessions—Death of recorder.]**—A prisoner was convicted at borough quarter sessions but sentence was postponed pending the hearing of an appeal to the Ct. of Criminal Appeal. The appeal was dismissed. The recorder having died before the next quarter sessions:—*Held*: the new recorder had jurisdiction to pass sentence upon prisoner.—*R. v. PEPPER, R. v. PLATT*, [1921] 3 K. B. 167; 90 L. J. K. B. 1152; 85 J. P. 264; 37 T. L. R. 863; 65 Sol. Jo. 715; 16 Cr. App. Rep. 12, C. C. A. *Annotation:—Refd. R. v. Hales* (1923), 17 Cr. App. Rep. 193.

See Part VII., Sect. 7, sub-sect. 17, *post*.

**1029. Should not sit contemporaneously with assizes.]**—The authority of cts. of quarter sessions, whether for a county or a borough, is not in law either determined or suspended by the coming by the judges into the county under their commission of assize, oyer & terminer & general gaol delivery; although generally speaking, it would be inconvenient & improper that cts. of quarter sessions for counties should be held concurrently with assizes for the same counties.—*SMITH v. R.* (1849), 13 Q. B. 738; 3 New Mag. Cas. 223; 3 New Sess. Cas. 564; 18 L. J. M. C. 207; 14 L. T. O. S. 84; 13 Jur. 850; 3 Cox, C. C. 586; 116 E. R. 1446.

was one with F.'s name. The papers were put into the fire, but this note was carried up the chimney by the draught & fell into the street, where it was picked up by deft. A person who was with him at the time, said that he thought it was not genuine, & advised him to destroy it; but deft. kept it, & afterwards passed it off, telling the person who took it that it was good:—*Held*: deft. was guilty of a felonious uttering, but the conviction was quashed, for the case should not have been tried at the quarter sessions.—*R. v. DUNLOP* (1857), 15 U. C. R. 118.—**CAN.**

**1. — Forgery.]**—The quarter ses-

sions has no jurisdiction to try the offence of forgery.—*R. v. McDONALD* (1871), 31 U. C. R. 337.—**CAN.**

**m. — Perjury.]**—A recognisance to appear for trial on a charge of perjury at the sessions was wrong, as the ct. had no jurisdiction in perjury.—*R. v. CURRIE* (1871), 31 U. C. R. 582.—**CAN.**

**n. — Power to fine & imprison for assault.]**—The ct. of quarter sessions is a ct. of record, & has power, in the case of an assault, to pronounce a sentence of fine & costs of prosecution, & imprisonment in default of payment; & a warrant of commitment under the seal of the ct., or signature of the

**1030. No power to sentence incorrigible rogue—Previous conviction as such by justices necessary—Vagrancy Act, 1824 (c. 83).]**—On Aug. 12, 1905, applt. was convicted at C. petty sessions of being an idle & disorderly person under sect. 3 of above Act. On Dec. 10, 1907, he was convicted under the same section of the same offence at A. petty sessions. On Oct. 24, 1908, he was convicted at C. petty sessions of being an incorrigible rogue in that he "did unlawfully wander abroad to beg alms," the deft. having been twice previously convicted of being an idle & disorderly person, & he was committed to quarter sessions, where, on Oct. 28, 1908, he was sentenced to twelve months' imprisonment with hard labour as an incorrigible rogue:—*Held*: the order of quarter sessions must be quashed, inasmuch as under sect. 5 of the above Act, before a person can be convicted as an incorrigible rogue there must be evidence that he has been previously convicted as a rogue & vagabond, & there was no evidence upon the face of the record that applt. had been so convicted.—*R. v. JOHNSON*, [1909] 1 K. B. 439; 78 L. J. K. B. 290; 100 L. T. 464; 73 J. P. 135; 25 T. L. R. 229; 53 Sol. Jo. 288; 22 Cox, C. C. 43; 2 Cr. App. Rep. 13, C. C. A.

*Annotation:—Refd. R. v. EVANS*, [1915] 2 K. B. 762.

**1031. — — — — —.]**—Before a ct. of quarter sessions can sentence an offender under Vagrancy Act, 1824 (c. 83), s. 10, it is necessary that he should have been convicted of being an incorrigible rogue by a ct. of summary jurisdiction under sect. 5 of the Act. It is not sufficient that the ct. of summary jurisdiction should have convicted him of matters on conviction whereof he is to be deemed an incorrigible rogue if the ct. does not actually proceed to convict him of being an incorrigible rogue.—*R. v. EVANS*, [1915] 2 K. B. 762; 84 L. J. K. B. 1603; 113 L. T. 508; 79 J. P. 415; 31 T. L. R. 410; 59 Sol. Jo. 496; 25 Cox, C. C. 72; 11 Cr. App. Rep. 178, C. C. A.

See, further, POOR LAW.

**SUB-SECT. 5.—COURTS OF SUMMARY JURISDICTION.**

**1032. Right of accused to be tried by jury—Summary Jurisdiction Act, 1879 (c. 49), s. 17—Must be informed of right—Effect of conviction on plea of guilty.]**—Where a person appears before a ct. of summary jurisdiction charged with an offence to which sect. 17 of the above Act applies, the ct. ought in pursuance of sub-sect. 2 to inform him of his right to be tried by a jury before he pleads to the charge. If he be not informed of that right & after the charge has been gone into pleads guilty the conviction is bad.

*Semble*: it is immaterial whether or not he knew of his right to be tried by a jury & immaterial whether or not the ct. knew, before the proceedings commenced, that he meant to plead guilty

chairman, is not necessary.—*OVENS v. TAYLOR* (1868), 19 C. P. 49.—**CAN.**

**o. Removal of indictment found at quarter sessions—Case of great consequence.]**—Conditional order granted to remove an indictment found at the quarter sessions against a co., it appearing, by affidavit, that it was a cause of too great consequence to be tried there.—*BURKE v. OIL GAS CO.* (1828), 1 Ir. L. Rec. 1st ser. 466.—**IR.**

**PART II. SECT. 1, SUB-SECT. 5.**

**p. Whether court of record.]**—Cts. of justice of the peace, established by 4 Wm. 4, c. 45, are not cts. of record. A limited power given to a

authorises police magistrates to try & convict persons charged with forgery is *ultra vires* the Provincial Legislature.—R. v. TOLAND (1892), 22 O. R. 505.—CAN.



**Sect. 1.—Courts of criminal jurisdiction: Sub-sects. 5 & 6. Sect. 2: Sub-sects. 1 & 2, A.]**

disclosed by the depositions; & in cases not falling within Vexatious Indictments Act, 1859 (c. 17), or in which the operation of that Act is limited by Criminal Law Amendment Act, 1867 (c. 35), s. 1, counts may be added to the indictment in respect of any indictable offence disclosed by the depositions, although accused was not summoned before the justices in respect of such offence.—*R. v. BROWN*, [1895] 1 Q. B. 119; 64 L. J. M. C. 1; 72 L. T. 22; 59 J. P. 485; 43 W. R. 222; 11 T. L. R. 54; 39 Sol. Jo. 64; 18 Cox, C. C. 81; 15 R. 59, C. C. R.

**Annotations:—***Reid. R. v. Bradbury, R. v. Edlin*, [1921] 1 K. B. 562. **Mentd.** *R. v. Worton* (1894), 72 L. T. 29; *Hawke v. Dunn*, [1897] 1 Q. B. 579; *Stoddart v. Argus Printing Co.*, [1901] 2 K. B. 470; *Ashley & Smith v. Hawke* (1903), 89 L. T. 538; *Taylor v. Monk* (1914), 83 L. J. K. B. 1125.

**1041. Jurisdiction to hear charge of assault—Where title to or interests in land in question—Damage to common lands—Offences against the Person Act, 1861 (c. 100), s. 46.]—An assault was committed by one commoner on another in order to prevent a horse & cart being led across the common & thus injuring the pasture:—*Held*: the jurisdiction of the justices to deal with the assault was not ousted, as no claim arose as to any title to any lands or any interest therein under sect. 46 of the above Act.—*R. v. FRENCH*, [1902] 1 K. B. 637; 71 L. J. K. B. 382; 86 L. T. 587; 66 J. P. 487; 50 W. R. 555; 18 T. L. R. 440; 46 Sol. Jo. 360; 20 Cox, C. C. 200, D. C.**

*See, also, MAGISTRATES.*

**SUB-SECT. 6.—COURTS OF SPECIAL CRIMINAL JURISDICTION.**

**Cambridge University—Vice-Chancellor's Court.]**

—*See* COURTS, Vol. XVI., pp. 198, 199.

**Oxford University—Chancellor's Court.]—See** COURTS, Vol. XVI., pp. 200–202.

**Courts-martial.]—See** ROYAL FORCES.

**Naval courts.]—See** ROYAL FORCES.

**Ecclesiastical courts.]—See** ECCLESIASTICAL LAW.

**SECT. 2.—LIMITS OF CRIMINAL JURISDICTION.**

**SUB-SECT. 1.—IN GENERAL.**

**1042. Territorial jurisdiction—General rule.]—**Some of a large number of Chinese coolies, who were being taken from China to Peru in a French ship, killed the captain & several of the French

crew, & then took the ship back to China:—*Held*: (1) they were guilty of piracy *jure gentium*; (2) the piracy was not an offence against the law of China within the meaning of Hong Kong Ordinance, No. 2, of 1850; (3) if they were punishable by the law of China, it was only because they had committed an act of piracy, which *jure gentium* was justiciable everywhere.

(4) Although any nation may make laws to punish its own subjects for offences committed outside its own territory, still the general principle of criminal jurisprudence is that the quality of the act depends on the law of the place where it is done (MELLISH, L.J.).—*A.-G. FOR COLONY OF HONG KONG v. KWOK-A-SING* (1873), L. R. 5 P. C. 179; 42 L. J. P. C. 64; 29 L. T. 114; 37 J. P. 772; 21 W. R. 825; 12 Cox, C. C. 565, P. C.

**Annotations:—***Generally, Mentd. Cox v. Hakes* (1890), 15 App. Cas. 506; *Sivewright v. Allen*, [1906] 2 K. B. 81; [1907] 3 K. B. 424, local.

jurisdiction over the crime belongs to the country where the crime is committed, & except over her own subjects, Her Majesty & the Imperial Legislature have no power whatever (LORD HALSBURY, C.).—*MACLEOD v. A.-G. FOR NEW SOUTH WALES*, [1891] A. C. 455; 60 L. J. P. C. 55; 65 L. T. 321; 7 T. L. R. 703; 17 Cox, C. C. 341, P. C.

**Annotations:—***Reid. Swift v. A.-G. for Ireland*, [1912] A. C. 276. **Mentd.** *Makin v. A.-G. for New South Wales* (1893), 69 L. T. 778; *A.-G. for Canada v. Cain, A.-G. for Canada v. Gilhula*, [1906] A. C. 542.

**1044. ———.]—All jurisdiction is properly territorial & extra territorium *jus dicenti, impune non paretur*. Territorial jurisdiction attaches upon all persons either permanently or temporarily resident within the territory while they are within it, but it does not follow them after they have withdrawn from it, & when they are living in another independent country (LORD SELBORNE).—*GURD-YAL SINGH (SIRDAR) v. FARIDKOTE (RAJAH)*, [1894] A. C. 670; 10 T. L. R. 621; 11 R. 340, P. C.**

**Annotations:—***Reid. Emanuel v. Symon*, [1908] 1 K. B. 302; *Jaffer v. Williams* (1908), 25 T. L. R. 12; *Gavin Gibson v. Gibson*, [1913] 3 K. B. 379; *Phillips v. Batho*, [1913] 3 K. B. 25. **Mentd.** *Pemberton v. Hughes*, [1899] 1 Ch. 781.

**1045. ——— Shore between high & low water mark.]—**The part of the sea shore comprised between high & low water mark forms part of the body of the adjoining county, the justices of which, & not the Admty., have jurisdiction to take cognisance of offences there committed, whether or not committed when the shore is covered with water.—*EMBLETON v. BROWN* (1860), 3 E. & E. 234; 30 L. J. M. C. 1; 6 Jur. N. S. 1298; 121 E. R. 429.

**PART II. SECT. 2, SUB-SECT. 1.**

**1042 i. Territorial jurisdiction—General rule.]—**At common law, no person could be tried for any offence except in the county where it was committed.—*R. v. HAYES* (1801), Rowe, 565.—*IR.*

**1042 ii. ———.]—Where** deft. counselled a woman in Vancouver to submit to an operation in Seattle, to procure her miscarriage:—*Held*: no act beyond the borders of Canada can be an offence against the law of Canada, unless made so by statute, & to counsel the commission of an act, which if performed in Canada would be a crime in Canada, is not an offence against the laws of Canada.—*R. v. WALKER* (1908), 14 B. C. R. 1; 8 W. L. R. 857; 14 Can. Crim. Cas. 122.—*CAN.*

**1042 iii. ———.]—A police magis-**trate for a certain city has no jurisdiction to convict for an offence against a provincial statute committed beyond

the limits thereof, even though accused was found or apprehended or in custody within the limits, Criminal Code, s. 577, not being applicable to prosecutions for offences against provincial statutes.—*R. v. COYNE*, [1918] 3 W. W. R. 267; 41 D. L. R. 225.—*CAN.*

**1042 iv. ———.]—The effect of** Merchant Shipping Act, 1894 (c. 60), s. 684, is that when an offence against the Act is committed in any part of H.M.'s dominions, it may be tried in any other part of H.M.'s dominions in which the offender may be, & it is not necessary in such a case that that indictment should fictitiously allege that the offence was committed within the local jurisdiction of the ct. in which the offence is to be tried.—*R. v. HINDE* (1902), 22 N. Z. L. R. 436.—*N.Z.*

**1042 v. ———.]—Though the Ct.** of Appeal have decided that the Crimes Act, 1908, s. 224 (1) (a), which defines the offence of bigamy as "the act of a

person who, being married, goes through a form of marriage with any other person in any part of the world," is beyond the power of the New Zealand Parliament in so far as it purports to deal with crime beyond the territorial limits of the Dominion, the invalid part of the enactment is severable from the remainder. The severance may be effected by the omission of the words "in any part of the world," which will leave a complete definition of the crime of bigamy without the addition of the words "in New Zealand," since these words are necessarily implied.—*R. v. JACKSON*, [1919] N. Z. L. R. 607.—*N.Z.*

**1042 vi. ———.]—Where** there was no evidence to show that accused, who was charged with forgery & altering a forged instrument, had altered the instrument in any place within the jurisdiction of the circuit ct. where he was indicted & tried, the presiding judge directed the jury to return a

**1046. — Territorial waters—Collision between British & foreign ships—Death on British ship.]—***R. v. KEYN*, No. 1124, *post*.

**1047. Offence committed abroad—Remedy in England.]—**An information, being merely local, will not lie in this country for an assault committed in Newfoundland; the remedy in this country would be merely civil.—*R. v. HOOPER* (1734), *Sess. Cas. K. B.* 71; *Kel. W.* 190; 93 *E. R.* 72; *sub nom. R. v. HOOKER*, *Ridg. temp. H.* 31; 7 *Mod. Rep.* 193.

*Annotation:—Refd. R. v. Baxter* (1731), 2 *Stra.* 918.

**1048. — Jurisdiction of English Courts.]—***R. v. MUNTON*, No. 994, *ante*.

**1049. Application of criminal statutes—General rule.]—**All criminal statutes are in their terms general, but they apply only to offences committed within the territory or by British subjects. When the Legislature intends the statute to apply beyond the ordinary territorial authority of the country, it so states expressly in the statute (*BRETT*), *L.J.*—*NIBOYET v. NIBOYET* (1878), 4 *P. D.* 1; 48 *L. J. P.* 1; 39 *L. T.* 486; 27 *W. R.* 203, *C. A.*

*Annotations:—Mentd. Harvey v. Farnie* (1882), 8 *App. Cas.* 43; *Ingham* (falsely called *Sachs v. Sachs* (1886), 56 *L. T.* 920; *Turner v. Thompson* (1888), 13 *P. D.* 37; *Forsyth v. Forsyth*, *Eccles & Foster* (1890), 63 *L. T.* 263; *Hurley v. Hurley & Menzies* (1892), 67 *L. T.* 384; *Linke* (otherwise *Van Aerde*) *v. Van Aerde* (1894), 10 *T. L. R.* 426; *Le Mesurier v. Le Mesurier*, [1895] *A. C.* 517; *Armstrong v. Armstrong*, [1898] *P.* 178; *Pemberton v. Hughes*, [1899] 1 *Ch.* 781; *Roberts v. Brennan*, [1902] *P.* 143; *Lowenfeld v. Lowenfeld*, *Corbett Intervening* (1903), 19 *T. L. R.* 443; *Ogden v. Ogden*, [1908] *P.* 46; *R. v. Hammersmith Superintendent Registrar of Marriages, Ex p. Mir-Anwaruddin*, [1917] 1 *K. B.* 634; *Anghinelli v. Anghinelli*, [1918] *P.* 247; *Keyes v. Keyes & Gray*, [1921] *P.* 204; *Lord Advocate v. Jaffrey*, [1921] 1 *A. C.* 146; *Graham v. Graham*, [1923] *P.* 31; *Mitford v. Mitford*, [1923] *P.* 130.

**1050. — —.]—**If there be an unlawful preparation of an expedition by some person within Her Majesty's dominions, any British subject who assists in such preparation will be guilty of an offence under Foreign Enlistment Act, 1870 (c. 90), s. 11, even though he renders the assistance from a place outside Her Majesty's dominions.

It is no doubt clear that in order to bring a case within sect. 11 of the Act there must be a preparation in the Queen's Dominions, but I think that, when you have got that fact established, there may be assistance in such preparation, or an employment of the kind mentioned in the sect., outside the Queen's Dominions which will amount to an offence against the Act, if the person tendering such assistance or accepting such employment be a subject of Her Majesty (*LORD RUSSELL, C.J.*).

If any construction otherwise be possible an Act will not be construed as applying to foreigners in respect of acts done by them outside the dominions of the Sovereign power enacting (*LORD RUSSELL, C.J.*).

The preparations mentioned in sect. 11 of this Act are preparations made either by subjects of the Queen or by foreigners in any part of the Queen's Dominions (*LORD RUSSELL, C.J.*).—*R. v. JAMESON*, [1896] 2 *Q. B.* 425; 65 *L. J. M. C.* 218; 75 *L. T.* 77; 60 *J. P.* 662; 12 *T. L. R.* 551; 18 *Cox, C. C.* 392.

*Annotations:—Mentd. R. v. Audley*, [1907] 1 *K. B.* 383; *R. v. Stride & Millard*, [1908] 1 *K. B.* 617; *R. v. Porter* (1909), 3 *Cr. App. Rep.* 237; *R. v. Crowe, Ex p. Sekgomo*, [1910] 2 *K. B.* 576; *Coldingham Parish Council v. Smith*, [1918] 2 *K. B.* 90.

verdict of not guilty.—*R. v. ACKERMAN* (1917), *C. P. D.* 108.—*S. AF.*

**r. Offence committed abroad—Jurisdiction of Canadian courts—Larceny.]**

—On an indictment for stealing, it appeared that the goods were taken in the state of Maine & brought into this province:—*Held*: in the absence

of proof that the taking were larceny according to the laws of Maine, prisoner could not be convicted of larceny here.—*R. v. HILL* (1863), 5 *All.* 630.—*CAN.*

## SUB-SECT. 2.—OFFENCES COMMITTED OUTSIDE THE JURISDICTION.

### A. By British Subjects.

**1051. Treason committed abroad—In Ireland.]—**Treason committed in Ireland, by an Irish peer, cannot be tried in England.—*ANON.* (1577), 3 *Dyer*, 360 b; 73 *E. R.* 807.

*Annotation:—Refd. Calvin's Case* (1608), 7 *Co. Rep.* 1 a.

**1052. — —.]—MACGUIRE'S (LORD) CASE** (1645), 4 *State Tr.* 653.

*Annotations:—Refd. R. v. Martin* (1848), 6 *State Tr. N. S.* 925. *Mentd. Wensleydale Peerage Case* (1856), 8 *State Tr. N. S.* 479.

**1053. — —.]—**A person charged with high treason committed in Ireland may be tried in England in the Ct. of K. B. or by commission in any part of England.—*PLUNKET'S CASE* (1681), 8 *State Tr.* 447.

**1054. — —.]—***R. v. KINLOCK* (1746), 18 *State Tr.* 395; 1 *Wils.* 157; *Post.* 16; 95 *E. R.* 547.

*Annotations:—Consd. R. v. Johnson* (1805), 6 *East.* 583. *Refd. Conway & Lynch v. R.* (1845), 5 *L. T. O. S.* 458; *R. v. Newton* (1849), 18 *L. J. M. C.* 201; *R. v. Davison* (1860), 2 *F. & F.* 250; *R. v. Charlesworth* (1861), 1 *H. & S.* 460; *R. v. Winsor* (1866), 10 *Cox, C. C.* 276. *Mentd. R. v. Grainger* (1765), 3 *Burr.* 1617; *R. v. Frost* (1839), 9 *C. & P.* 129; *R. v. Fitzgerald* (1843), 1 *Car. & Kir.* 201; *R. v. O'Connell* (1843), 2 *L. T. O. S.* 193; *R. v. Duffy* (1846), 7 *L. T. O. S.* 9.

**1055. — —.]—HARDIE'S CASE** (1820), 1 *State Tr. N. S.* 609.

**1056. — —.]—British subject naturalised in enemy state—During time of war.]—***R. v. LYNCH*, No. 1001, *ante*.

**1057. — —.]—Treason committed in Germany.]—***R. v. CASEMENT*, No. 1002, *ante*.

**1058. Murder & manslaughter**  
*BERS'S CASE* (1709), cited 8 *Mod. Rep.* at p. 144; 1 *East, P. C.* 370; 88 *E. R.* 109.

*Annotation:—Refd. R. v. Athos* (1723), 8 *Mod. Rep.* 135.

**1059. — —.]—By British subject in foreign state—British subject murdered.]—***R. v. EALING (or ELY)* (1720), 1 *East, P. C.* 369; *Car. C. L.* 105.

*Annotations:—Consd. R. v. Sawyer* (1815), 2 *Car. & Kir.* 101. *Refd. R. v. Athos* (1723), 8 *Mod. Rep.* 136.

**1060. — —.]—**Under 33 *Hen. 8*, a British subject is triable in this country for the murder of another British subject, committed on land within the territory of a foreign independent kingdom.—*R. v. SAWYER* (1815), 2 *Car. & Kir.* 101; *Russ. & Ry.* 294; 1 *Russell on Crimes & Misdemeanours*, 8th ed., 29, n.; *Car. C. L.* 103.

*Annotations:—Refd. R. v. Azzopardi* (1843), 6 *State Tr. N. S.* 21; *R. v. Jameson* (1896), 12 *T. L. R.* 551.

**1061. — —.]—**In an indictment for murder committed by a British subject abroad, it must be averred that prisoner & the deceased were subjects of His Majesty. To prove the allegation that prisoner was a subject of His Majesty, his own declaration is evidence to go to the jury, & it will be for them to say, whether they are satisfied that he is in fact a British born subject.—*R. v. HELSHAM* (1830), 4 *C. & P.* 394.

*Annotations:—Refd. R. v. Mattoo* (1836), 7 *C. & P.* 458; *R. v. Lewis* (1857), 7 *Cox, C. C.* 277. *Mentd. R. v. O'Connor* (1843), 13 *L. J. M. C.* 33.

**1062. — —.]—Foreigner murdered.]—**A British subject who commits a murder in a foreign country upon a person who was not a British subject, is triable in England under 9 *Geo. 4*, c. 31, s. 7.—*R. v. AZZOPARDI* (1843), 1 *Car. & Kir.* 203; 2 *Mood. C. C.* 288; 6 *State Tr. N. S.* 21; 2 *L. T. O. S.* 287; 1 *Cox, C. C.* 28, *C. C. R.*

**1063. Possession of property stolen abroad.]—**Where a person has in his possession property

*Sect. 2.—Limits of criminal jurisdiction: Sub-sect. 2, A. & B.; sub-sect. 3.]*

stolen outside the United Kingdom, he is liable to be convicted under Larceny Act, 1896 (c. 62), although he had received & had been in possession of that property before the Act came into operation.—*R. v. PANSE* (1897), 61 J. P. 536.

**1064.** —[—The prisoners, whilst living in expensive rooms in an hotel in Paris, ordered a fur jacket to be made for one of them by prosecutor. Before this fur jacket was delivered, they ordered & received at their hotel various other fur articles. They were not asked to pay for any of these articles, but prosecutor said that he regarded it as a cash transaction & did not ask for payment because other goods were in order, & the transaction would not be complete until the delivery of the fur jacket. Prisoners brought the furs to London, where they were arrested & indicted under Larceny Act, 1896 (c. 52):—*Held*: (1) there was evidence of larceny according to English law; (2) Larceny Act, 1896 (c. 52), applied to a case such as this, where the property was alleged to have been stolen by the same person in whose possession it was afterwards found in England.—*R. v. GRAHAM* (1901), 65 J. P. 248.

**1065. Bigamy—Second marriage contracted abroad.**—*R. v. RUSSELL* (EARL), No. 969, ante.

See Offences against the Person Act, 1861 (c. 100), s. 9.

**1066. Bribery of official in India.**—*R. v. STEVENS & AGNEW* (1804), 5 East, 244; 1 Smith, K. B. 437; 102 E. R. 1063.

*Annotations*:—*Reid*, *Douglas v. R.* (1848), 13 Q. B. 74. *Mentd.* *R. v. O'Connell* (1844), 3 L. T. O. S. 323; *Wilkinson v. Guston* (1846), 9 Q. B. 137; *R. v. Duffy* (1849), 7 State Tr. N. S. 795; *Bellhouse v. Mellor*, *Proudman v. Mellor* (1859), 4 H. & N. 116.

**1067.** —[—*DOUGLAS v. R.* (1848), 13 Q. B. 74; 17 L. J. M. C. 176; 11 L. T. O. S. 312; 12 Jur. 974; 3 Cox, C. C. 163; 116 E. R. 1191, Ex. Ch.; *affg. S. C. sub nom. R. v. DOUGLAS* (1846), 13 Q. B. 42.

*Annotations*:—*Mentd.* *Greville v. Stulz* (1847), 11 Q. B. 997; *R. v. Wynn* (1848), 1 Den. 365.

*B. By Aliens.*

See Sub-sect. 5, post.

**PART II. SECT. 2, SUB-SECT. 2.—A.**

*1064 i. General rule.—Offence committed where it takes effect.*—[PRISONER WAS CONVICTED of bigamy under 32 & 33 Vict. c. 20, s. 58. The first marriage was contracted in Toronto, the second in Detroit, U.S.A. The judge at the trial directed the jury that if prisoner was married to his first wife in Toronto, & the second in Detroit, they should find him guilty:—*Held*: a misdirection, & the jury should have been told in addition that before they found him guilty they ought to be satisfied of his being at the time of his second marriage a subject of H.M. resident in Canada, & that he had left Canada with intent to commit the offence.—*R. v. PIERCE* (1887), 13 O. R. 226.—CAN.

**1065 ii.** —[—*R. S. C.*, c. 161, s. 4, is not *ultra vires* the Dominion legislature as being repugnant to Imperial legislation or on any other grounds.—*R. v. BRIERLY* (1887), 14 J. R. 525.—CAN.

**1065 iii.** —[—Prisoner, who was a British subject, married in New Zealand, & subsequently, while he was serving as a member of the New Zealand Expeditionary Force & his life was still alive, went through the form of marriage with another woman in England. On his return to New Zealand prisoner was indicted for bigamy & convicted under Crimes Act,

1908, s. 224:—*Held*: an enactment purporting to deal with crime beyond the territorial limits of the Dominion was beyond the power of the New Zealand Parliament, & the conviction must be set aside.—*R. v. LANDER*, [1919] N. Z. L. R. 305.—N.Z.

**PART II. SECT. 2, SUB-SECT. 3.**

**1068 i. General rule.—Offence committed where it takes effect.**—[An offence which was commenced in one province & completed in another, is triable in either province.—*Ex p.* (1898), Q. R. 7 Q. B. 422.—CAN.

**1068 ii.** —[—Prisoner was indicted for having, at the City of Victoria, unlawfully caused to be taken B., an unmarried girl, being under the age of sixteen years, out of the possession & against the will of her father, contrary to Criminal Code, s. 283. The evidence showed that the girl, by persuasion of letters written by prisoner in Victoria, Canada, addressed to & received by her within the State of Washington, U.S.A., was induced to leave her father's house in that State & meet prisoner at Victoria. Upon meeting her there he suggested that it was not too late for her to return home, but she declined, & prisoner thereupon took her to a house near Victoria, where they spent the night together:—*Held*: it was essential

**SUB-SECT. 3.—OFFENCES PARTLY COMMITTED OUTSIDE THE JURISDICTION.**

**1063. General rule.—Offence committed where it takes effect.**—[C. was with six others indicted for committing an assault on the high seas within the jurisdiction of the Admty. of England about the distance of half a mile from C. harbour in the county of S. A pistol had been fired from the land at a distance of one hundred yards from the sea & a man had been killed in the water one hundred yards from the shore:—*Held*: the offenders were triable by the Admty. jurisdiction, for the offence was committed where the death happened & not at the place from whence the cause of death proceeded.—*R. v. COOMBS* (1786), 1 Leach, 388; 1 East, P. C. 367.

*Annotations*:—*Consd.* *Poonchahy Moodelliar v. R.* (1835), 3 Knapp, 348; *R. v. Keyn* (1876), 2 Ex. D. 63; *Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bindescheller*, [1893] A. C. 200. *Reid*, *Jannokeo Doss v. Bindabun Doss* (1836), 1 Moo. Ind. App. 67.

**1069.** —[—*R. v. KEYN*, No. 1124, post.

**1070.** —[—A clerk whose duty it was to remit at once to his employers in Middlesex all money collected by him as their clerk, collected at York, on Apr. 18, a sum of money as such clerk, but never remitted any portion of it. On Apr. 19 & 20 he wrote & posted from places in Yorkshire to his employers in Middlesex letters making no mention of the money so collected, & on Apr. 21, he wrote & posted at Doncaster in Yorkshire to his employers in Middlesex a letter which was intended to make them believe that he had not then in fact collected the money in question:—*Held*: the receipt of the letter of Apr. 21, in Middlesex was sufficient to give jurisdiction to try the prisoner in Middlesex.

If a shot is fired or a spear is thrown from a place outside the boundary of a county into another county with intent to injure a person in that county the offence is committed in the county within which the blow is given. So with a letter (*FIELD, J.*).—*R. v. ROGERS* (1877), 3 Q. B. D. 28; 47 L. J. M. C. 11; 37 L. T. 473; 42 J. P. 37; 26 W. R. 61; 14 Cox, C. C. 22, C. C. R.

*Annotation*:—*Consd.* *Bennett v. Cosgriff* (1878), 38 L. T. 177.

**1071. Offence committed outside jurisdiction—Completed in England.**—*R. v. MUNTON*, No. 994, ante.

to the offence that the girl should have been in the possession of her father at the time of the taking, & upon the facts, when she met prisoner at Victoria, she had already abandoned that possession.—*R. v. BLYTHE* (1898), 4 B. C. R. 276.—CAN.

**1068 iii.** —[—Master of a ship was found guilty of stealing oatmeal which had been put on board at Keltor, in Scotland, to be conveyed under his charge to the proprietor at Mary Port, England.—*H.M. ADVOCATE v. BROWN* (1842), 1 Broun, 425.—SCOT.

**1068 iv.** —[—A domiciled Englishman, resident in England, who had been lawfully apprehended in England & brought to Scotland for trial on a charge of falsehood, fraud, & wilful imposition, by sending letters from England to traders in Scotland, containing false statements & representations, whereby he had fraudulently induced them to forward goods to him in England without paying & without intending to pay for the same, was subject to the jurisdiction of the criminal cts. of Scotland as the *forum delicti*.—*H.M. ADVOCATE v. WITHERINGTON* (1881), 8 R. (Cl. of Sess.) 41; 18 Sc. L. R. 576.—SCOT.

**s. Offence committed outside jurisdiction.**—[The *Plato*, a British ship, was wrecked. The crew rigged the long boat of eight tons burthen &

**1072.** ——— **By agent.]**—If a man employ a conscious or unconscious agent in this country, he may be amenable to the laws of England, although at the time he was living beyond the jurisdiction (LORD CAMPBELL, C.J.).—*R. v. GARRETT* (1853), *Dears. C. C.* 232; 23 *L. J. M. C.* 20; 17 *J. P.* 774; 17 *Jur.* 1060; 2 *W. R.* 97; 2 *C. L. R.* 106; 6 *Cox, C. C.* 260, *C. C. R.*

*Annotation:—Refd.* *Liverpool Adelphi Loan Assocn. v. Fairhurst* (1854), 2 *C. L. R.* 512.

**1073.** ——— **Libel posted in Ireland—Publication in England.]**—A libel written in Dublin, & received in London from an unknown hand, with the Dublin postmark, was published in Middlesex in the form of letters, which contained internal evidence of a request by the writer to the publisher to publish them in Middlesex:—*Held*: upon probable evidence of the loss of the envelopes, & probable evidence of their being received by the post, this was a publication by the writer living in Dublin, by his agent in Middlesex, & sufficient evidence of publication, both to authorize the reading of the libel & to go to the jury, upon an indictment charging the publication in Middlesex, the handwriting of deft. to the letters being proved by persons acquainted with its character.—*R. v. JOHNSON* (1805), 29 *State Tr.* 81; 7 *East*, 65; 3 *Smith, K. B.* 94; 103 *E. R.* 26.

*Annotations:—Consd.* *Burdett's Case* (1820), 1 *State Tr. N. S. 1*. *Refd.* *Pooneshahy Moodchar v. R.* (1835), 3 *Knapp*, 348; *Jannoke Doss v. Bindabun Doss* (1836), 1 *Moo. Ind. App.* 67; *Companhia de Mocambique v. British South Africa Co., De Sousa v. British South Africa Co.*, [1892] 2 *Q. B.* 358. *Mentd.* *Kensington v. Inglis* (1807), 8 *East*, 273.

**1074.** ——— **Larceny committed within King's dominions—Property brought into England.]**—If a larceny be committed out of the kingdom, though within the King's dominions, bringing the things stolen into this kingdom will not make it larceny here.—*PROWSE'S CASE* (1832), 1 *Mood. C. C.* 349; 9 *C. & P.* 219, *n.*

*Annotations:—Folld.* *R. v. Madge* (1839), 9 *C. & P.* 29. *Refd.* *R. v. Carr* (1877), 15 *Cox, C. C.* 131, *n.*

**1075.** ——— **—J—Prisoner had stolen goods in Guernsey & brought them to England, where he was taken & committed for trial:—Held: Guernsey not being a part of the United Kingdom, prisoner could not be convicted of larceny, for having them in possession here, nor of receiving in England the goods so stolen in Guernsey.—*R. v. DERRUEL* (1861), 11 *Cox, C. C.* 207.**

*Annotation:—Expld.* *R. v. Ellis*, [1899] 1 *Q. B.* 230.

**1076.** ——— **Larceny committed abroad—Property**

**brought into England.]**—A person who steals goods in France, cannot be tried in England for the offence, though he be found in possession of the stolen property there.—*R. v. MADGE* (1839), 9 *C. & P.* 29.

*Annotation:—Refd.* *R. v. Carr* (1877), 15 *Cox, C. C.* 131, *n.*

**1077.** ——— **—J—Prisoner was charged for stealing bonds of the Peruvian Govt. The bonds in question were transmitted by prosecutors to a customer in Paris. They were traced as far as Calais & were stolen from the train after leaving that place. Prisoner was found dealing with them in London & the question arose as to the jurisdiction of the Central Criminal Ct. to try the case, the robbery having been committed in France:—Held: there was no jurisdiction.—*R. v. CARR* (1877), 15 *Cox, C. C.* 131, *n.***

**1078.** ——— **Cheque forged & uttered abroad—Subsequent presentment in England.]**—On an indictment for forging & uttering a cheque or order for the payment of money, it appeared that the cheque was dated as if drawn abroad, but there was evidence, by comparison of handwriting, that it was drawn by prisoner abroad; & also evidence that he caused it to be presented to a banker abroad, through whom it was presented in this country, without a stamp:—*Held*: prisoner might be convicted of uttering it in this country, if he set it in circulation abroad.—*R. v. TAYLOR* (1865), 4 *F. & F.* 511.

**1079.** ——— **False pretences made outside England—Property obtained in England.]**—Deft., who carried on business in the county of Durham, obtained goods on credit in that county from a traveller of prosecutors by means of false representations made by deft. to prosecutors in Glasgow, in which place they carried on business:—*Held*: (1) (*HAWKINS, WILLS & BRUCE, JJ.*) the offence was properly triable in the county of Durham on the ground that the offence consisted in obtaining the goods, & not in making the false pretences whereby they might be obtained, & therefore an English ct. had jurisdiction to try a charge of obtaining goods by false pretences where the goods had been obtained within the jurisdiction of the ct. dealing with the charge, although the false representations might have been made beyond the jurisdiction of the English cts.; (2) (*WRIGHT, J.*) the offence was properly triable in the county of Durham on the ground that, under the circumstances disclosed in the case, the possession of the goods by the deft. might be treated as a possession in the county of Durham

sailed in it to the Mallantha & Solomon Group. The inhabitants, amongst whom were prisoners, fired arrows from canoes & from the shore, wounding the captain. In attempting to escape to sea the boat went ashore on a reef, part of the island. Prisoners & other natives waded out to the boat & killed the captain:—*Held*: they could not be tried in Sydney as the jurisdiction given to British Cts. by Merchant Shipping Act is limited to crimes committed on a British ship. As the offence was committed when the boat was ashore between high & low water mark she was not "upon the high seas" even if she were a "British Ship," & consequently there was no jurisdiction.

*Semile*: those who do acts without the jurisdiction cannot be held amenable to the jurisdiction because of their taking part in a common design with others committing crimes within the jurisdiction.—*R. v. WAINA & SWATO* (1874), 2 *N. S. W. L. R.* 403.—*AUS.*

*t.* ——— **—J—B. entrusted with rice at M., a port in British India, for conveyance to C., also a port in**

British India, took the rice to G., a port in a foreign territory, & there sold it. He was convicted at M. of criminal breach of trust as a carrier under Penal Code, s. 407:—*Held*: (1) the sessions ct. at M. had no jurisdiction to try the offence under Code of Criminal Procedure; (2) no offence was committed on the high seas so as to give the ct. jurisdiction under 12 & 13 *Vict. c. 96*, extended by 23 & 24 *Vict. c. 88*.—*BAPU DALVI v. R.* (1882), 1 *L. R. 3 Mad.* 23.—*IND.*

**u. Offence committed on high seas—Manlaughter.]**—Resps. were convicted in Victoria of manslaughter upon the high seas, & sentenced to fifteen years' penal servitude. On a return to a writ of *habeas corpus*, the ct. ordered them to be discharged, on the ground that a sentence of penal servitude could not be carried out in the colony without the preliminary direction of one of the Secretaries of State:—*Held*: Penal Servitude Act, 1857 (*c. 3*), was applicable to the colonies, with respect to sentences to be passed on persons only triable there

by virtue of Admiralty Offences (Colonial) Act, 1849 (*c. 96*), & as it appeared that by virtue of the above imperial statutes & various acts of the colonial legislature, a sentence of penal servitude could be carried into execution in the colony, the return to the writ that they were in custody "to undergo such sentence" was sufficient.—*R. v. MOUNT* (1875), 32 *L. T.* 279.—*AUS.*

**a. ——— Indictment stating offence committed "upon the sea"—Whether court has jurisdiction.]**—Where an indictment for felony committed on the high seas, was framed merely "upon the sea," or open sea, "to wit, at St. John's, etc."—*Held*: since the ct. could try the offence only under the authority of the Act giving the same jurisdiction as the English Admiralty Ct., viz., over crimes committed "on the high seas," an indictment for an offence "upon the sea," or open sea, did not import jurisdiction, & was bad, & prisoner discharged.—*R. v. GREY* (1851), 3 *Nfld. L. R.* 205.—*NFLD.*

*Sect. 2.—Limits of criminal jurisdiction: Sub-sects.*

under a representation made in Glasgow & continuing in the county of Durham.

(3) The rule of common law restraining jurors from inquiring into facts arising beyond the limits of the county was not at any time so strictly observed in misdemeanours as in felonies. It seems to me that in the case of a misdemeanour the offence can be properly dealt with in the county where the offence is completed, notwithstanding that some act constituting a material circumstance may have happened altogether beyond the jurisdiction (BRUCE, J.).—*R. v. ELLIS*, [1899] 1 Q. B. 230; 68 L. J. Q. B. 103; 79 L. T. 532; 62 J. P. 838; 47 W. R. 188; 15 T. L. R. 57; 43 Sol. Jo. 77; 19 Cox, C. C. 210, C. C. R.

*Annotation*.—As to (1) *Reid. R. v. Oliphant* (1905), 74 L. K. B. 591.

**1080. — Embezzlement by agent abroad—False accounts sent to England.**—*R. v. MUNTUN*, No. 994, *ante*.

**1081. — — — — —**—Deft. was employed by a firm, carrying on business in London, to manage their branch establishment in Paris. It was his daily duty to enter on slips an account of all sums received by him in Paris for his employers, & to transmit these slips to them in London in order that the amounts might be entered up in a cash-book kept in London. On a certain date deft. received three sums in Paris which he fraudulently appropriated to his own use, & omitted to enter the receipt thereof on the slips sent by him on that day to London, knowing & intending that the same would in consequence be omitted from the cash-book, as was the case. Deft. was indicted at the Central Criminal Ct. under Falsification of Accounts Act, 1875 (c. 24), s. 1, for omitting, or concurring in omitting, material particulars from the cash-book, & convicted:—*Held*: the ct. had jurisdiction to try the case, & deft. was rightly convicted.—*R. v. OLIPHANT*, [1905] 2 K. B. 67; 74 L. J. K. B. 591; 94 L. T. 824; 69 J. P. 230; 53 W. R. 556; 21 T. L. R. 416; 49 Sol. Jo. 460; 21 Cox, C. C. 192, C. C. R.

*Annotation*.—*Mentd. R. v. De Marny*, [1907] 1 K. B. 388.

**1082. Offence committed within jurisdiction—Smuggling goods from England to Ireland.**—Deft., in England, concerted with M. a plan for smuggling tobacco into Ireland, & in performance of such concerted plan, he took on board his vessel, on the high seas, from a cutter dispatched from Flushing for the purpose, a cargo of tobacco in illegal packages, sailed with it to N., in Glamorgan-shire, there took on board a quantity of culm, in order to conceal the tobacco, & sailed thence to Youghal, in Ireland, where he landed the tobacco:—*Held*: deft. was properly triable in England, as having, in England, assisted & been concerned in an illegal unshipping of prohibited goods within 3 & 4 Will. 4, c. 53, s. 44, *viz.*: the transshipment of them from the foreign vessel to his own.—*A.-G. v. CART* (1837), 3 M. & W. 7; *Murp. & H.* 300; 7 L. J. Ex. 38; 150 E. R. 1033.

**1083. — Joint making of implements of forgery—Agent in England—Principal abroad.**—*R. v. BULL & SCHMIDT*, No. 443, *ante*.

**1084. — False pretences made in England—Property sent abroad from England.**—Where a false pretence is made in this country to induce persons to part with their money & send it to a place abroad, & the postal orders & letters containing the money are posted in this country for transmission to the place abroad, there to be

received by the person making the false pretence, the offence of obtaining money by false pretences is committed in this country where the postal orders & letters are posted.—*R. v. STODDART* (1909), 73 J. P. 348; 25 T. L. R. 612; 53 Sol. Jo. 578; 2 Cr. App. Rep. 217, C. C. A.

*Annotations*.—*Mentd. R. v. Bradshaw* (1910), 4 Cr. App. Rep. 280; *R. v. Brownlow* (1910), 74 J. P. 240; *R. v. Norton*, [1910] 2 K. B. 496; *R. v. Pratley* (1910), 4 Cr. App. Rep. 159; *R. v. Ellison* (1911), 76 J. P. 38; *R. v. Hill* (1911), 76 J. P. 40; *R. v. Savidge* (1911), 76 J. P. 32; *R. v. Vassileva* (1911), 6 Cr. App. Rep. 228; *R. v. Horn* (1912), 76 J. P. 270; *R. v. Monk* (1912), 7 Cr. App. Rep. 119; *Ibrahim v. R.*, [1914] A. C. 599; *R. v. Schama*, *R. v. Abramovitch* (1914), 112 L. T. 480; *R. v. Finch* (1916), 85 L. J. K. B. 1575; *R. v. Immer*, *R. v. Davis* (1917), 118 L. T. 416; *R. v. Bliss Hill* (1918), 82 J. P. 194; *R. v. Broadbent* (1918), 13 Cr. App. Rep. 125; *R. v. Sanders* (1919), 14 Cr. App. Rep. 11.

**1085. — — — — — By letters sent abroad—Property sent from abroad to England.**—H. wrote & posted at N., in England, a letter addressed to G. at a place out of England, containing a false pretence by means of which he fraudulently induced G. to transmit to N. a draft for £150 which he there cashed:—*Held*: there was jurisdiction to try H. at N., the pretence was made at N., where also the money obtained by means of it was received.—*R. v. HOLMES* (1883), 12 Q. B. D. 23; 53 L. J. M. C. 37; 49 L. T. 540; 32 W. R. 372; 15 Cox, C. C. 343; 47 J. P. Jo. 756, C. C. R.

**1086. — — — — — Property obtained abroad.**—N., being in Southampton, wrote & sent certain letters containing alleged false pretences to certain persons carrying on business within the jurisdiction of the German Empire, thereby inducing them to part with certain goods & deliver them to his order to certain persons in Hamburg. N. also sent to the same persons, certain alleged forged cheques in payment:—*Held*: N. was a fugitive criminal within Extradition Act, 1870 (c. 52), s. 26, & was rightly committed by the police magistrate to await the warrant of the Secretary of State for his extradition.

It is clear that there may be cases where a person has committed a crime in a foreign country without ever being there, & who therefore could not be said to have fled from that country, & that is why the Act expressly defines the meaning of the expression "fugitive criminal" (CAVE, J.).—*R. v. NILLINS* (1884), 53 L. J. M. C. 157, D. C.

*Annotation*.—*Apprvd. & Folld. R. v. Godfrey*, [1923] 1 K. B. 24.

**1087. — Obscene matter published abroad—Advertisement in English paper.**—*R. v. DE MARNY* No. 606, *ante*.

**1088. Offence committed on high seas—Completed in England.**—An information at common law for a conspiracy between the captain & purser of a man of war for planning & fabricating false vouchers to cheat the Crown, which planning & fabrication were done upon the high seas, is well triable in Middlesex, upon proof there of the receipt by the Commrs. of the Navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post, & the application there by a third person, a holder of one of such vouchers, a bill of exchange, for payment, which he there received.—*R. v. BRISAC* (1803), 4 East, 164; 102 E. R. 792.

*Annotations*.—*Consd. Pooncakhoty Moodellar v. R.* (1835), 3 Knapp, 348. *Reid. R. v. Burdett* (1820), 4 B. & Ald. 95; *Jannokee Doss v. Bindabun Doss* (1836), 1 Moo. Ind. App. 61; *R. v. Meany* (1867), 15 W. R. 1082; *R. v. Oliphant*, [1905] 2 K. B. 67. *Mentd. Re Royal British Bank* (1857), 29 L. T. O. S. 148; *R. v. McCafferty* (1867), 15 W. R. 1022; *Mulcahy v. R.* (1868), L. R. 3 H. L. 308; *R. v. Parnell* (1881), 14 Cox, C. C. 508.

**1089. — By foreigner—Death in England.**—

Prisoner & deceased were foreigners, & the latter died at Liverpool from injuries inflicted by prisoner on board a foreign ship on the high seas:—*Held*: the offence was not cognizable by our law, & the conviction for manslaughter was wrong.

The injury which caused the death was inflicted by one foreigner upon another on board a foreign vessel upon the high seas; & consequently, if death had then & there followed, no offence cognizable by the law of this country would have taken place. 9 Geo. 4, c. 41, s. 8, therefore, is inapplicable; & unless it be applicable, the conviction cannot be sustained (WILLES, J.).—*R. v. LEWIS* (1857), *Dears. & B.* 182; 26 L. J. M. C. 104; 29 L. T. O. S. 216; 21 J. P. 358; 3 Jur. N. S. 523; 5 W. R. 572; 7 Cox, C. C. 277, C. C. R.

*Annotation*:—*Consd. R. v. Keyn* (1876), 13 Cox, C. C. 403.

#### SUB-SECT. 4.—OFFENCES COMMITTED ON SEAS AND RIVERS.

##### A. In General.

**1090. Rights & liabilities of persons on board ship.**—(1) The Admty. jurisdiction of England extends over British vessels, not only when they are sailing on the high seas, but also when they are in the rivers of a foreign territory at a place below bridges, where the tide ebbs & flows, & where great ships go. All seamen, whatever their nationality, serving on board British vessels, are amenable to the provisions of British law.

An American citizen serving on board a British ship caused the death of another American citizen serving on board the same ship, under circumstances amounting to manslaughter, the ship at the time being in the river Garonne within French territory, at a place below bridges where the tide ebbed & flowed, & great ships went:—*Held*: the ship was within the Admty. jurisdiction, & prisoner was rightly tried & convicted at the Central Criminal Ct. (2) *Qu.*: as to the effect of Merchant Shipping Act, 1854 (c. 104), s. 267.—*R. v. ANDERSON* (1868), L. R. 1 C. C. R. 161; 38 L. J. M. C. 12; 19 L. T. 400; 33 J. P. 100; 17 W. R. 208; 11 Cox, C. C. 198, C. C. R.

*Annotations*:—As to (1) *Consd. R. v. Keyn* (1876), 2 Ex. D. 63; *R. v. Carr* (1882), 10 Q. B. D. 76. *Refd. The Princess Royal* (1870), 1 R. 3 A. & E. 41; *The M. Moxham* (1876), *The Mecca*, [1895] P. 95; *Bolivia Republic v. Indemnity Mutual Marine Assoc.*, [1909] 1 K. B. 785. *Generally, Mentd. Brown v. Burt* (1911), 81 L. J. K. B. 17.

—*Refd. R. v. Mullman & Macky* (1767), Park.

**1092. — Jure gentium.**—A.-G. FOR COLONY OF HONG KONG *v. KWOK-A-SING*, No. 1012, *ante*.

*See, also*, Part XXIV., Sect. 1, sub-sect. 1.

**of accessories on shore—To of ship on high seas—Admiralty jurisdiction.**—Accessories before the fact on shore to the wilful destruction of a ship on the high seas,

are not triable by the Admty. jurisdiction under 11 Geo. 1, c. 29, s. 7.—*EASTERBY'S CASE* (1803), *Russ. & Ry.* 37; 2 Leach, 947, C. C. R.

**1094. Former jurisdiction of Admiralty & common law distinguished.**—ADMIRALTY CASE (1610), 12 Co. Rep. 79; 77 E. R. 1357.

*Annotation*:—*Consd. R. v. Keyn* (1876), 2 Ex. D. 63.

*See, also*, ADMIRALTY, Vol. I., p. 108, Nos. 120–126.

**1095. — Between high & low water mark.**—CONSTABLE'S CASE (1601), 5 Co. Rep. 106 a; 77 E. R. 218.

*Annotations*:—*Refd. Admiralty Case* (1609), 13 Co. Rep. 51. *Mentd. Gold v. Death* (1615), Cro. Jac. 381; *R. & Waller v. Hanger* (1615), 3 Bulst. 1; *Prideaux v. Warne* (1673), *Freem. K. B.* 355; *Onslow v. Horne* (1771), 2 Wm. Bl. 750; *Baldwin v. Elphinstone* (1775), 2 Wm. Bl. 1037; *Dunwich Corp'n. v. Sterry* (1831), 1 B. & Ad. 831; *R. v. Forty-nine Casks of Brandy* (1836), 3 Hag. Adm. 257; *R. v. Two Casks of Tallow* (1837), 3 Hag. Adm. 294; *R. v. G. W. Ry.* (1842), 3 Q. B. 333; *Beaufort v. Swansea Corp'n.* (1849), 3 Exch. 413; *R. v. Thurborn* (1849), T. & M. 67; *Penryn Corp'n. v. Holm* (1877), 37 L. T. 133; *The Schiller (Cargo Ex.)* (1877), 2 P. D. 145; *The Gas Float Whitton (No. 2)*, [1896] P. 42; *The Olympic*, [1913] P. 92.

**1096. — — — — —**—EMBLETON *v. BROWN*, No. 1045, *ante*.

**1097. — — — — —**—*R. v. KEYN*, No. 1124, *post*.

**1098. — Death by shot from shore.**—*R. v. COOMBES*, No. 1068, *ante*.

**1099. — “Within the body of the county” — River Thames.**—*R. v. MARSH* (1615), 3 Bulst. 27; 81 E. R. 23; *sub nom. MARCHES CASE (alias PALACHES CASE)*, 1 Roll. Rep. 175.

**1100. — — — — — Havens, creeks & rivers.**—The Cts. of Common Law have concurrent jurisdiction with the Admty. Cts. in murders committed in the M. haven, & in all the other havens, creeks, & rivers in this realm.—*R. v. BRUCE* (1812), *Russ. & Ry.* 243; 2 Leach, 1093.

*Annotation*:—*Consd. R. v. Keyn* (1876), 2 Ex. D. 63.

**1101. — — — — — Bristol Channel—Foreign ship.**—Upon a count of indictment of three prisoners, for feloniously wounding with intent to do grievous bodily harm, it was proved the offence was committed on board an American ship, in the P. roads, Bristol Channel, three-quarters of a mile from the coast of Glamorganshire, at a spot never left dry by the tide, & lying between Glamorganshire & F. H., an island commonly treated as part of the county of Glamorgan, the ship being at the time two miles from the island, on the inside. It was about ten miles to the opposite shore of Somersetshire, & ninety miles from the roads to the mouth of the Channel:—*Held*: the part of the sea where the vessel was formed part of the county of Glamorgan, & the venue

C. C. R.

*Annotations*:—*Refd. R. v. Keyn* (1876), 2 Ex. D. 63; *The Mecca* (1894), 71 L. T. 711. *Mentd. The Ida* (1860), *Lush. 6*; *Whitstable Free Fishers v. Gaan* (1861), 11 C. B. N. S. 387; *Direct United States Cable Co. v. Anglo American Telegraph Co.* (1877), 2 App. Cas. 394.

—*See, generally*, ADMIRALTY, Vol. I., pp. 108, 109.

*See Territorial Waters Jurisdiction Act, 1878*

#### PART II. SECT. 2, SUB-SECT. 4.—A.

**of Admiralty — was convicted before Comrs. of a murder committed in a small boat within Roundstone Bay, which was proved to be within the body of the county of Galway, & was bounded by headlands, so that a man could see across from the extremity of one to the other, & the place where the offence was com-**

**mitted was within human sight.** There was evidence that in part of the bay there were fifteen fathoms water, & that a vessel of 120 tons could sail there; but there was no evidence of the bay having ever been frequented by shipping, or of Admiralty process having been executed there:—*Held*: the case was within the jurisdiction of the Admiralty.—*R. v. MANNION* (1846), 2 Cox, C. C. 158.—*IR.*

**c. — — — — — Great lakes.**—The great inland lakes of Canada are within the admiralty jurisdiction, & offences committed on them are, as though committed on the high seas; & therefore any magistrate of this Province has authority to inquire into offences committed on the lakes, although in American waters.—*R. v. SHARR* (1869), 5 P. R. 135.—*CAN.*



*Sect. 2.—Limits of criminal jurisdiction: Sub-sect. 4, A. & B.]*

(c. 73); Merchant Shipping Act, 1894 (c. 60), ss. 685–687.

*B. On British Ships.*

**1102. On high seas—Definition of high seas.]—**The expression “high seas” when used with reference to the jurisdiction of the Ct. of Admty., included all oceans, seas, bays, channels, rivers, creeks, & waters below low-water mark, & where great ships could go, with the exception only of such parts of such oceans, etc., as were within the body of some county (LINDLEY, L.J.).

A foreign or colonial port, if it was part of the high seas in the above sense, would be as within the jurisdiction of the Admty. as any other part of the high seas. The jurisdiction, however, is necessarily limited in its application. It can only be exercised over persons or ships when they come to this country. An artificial basin or dock excavated out of land, but into which water from the high seas could be made to flow, would not, I apprehend, be in any sense part of the high seas, whether such basin or dock were in this country or any other (LINDLEY, L.J.).—THE MECCA, [1895] P. 95; 64 L. J. P. 40; 71 L. T. 711; 43 W. R. 209; 11 T. L. R. 139; 39 Sol. Jo. 132; 7 Asp. M. L. C. 529; 11 R. 742, C. A.

*Annotation:—Mentd.* Pochontas Fuel Co. (Incorporated) v. Ambatielos (1922), 27 Com. Cas. 148.

**1103. —.]—**(1) A hulk retaining the general appointments of a ship, registered as a British ship, & hoisting the British ensign, although only used as a floating warehouse, is *prima facie* sufficiently a British ship to be within Merchant Shipping Act, 1854 (c. 104), s. 267, & a crime committed therein is within the jurisdiction of the Admty.

(2) *Semble*: there would be jurisdiction at common law if a British ship was on the high seas, or *infra primos pontes*, or in a tidal river where great ships come & go. The offence need not be consummated or wholly completed on board such ship to give jurisdiction.—R. v. ARMSTRONG (1875), 13 Cox, C. C. 184.

*Annotation:—As to* (2) *Refd.* R. v. Keyn (1876), 2 Ex. D. 63.

**1104. —.]—**R. v. DUDLEY & STEPHENS, No. 334, *ante*.

**1105. — Act justifiable while within foreign jurisdiction.]—**(1) The master of an English vessel contracted with the Chilean Govt. to convey banished Chilean subjects from Valparaiso to Liverpool, & they were put on board under duress, & so conveyed against their will:—*Held*: assuming the master could justify what he did within the Chilean jurisdiction, yet, after the vessel passed out of it, he was guilty of a wrong amounting to a false imprisonment.

(2) Although an English ship in some respects carries with it the laws of her country in the territorial waters of a foreign state, yet in other respects it is subject to the laws of that state as to acts done to the subjects thereof.

(3) It is clear that an English ship on the high seas, out of any foreign territory, is subject to the laws of England, & persons, whether foreign or English, on board such ship are as much amenable to English law as they would be on English soil (ERLE, C.J.).—R. v. LESLEY (1860), Bell, C. C. 220; 29 L. J. M. C. 97; 1 L. T. 452; 24 J. P. 115; 6 Jur. N. S. 202; 8 W. R. 220; 8 Cox, C. C. 269, C. C. R.

*Annotations:—As to* (2) *Consd.* R. v. Keyn (1876), 2 Ex. D. 63. *Generally, Mentd.* Seymour v. Scott (1863), 8 L. T. 511; Phillips v. Eyre (1870), L. R. 6 Q. B. 1; Francis, Times v. Carr (1899), 81 L. T. 50.

**1106. — Offender not a British subject.]—**PREVÔT'S CASE (1799), cited in 1 Taunt. 32; 127 E. R. 741.

*Annotations:—Refd.* R. v. Serva (1845), 1 Cox, C. C. 292; R. v. Lopez, R. v. Sattler (1858), 7 Cox, C. C. 431.

**1107. —.]—**SAUVAJOT'S CASE (1799), cited in 1 Taunt. 32; 127 E. R. 741.

*Annotations:—Refd.* R. v. Serva (1845), 1 Cox, C. C. 292; R. v. Lopez, R. v. Sattler (1858), 7 Cox, C. C. 431.

**1108. —.]—**ACOW'S CASE (1806), cited in 1 Taunt. 32; 127 E. R. 741.

*Annotations:—Refd.* R. v. Serva (1845), 1 Cox, C. C. 292; R. v. Lopez, R. v. Sattler (1858), 7 Cox, C. C. 431.

**1109. — Even though illegally detained on ship.]—**A foreigner on board an English ship on the high seas is subject to the law of England, & therefore, if he there does an act which is a criminal offence by the law of England, he may be punished for it by that law, & may, by virtue of 18 & 19 Vict. c. 91, s. 21, be tried for the offence before any ct. of justice in the Queen's dominions having cognisance of such crimes when committed within its limits, within whose jurisdiction he may be brought, for when so brought, he is, within the language of the Act, “found within its jurisdiction.” Nor is it material, as to the liability of the foreigner to punishment or to the jurisdiction of the ct. to try him, that he was illegally & by force taken on board the English ship & there detained in custody at the time of the commission of the offence, the act alleged to be a crime not being committed for the purpose of releasing himself from the illegal duress.

Where a foreigner who, being illegally arrested in a foreign town & taken & kept in custody on board an English ship on the high seas, shot dead the officer who arrested him, out of malice prepense, & not with a view to escape:—*Held*: his conviction for the murder by the Central Criminal Ct., within whose jurisdiction he was brought for trial, was good.—R. v. LOPEZ, R. v. SATTLER (1858), Dears, & B. 525; 27 L. J. M. C. 48; 30

**PART II. SECT. 2, SUB-SECT. 4.—B.**

*d. On high seas—Boat ashore between high & low water-mark.]—*A British ship was wrecked. The crew lugged the long boat of eight tons up the beach & sailed in it to the Mallantha: Solomon Group. The inhabitants, amongst whom were prisoners, fired arrows from canoes & from the shore, wounding the captain. In attempting to escape to sea the boat went ashore on a reef, part of the Island. Prisoners & other natives waded out to the boat & killed the captain:—*Held*: they could not be tried in Sydney as the jurisdiction given to British Ct. by Merchant Shipping Act is limited to cases committed on a British ship, & the offence was committed when the boat was ashore between high & low water mark she was not “upon the

high seas” even if she was a “British Ship,” & consequently there was no jurisdiction.—R. v. WAINA & SWATOA (1874), 2 N. S. W. L. R. 403.—AUS.

*e. — Stealing from the person.]—*Prisoner was convicted at quarter sessions of attempting on the high seas to steal from the person. He was

had jurisdiction to try prisoner.—R. v. PRICE (1885), 6 N. S. W. L. R. 139; 1 N. S. W. N. 147.—AUS.

*f. —.]—*Prisoner, a foreigner, was arrested & committed for trial on a charge of theft committed on a British vessel on the high seas. His discharge was applied for on the ground that the committing magistrate had no jurisdiction, the preliminary

examination having taken place before the assent of the Governor-General, assenting to the institution of the proceedings, required by Code, s. 691, had been received:—*Held*: defendant was liable to arrest for an offence committed on board of a British ship on the high seas notwithstanding the limitation contained in sect. 691, & the

*Annotation:—As to* (2) *Consd.* R. v. NEILSON (1918), 52 N. S. R. 42; 40 D. L. R. 120.—CAN.

*g. — Commission of offence by British subject on foreign ship.]—*The ct. in England have power by 30 & 31 Vict. c. 124, s. 11, to try British subjects for offences committed on board of foreign ships on the high seas, provided the offender does not belong to the ship; but the Supreme Ct. of the colony has no such power.

L. T. O. S. 277; 22 J. P. 84; 4 Jur. N. S. 98; 6 W. R. 227; 7 Cox, C. C. 431, C. C. R.

*Annotations*:—*Consd.* R. v. Leslie (1860), 8 Cox, C. C. 269. *Refd.* R. v. Anderson (1868), L. R. 1 C. C. R. 161; R. v. Keyn (1870), 2 Ex. D. 63; R. v. Carr (1882), 10 Q. B. D. 76. *Mentd.* Cammell v. Sewell (1858), 3 H. & N. 617; R. v. Tivnan (1864), 10 L. T. 499; The Princess Royal (1870), 39 L. J. Adm. 43.

**1110. — Sufficiency of evidence as to.]**—A ship had sailed from London on a China voyage, & three chests of tea were stolen from her when off Wampa. It was stated that Wampa was on a river, twenty or thirty miles from the sea, & no evidence was given as to the tide flowing there or not:—*Held*: this was sufficient evidence that the ship was on the high seas to give the Central

7 C. & P. 664; 1 Mood. C. C. 494, C. C. *Annotations*:—*Consd.* R. v. Anderson (1868), L. R. 1 C. C. R. 161; R. v. Carr (1882), 10 Q. B. D. 76. *Mentd.* R. v. Hughes (1857), 7 Cox, C. C. 301.

**1111. In tidal rivers—Below bridges & where great ships go.]**—R. v. ARMSTRONG, No. 1103, *ante*.

**1112. — Offender not a British subject.]**—R. v. ANDERSON, No. 1090, *ante*.

**1113. — ]**—Certain bonds or valuable securities were stolen from a British merchant ship whilst she was lying afloat, in the ordinary course of her trading, in the river at R., in Holland, moored to the quay, & were afterwards wrongfully received in England by prisoners with a knowledge that they had been thus stolen. The place where the ship lay at the time of the theft was in the open river, sixteen or eighteen miles from the sea, but within the ebb & flow of the tide. There were no bridges between the ship & the sea, & the place where she lay was one where large vessels usually lay. It did not appear who the thief was, or under what circumstances he was on board the ship:—*Held*: prisoners could be properly tried & convicted at the Central Criminal Ct. in this country, as the larceny took place within the jurisdiction of the Admty. of England.—R. v. CARR (1882), 10 Q. B. D. 76; 52 L. J. M. C. 12; 47 L. T. 450; 47 J. P. 38; 31 W. R. 12; 4 Asp. M. L. C. 604; 15 Cox, C. C. 129, C. C. R.

*Annotation*:—*Refd.* The Mecca, [1895] P. 95.

**1114. In foreign ports.]**—R. v. JEMOT (1812), Russell on Crimes & Misdemeanours, 8th ed. 34.

*Annotations*:—*Consd.* R. v. Anderson (1868), L. R. 1 C. C. R. 161; R. v. Carr (1882), 10 Q. B. D. 76.

**1115. — ]**—THE MECCA, No. 1102, *ante*.

**1116. What is British ship—Hulk used as floating warehouse.]**—R. v. ARMSTRONG, No. 1103, *ante*.

**1117. — Proof of nationality—Oral evidence sufficient.]**—To prove that a ship is a British ship, it is not necessary to produce the register or a copy thereof; it is sufficient to show orally that she belongs to British owners, & carries the British flag.—R. v. ALLEN (1860), 10 Cox, C. C. 405.

The jurisdiction given to colonial cts. by 12 & 13 Vict. c. 96, to try cases of offences committed "where the Admiral has jurisdiction" applies only to offences committed on board British ships on the high seas.—R. v. DODD (1874), 2 C. A. 598; 2 J. R. 52.—N.Z.

**h. What is a British ship.]**—Prisoner commanded a vessel that sailed under British colours:—*Held*: sufficient evidence that the vessel was in fact British.

Where the captain of a British vessel lying in the harbour of one of the Pacific Islands, of which the French had taken possession, murdered on board his ship a

not shown to be a British subject:—*Held*: Supreme

Ct. had jurisdiction to try the case under 9 Geo. 4, c. 83, s. 4.—R. v. ROSS (1854), 1 N. S. W. S. C. R. 43.—AUS.

**k. — ]**—R. v. HARVEY (1869), 8 N. S. W. S. C. R. 340.—AUS.

**l. — ]**—Prisoner, second mate of a ship, was tried before the Ct. of Queen's Bench, Quebec, on an indictment for manslaughter. He had ill-treated on the high seas a seaman of the name of M. so grievously that he had to be put on shore at K., where he died. His death, according to medical testimony, having been accelerated by the ill-treatment he had received. On a reserved case:—*Held*: (1) in order to prove that a

—*On a trial for maliciously wounding on the high seas, it was stated by three witnesses that the vessel was a British ship of Shields, & that she was sailing under the British flag, but no proof was given of the register of the vessel or of the ownership:—Held*: the ct. had jurisdiction over the offence; (1) because the evidence was sufficient to prove that the vessel was a British vessel; (2) because even if it had appeared that the vessel was not registered, the ct. would still have jurisdiction, as there is nothing in Merchant Shipping Acts to take away that jurisdiction, & (3) by reason of the Merchant Shipping Act, 1854 (c. 104), s. 106, which provides that, as regards the punishment of offences committed on board such a ship, she shall be dealt with in the same manner as if she were a recognised British ship.—R. v. SEBERG (1870), L. R. 1 C. C. R. 264; 22 L. T. 523; 34 J. P. 468; 18 W. R. 935; 11 Cox, C. C. 520; *sub nom.* R. v. VON SEBERG, 39 L. J. M. C. 133, C. C. R.

**1119. — British register—Alien owner.]**—Upon the trial of a foreigner for a homicide committed on board a foreign built ship on the high seas, it was proved that the ship was manned by foreigners, but had been registered as a British ship under Merchant Shipping Act, 1854 (c. 104), & at the time the offence was committed, was sailing under the British flag, & that the owner resided in London, but it was admitted that he was not a natural-born British subject:—*Held*: the register of the ship, coupled with the facts that she was sailing under the British flag, & that the owner was resident in England, amounted to *prima facie* evidence that the ship was British.—R. v. BJORNSEN (1865), L. & C. 545; 6 New Rep. 179; 34 L. J. M. C. 180; 12 L. T. 473; 29 J. P. 373; 11 Jur. N. S. 589; 13 W. R. 664; 10 Cox, C. C. 74; 2 Mar. L. C. 210, C. C. R.

**1120. On King's ship.]**—R. v. DEVON J.J., *Ex p.* PUBLIC PROSECUTIONS DIRECTOR, No. 1138, *post*.

**1121. Rights & liabilities of persons on board.]**—An English ship may be considered as a floating island, & in that ship persons become subject to the English laws alone (HOLROYD, J.).

Men, when on board an English ship, have all the rights belonging to Englishmen, & are subject to all their liabilities. If they have committed any offence they must be tried according to English law. If any injury has been done to them they have a remedy by applying to the laws of this country for redress (BEST, J.).—FORBES v. COCHRANE (1824), 2 B. & C. 448; 2 State Tr. N. S. 147; 3 Dow. & Ry. K. B. 679; 2 L. J. O. S. K. B. 67; 107 E. R. 450.

*Annotation*:—*Refd.* Grace, The Slave (1827), 2 Hag. Adm. 94.

**1122. — ]**—R. v. LOPEZ, R. v. SATTler, No. 1109, *ante*.

**1123. — ]**—R. v. LESLEY, No. 1105, *ante*.

steamer upon which a crime has been committed was a British steamer, it was not necessary to file the register of the steamer, & it is sufficient to establish that she sailed under the British flag; (2) where a person dies in this Province from ill-treatment received while on board of ship at sea, the trial for manslaughter of the author of such ill-treatment must take place in the district where death ensued, & not in the district where accused was arrested.—R. v. MOORE (1881), 2 D. C. A. 52.—CAN.

**m. — Application of English law—Stowaway.]**—R. v. MCCARTHY, R. v. FARRELL (1922), 69 D. L. R. 92; 37 Can. Crim. Cas. 221.—CAN.



*Sect. 2.—Limits of criminal jurisdiction: Sub-sect. 4, C. & D.; sub-sect. 5.]*

*C. On Foreign Ships.*

**1124. General rule—Within three mile limit.]**

—Prisoner was indicted at the Central Criminal Ct. for manslaughter. He was a foreigner & in command of a foreign ship, passing within three miles of the shore of England on a voyage to a foreign port, & whilst within that distance his ship ran into a British ship & sank her, whereby a passenger on board the latter ship was drowned. The facts of the case were such as to amount to manslaughter by English law:—*Held*: (1) (LORD COLERIDGE, C.J., BRETT & AMPHLETT, JJ.A., GROVE, DENMAN, & LINDLEY, JJ., *diss.*), the Central Criminal Ct. had no jurisdiction to try prisoner for the offence charged, on the ground that, prior to 28 Hen. 8, c. 15, the admiral had no jurisdiction to try offences by foreigners on board foreign ships, whether within or without the limit of three miles from the shore of England, that that & the subsequent statutes only transferred to the Common Law Cts. & the Central Criminal Ct. the jurisdiction formerly possessed by the admiral, & therefore, in the absence of statutory enactment the Central Criminal Ct. had no power to try such an offence; (2) (LORD COLERIDGE, C.J., BRETT & AMPHLETT, JJ.A., GROVE, DENMAN, & LINDLEY, JJ., *diss.*), the Central Criminal Ct. had no jurisdiction to try prisoner for the offence charged, on the ground that, prior to 28 Hen. 8, c. 15, the admiral had no jurisdiction to try offences by foreigners on board foreign ships, whether within or without the limit of three miles from the shore of England, that that & the subsequent statutes only transferred to the Common Law Cts. & the Central Criminal Ct. the jurisdiction formerly possessed by the admiral, & therefore, in the absence of statutory enactment the Central Criminal Ct. had no power to try such an offence; (3) (LORD COLERIDGE, C.J., BRETT & AMPHLETT, JJ.A., GROVE, DENMAN, & LINDLEY, JJ., *diss.*), the Central Criminal Ct. had no jurisdiction to try prisoner for the offence charged, on the ground that, prior to 28 Hen. 8, c. 15, the admiral had no jurisdiction to try offences by foreigners on board foreign ships, whether within or without the limit of three miles from the shore of England, that that & the subsequent statutes only transferred to the Common Law Cts. & the Central Criminal Ct. the jurisdiction formerly possessed by the admiral, & therefore, in the absence of statutory enactment the Central Criminal Ct. had no power to try such an offence.

English criminal law extended over those limits, & the admiral formerly had, & the Central Criminal Ct. now has, jurisdiction to try offences there committed although on board foreign ships; (3) (LORD COLERIDGE, C.J., & DENMAN, J.) prisoner's ship having run into a British ship & sunk it, & so caused the death of a passenger on board the latter ship, the offence was committed on board a British ship, & therefore, the Central Criminal Ct. had jurisdiction.

(4) Whatever of the sea lies within the body of a country is within the jurisdiction of the common law. Whatever does not, belonged formerly to that of the Admty., & now belongs to the cts. to which the jurisdiction of the admiral has been transferred by statute; while in the estuaries & mouths of great rivers, below the bridges, in the matter of murder & mayhem, the jurisdiction is concurrent. On the shore of the outer sea the body of the country extend so far as the land is uncovered by water. So rigorous has been the line of demarcation between the two jurisdictions, as regards the shore between the high & low water mark, the jurisdiction has been divided

between the Admty. & the common law according to the state of the tide (COCKBURN, C.J.).—*R. v. KEYN* (1876), 2 Ex. D. 63; 46 L. J. M. C. 17; 41 J. P. 517; 13 Cox, C. C. 403, C. C. R.

*Annotations:—As to (1) Reff. R. v. Dudley & (1884), 14 Q. B. D. 273. Generally, Mentd. R. v. Fletcher, Ex p. Birnie (1876), 35 L. T. 538; Blackpool Pier Co. & South Blackpool Jetty Co. v. Fylde Union Assmt. Com. & Layton with Mecca (1894), 64 L. J. P. 40; Badische Anilin und Soda Fabrik v. Johnson & Basle Chemical Works, Bindschedler, [1897] 2 Ch. 322; Davidsson v. Hill, [1901] 2 K. B. 606; Carr v. Frazer Times, [1902] A. C. 176; West Rand Central Gold Mining Co. v. IL, [1905] 2 K. B. 391; Denaby & Cadeby Main Collieries v. Anson, [1911] 1 K. B. 171; A.-G. for British Columbia v. A.-G. for Canada, [1914] A. C. 153; Secretary of State for India v. Chelikani Rama Rao (1916), 85 L. J. P. C. 222; Johnstone v. Pedlar (1921), 90 L. J. P. C. 181.*

*See, now, Territorial Waters Jurisdiction Act, 1878 (c. 73).*

**1125. On high seas—Murder by crew of captured vessel.]**—By a convention between England & the Emperor of Brazil, the slave trade was declared to be piracy, & powers were mutually accorded for the visitation & capture of the vessels of either nation when so engaged, but subject to certain conditions:—*Held*: these conditions must be scrupulously adhered to, in order to give validity to the seizure of vessels under such convention, & where a capture had taken place which was not attended by all the formalities required by the convention, if the crew of the captured vessel rose upon their captors & killed him, they could

*R. v. SERVA* (1875), 2 Car. & Kir. 95; 1 Den. 104; 6 State Tr. N. S. 197; 10 J. P. 134; 1 Cox, C. C. 292; *sub nom.* *R. v. MAJAVEL*, 6 L. T. O. S. 188, C. C. R.

*Annotations:—Folld. R. v. Keyn* (1876), 2 Ex. D. 63. *Reff.* Shea v. R., Dwyer v. R. (1848), 3 Cox, C. C. 141. *Mentd.* The Princess Royal (1870), L. R. 3 A. & E. 41.

**1126. — Murder—Death taking place in England.]**—*R. v. LEWIS*, No. 1089, *ante*.

**1127. — Scuttling ship—Conspiracy to defraud insurers.]**—*R. v. KOHN*, No. 830, *ante*.

**1128. — Homicide by foreigner.]**—*R. v. BJORNSEN*, No. 1119, *ante*.

**1129. Within territorial waters—Common law jurisdiction.]**—*R. v. CUNNINGHAM*, No. 1101, *ante*.

*D. Court of Trial.*

**1130. Central Criminal Court—Larceny on British ship—In foreign river.]**—*R. v. ALLEN*, No. 1110, *ante*.

**1131. — — — Below bridges.]**—*R. v. CARR*, No. 1113, *ante*.

**1132. — Destroying ship—Accessory before the fact.]**—The Central Criminal Ct. has jurisdiction to try accessories before the fact to the felony

**PART II. SECT. 2, SUB-SECT. 4.—C.**

*n. On high seas—Against British subject.]*—A British ct. has no jurisdiction to punish a foreigner for an offence committed on the high seas, in a foreign ship, against a British subject.—*R. v. KINSMAN* (1853), James, 62.—**CAN.**

*o. — By foreign subject.]*—Accused, who was a subject of the State of Junaghad, committed an offence on a ship owned by a subject of the Junaghad State, when it was on the high seas some eighteen miles off the coast of the Kanara District. A question having arisen whether he could be tried for the offence by the First Class Magistrate of Karwar:—*Held*: the magistrate had no jurisdiction to try accused.—*R. v. PUNJA GUNI* (1917), 1 L. R. 42 Bom. 234.—**IND.**

*p. Within territorial waters.]*—A sheriff has jurisdiction to try a foreign

sailor for an offence committed by him on board a foreign vessel lying within the sheriff's territory, upon a seaman engaged in that vessel.—*LEWIS v. BLAIR* (1858), 3 Ir. 16; 30 Sc. Jur. 508.—**SCOT.**

*q. —.]*—A Dane, master of a steam trawler registered in Norway, was charged in D. Sheriff Ct. with a contravention of the Sea Fisheries Regulation Act (Scotland), 1895 (c. 42), s. 10 (4), by using on a certain date the method of fishing known as otter-trawling "in a part of the Moray Firth, which is within a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire, & is within the area specified in bye-law No. 10 made by Fishery Board of Scotland" made under Herring Fishery (Scotland) Act, 1889 (c. 23), s. 7. The locus of the alleged offence was admittedly within the area specified in the bye-law & was out with a line drawn at a distance of one marine

league from low-water mark on the adjacent coast. Accused objected that he was not subject to the jurisdiction of the D. Sheriff Ct. on the ground that the statutes & bye-laws were inapplicable as regarded foreigners to such part of the area specified as lay out with the territorial jurisdiction of the British Crown, & that the locus libelled was by international law out with such jurisdiction. Accused was convicted. Appeal:—*Held*: accused was subject to D. Sheriff Ct. & the conviction & sentence was legal & competent.—*MORTENSEN v. PETERS* (1906), 8 F. (Ct. of Sess.) 93.—**SCOT.**

**PART II. SECT. 2, SUB-SECT. 4.—D.**

*r. Ordinary criminal courts—Admiralty Offences (Colonial) Act, 1849 (c. 96), & 23 & 24 Vict. c. 88.]*—An offence committed on the high seas, but within three miles from the coast of British India, as being committed within the territorial limits of British

of "casting away & destroying a ship," on the high seas, on an indictment in the usual form against principal & accessory, though the principal felon be not amenable to justice. The underwriters on a policy of goods fraudulently made are within 1 Vict., c. 89, s. 6, though no goods were put on board.—*R. v. WALLACE* (1841), Car. & M. 200; 2 Mood. C. C. 200, C. C. R.

**1133. — Murder on British ship—On high seas.]—***R. v. LOPEZ, R. v. SATTLER*, No. 1109, *ante*.

**1134. — Manslaughter on British ships—In foreign territorial waters—By foreign member of crew—Effect of Merchant Shipping Act, 1854 (c. 104), s. 267.]—***R. v. ANDERSON*, No. 1090, *ante*.

**1135. Assizes—Where prisoner "found"—Offence by foreign member of crew of British ship—On high seas.]—***R. v. LOPEZ, R. v. SATTLER*, No. 1109, *ante*.

**1136. —.]—***R. v. MENHAM & FOX* (1858), 1 F. & F. 369.

**1137. Quarter sessions—Prisoner apprehended within jurisdiction—Larceny on British ship—On high seas—Larceny Act, 1861 (c. 96), s. 115.]—***R. v. PEEL*, No. 1022, *ante*.

**1138. —.]—***R. v. DEVON J.J., Ex p. PUBLIC PROSECUTIONS DIRECTOR* (1923), 40 T. L. R. 213, D. C.

**1139. Jurisdiction of justices—Vessel passing through several jurisdictions.]—**A vessel on her way up a river, may pass through several jurisdictions, but the justices of the place on land into which the offender is first carried, have jurisdiction to try & convict him (*LITTLEDALE, J.*).—*R. v. NUNN* (1828), 3 Man. & Ry. K. B. 75; 2 Man. & Ry. M. C. 1; 7 L. J. O. S. M. C. 10.

*See* Central Criminal Court Act, 1834 (c. 36), s. 22; Admiralty Offences Act, 1844 (c. 2); Territorial Waters Jurisdiction Act, 1878 (c. 3); Merchant Shipping Act, 1894 (c. 60), ss. 685-687.

#### SUB-SECT. 5.—OFFENCES COMMITTED BY ALIENS.

**1140. Whether liable for treason—Act done in course of war.]—***WARBECK'S CASE* (1500), cited 7 Co. Rep. 6 b; 77 E. R. 384.

*Annotation:—Mentd.* *R. v. TUCKER* (1694), 1 Ld. Raym. 1.

*See* Nos. 6661—6664, *post*.

**1141. Offence by alien prisoner of war in England.]—***MOLIERES' CASE* (1758), Fost. 188.

*Annotations:—Dtd.* *R. v. JOHNSON* (1805), 6 East, 583. *Mentd.* *R. v. MANNING* (1849), 1 Den. 467.

**1142. Alien resident in England—Whether liable for offences committed abroad.]—***R. v. BERNARD*, No. 667, *ante*.

**1143. —.]—**It is a crime on the part of a British subject, or for a foreigner owing

India, is punishable under the provisions of the Penal Code. The ordinary criminal cts. of the country have jurisdiction over such offences by virtue of the above Acts.—*R. v. KASHYA RAMA* (1871), 8 Bom. Cr. Ca. 63.—**IND.**

#### PART II. SECT. 2, SUB-SECT. 5.

**a. Whether liable for treason.]—**A foreigner who has his fixed domicile in Natal is subject to the law as to high treason in the same way as a natural born subject.—*R. v. PROZESKY* (1900), 21 N. L. R. 216.—**S. AF.**

**t. —.]—**A foreigner who is residing in a country not a casual visitor is subject to the law as to high treason.—*R. v. BADENHORST* (1900),

21 N. L. R. 227.—**S. AF.**

**a. —.]—**The protection afforded by a State to a resident alien does not cease simply because for a time the State forces are withdrawn & the enemy is in possession & exercises the rights of an army in occupation. Where territory so occupied reverts to the control of its rightful Sovereign, wrongs done during the foreign occupation are cognisable by the ordinary cts. & an alien who has aided the enemy may be tried & punished for high treason.—*JAGER v. A.-G. OF NATAL* (1907), 28 N. L. R. 319.—**S. AF.**

**b. Offence committed within territorial waters.]—**Prisoner, a foreigner, was arrested & committed for trial on a charge of theft committed on a

temporary allegiance to the Crown of England, to plot & conspire for the commission of a crime in a foreign country, or for the commission of a crime in this country (*LORD CAMPBELL, C.J.*).—*R. v. TCHORZEWSKI* (1858), 8 State Tr. N. S. 1091.

**1144. Offence committed on foreign ship abroad—General rule.]—***R. v. LEWIS*, No. 1089, *ante*.

**1145. — By alien prisoner of war.]—**A manslaughter committed in China, by an alien enemy, who had been a prisoner of war, & was then acting as a mariner on board an English merchant ship, on an Englishman, cannot be tried here under a commission issued in pursuance of 33 Hen. 8, c. 23, & 43 Geo. 3, c. 113, s. 6.—*R. v. DEPARDO* (1807), 1 Taunt. 26; Russ. & Ry. 134; 127 E. R. 739, C. C. R.

*Annotations:—Refd.* *R. v. de Mattos* (1836), 7 C. & P. 458; *R. v. Serva* (1845), 2 Car. & Kir. 53; *R. v. Lopez, R. v. Sattler* (1858), Dears. & B. 525.

**1146. — Death on English ship.]—**The crew of an English ship being on shore, a quarrel arose between a Spaniard & one of them, which led to blows by the Spaniard, which killed the other. The death took place on board the ship. The Spaniard was brought to England, & indicted & tried in London under a special commission issued in pursuance of 9 Geo. 4, c. 31, s. 7:—*Held*: under the circumstances, he could not be convicted (1) as he was not a "subject of His Majesty" within the meaning of sect. 7 of the Act, (2) as the death was on shipboard, though the blows were given on shore, the offence could not be said to have been committed according to the words of the statute, "on land out of the United Kingdom."—*R. v. DE MATROS* (1836), 7 C. & P. 458.

**1146a. Offence under Aliens Order—Punishable on summary conviction.]—**An objection that a statutory order has not been formally proved must be taken at the trial by a person charged with an offence under such order. If the objection is not taken then, the point cannot be raised on appeal. Aliens Restriction (Amendment) Act, 1919 (c. 92), has not repealed Aliens Restriction Act, 1914 (c. 12), s. 1 (1). Where, therefore, a person is charged with an offence under an order made under these Acts, the *onus* is upon that person to prove that he is not an alien & is not on the prosecution to prove that he is an alien. Offences under the Aliens Order, 1920, are triable only in cts. of summary jurisdiction & not on indictment.—*R. v. KAKALO*, [1923] 2 K. B. 793; 92 L. J. K. B. 997; 129 L. T. 477; 87 J. P. 184; 39 T. L. R. 671; 68 Sol. Jo. 41; 27 Cox, C. C. 454; 17 Cr. App. Rep. 149, C. C. A.

**1147. Offences committed within territorial waters—Manslaughter by negligence.]—***R. v. KEYN*, No. 1124, *ante*.

**Offences committed aboard British ships.]—***See* Sub-sect. 2, *ante*.

*See, generally, ALIENS*, Vol. II., pp. 121 *et seq.*

British vessel on the high seas. His discharge was applied for on the ground that the committing magistrate had no jurisdiction, the preliminary examination having taken place before the assent of the Governor-General, assenting to the institution of the proceedings, required by Code, s. 591, had been received:—*Held*: *deft.* was liable to arrest for an offence committed on board of a British ship on the high seas notwithstanding the limitation contained in sect. 591, & the application for his discharge must be refused.—*R. v. NEILSON* (1918), 52 N. S. R. 42; 40 D. L. R. 120.—**CAN.**

**c. — Fishery offence.]—***MORTENSEN v. PETERS* (1906), 8 F. (Ct. of Sess.) 93.—**SCOT.**

## SECT. 3.—VENUE.

## SUB-SECT. 1.—AT COMMON LAW.

## A. In General.

## 1148. General rule.—Where offence committed.]

—In the case of felony the trial shall be always by the common law in the same place where the offence was.—*DOWDALE'S CASE* (1605), 6 Co. Rep. 46 b.; 77 E. R. 323.

*Annotations* :—*Refd.* Calvin's Case (1608), 7 Co. Rep. 1 a; Orde v. Moreton (1609), 1 Bulst. 129; Wey v. Yally (1704), 6 Mod. Rep. 194; British South Africa Co. v. Companhia de Mocambique, [1893] A. C. 602. *Mentd.* Errington v. Thompson (1697), 1 Ld. Raym. 183; *Re* Scott, Scott v. Scott, [1916] 2 Ch. 268.

1149. — Jurisdiction of counties—Road repair.]—If a parish lies in two counties, the indictment for not repairing the highways must be laid in the county where the ruinous road lies.

This part of the parish here indicted is not a particular precinct; it is the whole of the parish that lies within this county of G., & it might have been laid so; the indictment must be confined to the county (LORD MANSFIELD, C.J.).—*R. v. WESTON UNDER PENYARD (INHABITANTS)* (1770), 4 Burr. 2507; 98 E. R. 314.

*Annotations* :—*Consd.* R. v. Great Broughton (1771), 5 Burr. 2700. *Dbtd.* R. v. Clifton (1794), 5 Term Rep. 498. It is supposed that when a parish lies in two counties, it is an exception to the general rule; such an exception, however, was not even hinted at in any case on the subject or any authority whatever before the case of *R. v. Weston* (LORD KENYON, C.J.); *R. v. Bridgewater* (1839), 10 Ad. & El. 711.

1150. — Offence in county city—Trial in county at large.]—Perjury being committed at B., within the limits of the City of G., which is a county in itself, on the trial of a cause before a jury of the county at large; the indictment may be found & tried by juries of the county at large. The King cannot, by charter, authorise the trial of crimes out of the county where they were committed.—*R. v. GOUGH* (1781), 2 Doug. K. B. 791; 99 E. R. 503.

*Annotations* :—*Consd.* R. v. Holt (1793), 5 Term Rep. 436; Johnson v. Dealtry (1819), 3 B. & Ald. 72. *Mentd.* R. v. Waddington (1800), 1 East, 143; Anon. (1832), 1 L. J. Ex. 116; Pain v. Terry (1865), 12 L. T. 269.

1151. — Misdemeanours—Libel.]—On information for writing, composing, & publishing a libel in the county of L. it appeared that deft., on Aug. 22, wrote & composed the libel in L., & that he was seen in L. on that & the following day. On Aug. 24 the libel was delivered in the county of M. by A. to B., being inclosed in an envelope addressed to A., containing written directions to A. to forward the libel to B., by whom it was subsequently published in M. The envelope was open, & it was not proved that there was on it any trace of a seal or post-mark. A was not called at the trial as a witness by either party, nor was it proved that he was a resident, or had been about that time in L.:—*Held*: where deft. wrote & composed a libel in L. with the intent to publish, & afterwards published it in M., he might be indicted for a misdemeanour in either county.

## PART II. SECT. 3. SUB-SECT. 1.—A.

1148 i. General rule.—Where offence committed.]—A criminal must be tried in the county or judicial district where the crime is alleged to have been committed.—*R. v. MALOTT* (1886), 1 B. C. R., pt. 11, 212.—*CAN.*

1148 ii. —.]—A person charged with an indictable offence has *prima facie* the right to be tried in the district in which the offence is supposed to have been committed. That right is derived from the common law.—*R. v. LYNN* (1911), 16 W. L. R. 324; 4 Sask. L. R. 324.—*CAN.*

1148 iii. —.]—As a general rule, accused should be tried in the

district where the offence was committed; but the arrest & committal for trial in one district are enough to confer jurisdiction in the local ct., although the offence was committed in another judicial district, accused having the right to apply for a change of venue.—*R. v. ROCHON* (1923), Q. R. 35 K. B. 208.—*CAN.*

1156 i. Where act is act of commission—Perjury—Place where oath is taken.]—Prisoner being indicted for perjury in giving evidence upon a charge for felony against G., it appeared that the felony was committed in the county of M., if at all. The justices before whom the examination took place entertained

To write & publish a libel is a misdemeanour compounded of distinct parts, each of which part, being an act done in prosecution of one & the same criminal intention, is a misdemeanour. Where a misdemeanour consists of such distinct parts the whole may be tried in that county wherein any part can be proved to have been done (ABBOTT, C.J.).—*R. v. BURDETT* (1820), 4 B. & Ald. 95; 1 State Tr. N. S. 1; 106 E. R. 873; *subsequent proceedings* (1821), 4 B. & Ald. 314.

*Annotations* :—*Expld.* A.-G. v. Kenflock (1837), 2 M. & W. 715. *Consd.* R. v. Meany (1867), 10 Cox, C. C. 506. *Fold.* R. v. Rogers (1877), 3 Q. B. D. 28. *Consd.* R. v. Holmes (1883), 12 Q. B. D. 23; R. v. Ellis, [1899] 1 Q. B. 230. *Refd.* Perkins's Case (1826), 1 Lew. C. C. 99; Hall v. Story (1846), 16 M. & W. 63; Cherry v. Thompson (1872), 41 L. J. Q. B. 243; R. v. Cooper (1875), 45 L. J. M. C. 15. *Bree v. Marescaux* (1881), 7 Q. B. D. 434; Tozler v. Hawkins (1885), 15 Q. B. D. 650; R. v. De Marny, [1907] 1 K. B. 388. *Mentd.* Pearson v. McGowran (1825), 5 Dow. & Ry. K. B. 616; R. v. Lovett (1839), 3 State Tr. N. S. 1177; Stikeman v. Dawson (1847), 1 De G. & Sm. 90; R. v. Grant, Ranken & Hamilton (1848), 7 State Tr. N. S. 507; R. v. Duffy (1849), 7 State Tr. N. S. 795; Doe d. Bennett v. Hale (1850), 15 Q. B. 171; R. v. Carden (1879), 5 Q. B. D. 1; Broad v. Perkins (1888), 4 T. L. R. 545.

1152. —.]—*R. v. ELLIS*, No. 1079, *ante*.

1153. Where act is act of commission—Murder—Place where stroke is given.]—ANON. (1491), Y. B. 7 Hen. 7 fo. 8, pl. 1.

*Annotations* :—*Consd.* Gaven v. Hussee & Gibbs (1537), 1 Dyer, 38 a. *Refd.* R. v. G. W. Ry. (1842), 3 Ry. & Can. Cas. 161.

1154. — Place where death occurs.]—A person is said to be slain where he dies, & not where he was wounded.—*R. v. SAVAGE* (1647), Sty. 76; 82 E. R. 542.

1155. — Where stroke given or where death occurs.]—ANON. (*circa* 1590), 1 Dyer, 50 b, n. *Annotation* :—*Refd.* R. v. O'Brian (1844), 1 Den. 9.

1156. — Perjury—Place where oath is taken.]—It is no objection to an indictment for perjury in an affidavit of an attorney of the ct. made in answer to a charge, exhibited against him in a summary way, for having in his possession blank pieces of paper with affidavit stamps & the signatures of a Master Extraordinary in Ch. & another person at the bottom of the papers, that it is not stated where the ct. was holden when the original application was made, or when the rule was made, calling on deft. to answer the charge, a sufficient venue being laid to the fact of taking the false oath.—*R. v. CROSSLEY* (1797), 7 Term Rep. 315; 2 Esp. 526; 101 E. R. 994.

*Annotations* :—*Mentd.* Dunn v. R. (1848), 13 Jur. 233; Graham v. Ingelby (1848), 2 Exch. 442; R. v. Vreones, [1891] 1 Q. B. 360.

1157. —.]—*R. v. GOUGH*, No. 1150, *ante*.

1158. —.]—A witness committed perjury at the W. county quarter sessions, which are held in the guildhall of W., which is situate in the county of the city of W.:—*Held*: the indictment for this perjury might be preferred in the county of the city of W.—*R. v. JONES* (1833), 6 C. & P. 137; 2 Nev. & M. M. C. 156.

the charge & examined the within the city of L.:—*Held*: the conviction was illegal.—*R. v. ROW* (1864), 14 C. P. 307.—*CAN.*

d. — Obtaining property by false pretences—Place where false pretence made.]—Prisoner, at S., in the county of H., falsely represented to the agent of a sewing machine company that he owned a lot of land, & thus induced the agent to sell machines to him, which were sent to T., in the county of Y., & delivered to him at S.:—*Held*: the offence was complete in H., & could not be tried in Y.—*R. v. CAN.* (1891), 26 C. P. 139.—

**1159. — Forgery—Whether at place of uttering.]**—If a person authorise another to sign a note in his name, dated at a particular place, & made payable at a banker's; & the person in whose name it is drawn, represent it to be the name of another person, with intent to defraud, & no such person as the note & the representation import, exists, this is forgery, for it is a false making of an instrument in the name of a non-existing person.

With respect to *deft. P.*, we are of opinion that there was not sufficient evidence to show that the forgery was committed by him in the county of M., where the indictment was laid; for the bare fact of the note having been uttered in that county by B., taking him even to be an accomplice, is no evidence of the forgery itself having been committed there (*per CUR.*).—*R. v. PARKES & BROWN* (1796), 2 Leach, 775; 2 East, P. C. 963, 992.

*Annotation:—Reid. R. v. Ritson & Ritson* (1869), 39 L. J. M. C. 10.

**1160. — — — —.]**—*R. v. CORAH* (1827), 2 Russell on Crimes & Misdemeanours, 6th ed. 658.

**1161. — Publication of false balance sheet by directors—Document filed in London—Larceny Act, 1861 (c. 96), s. 84.]**—There is "publication" under sect. 84 of the above Act within the jurisdiction of the Central Criminal Ct. if a document made or executed anywhere is filed in London.—

*L. J. K. B.* 78; *sub nom. R. v. HOOLEY, R. v. MACDONALD, R. v. WALLIS*, 127 L. T. 228; 87 J. P. 4; 38 T. L. R. 724; 27 Cox, C. C. 248; 16 Cr. App. Rep. 171, C. C. A.

**1162. Where act is act of omission—Embezzlement—Non-accounting for money received—Place to which account should have been rendered.]**—

*Held*: a denial by a servant when in the county of Stafford, of his having received money in the county of Salop was evidence to show that the receipt in the county of Salop was with intent to embezzle within 39 Geo. 3, c. 85, & the trial was properly had in the county of Salop.—*R. v. HOBSON* (1803), Russ. & Ry. 56; 1 East, P. C. Addenda xxiv, cited in 2 Leach, at p. 975; 5 Cox, C. C. 361, n.

*Annotations:—Consd. R. v. Taylor* (1803), 3 Bos. & P. 596; *R. v. Davison & Gordon* (1855), 7 Cox, C. C. 158; *R. v. Rogers* (1877), 3 Q. B. D. 28.

**1163. — — — —.]**—If a servant receive money in one county, for the use & on account of his master who lives in another county, & does not account for it to his master, the offence of embezzling the money may be laid to have been committed in the county in which his master lives.—*R. v. TAYLOR* (1803), 3 Bos. & P. 596; Russ. & Ry. 63; 2 Leach, 974; 127 E. R. 322.

*Annotations:—Consd. R. v. Murdock* (1851), 5 Cox, C. C. 360; *R. v. Rogers* (1877), 3 Q. B. D. 28.

**1164. — — — —.]**—Prisoner was a travelling salesman, whose duty it was to go into the county of D. every Monday to sell goods & receive money for them there, & return with it to his master in N. every Saturday. He received

two sums of money for his master in D., but never returned to render any account of them. Two months afterwards he was met by his master in N., who asked him what he had done with the money. Prisoner said he was sorry for what he had done, he had spent it:—*Held*: prisoner was rightly indicted in N., there having been evidence to go to the jury of an embezzlement in N.—*R. v. MURDOCK* (1851), 2 Den. 298; T. & M. 604; 21 L. J. M. C. 22; 18 L. T. O. S. 144; 15 J. P. 770; 16 Jur. 19; 5 Cox, C. C. 360, C. C. R.

*Annotation:—Consd. R. v. Rogers* (1877), 3 Q. B. D. 28.

**1165. — — — —.]**—Upon the trial of an indictment against bkpts. under 12 & 13 Vict. c. 106, s. 251, for embezzling part of their personal estate to the value of £10, to wit, bank notes & moneys, it appeared that the adjudication took place on June 21. Four days previously the bkpts. received several bank notes, & on the same day crossed over to Belgium, where they remained for a considerable time. Some of these identical notes were afterwards received by mercantile houses in London from places in Belgium, to which the bkpts. were traced, but there was no evidence as to how or where the notes were dealt with by them from the moment of their receiving them. In their possession, when they were apprehended,

an account of their expenditure in Belgium, the items being stated in foreign coin. The bkpts. were followed to England, & there arrested, & when before the Bkpcy. Ct. they gave no account of the disposal of the notes in question:—*Held*:

(1) there was no evidence of any offence committed within this realm, for if the notes were changed in this country, such a disposal must have taken place on June 17, & therefore, before the adjudication, & if disposed of abroad, that, as well as the disposal of the proceeds, was a complete offence there; (2) although a subsequent non-accounting was evidence of a fraudulent appropriation, it was not any part of the crime of embezzlement.

(3) An act of omission can have no locality except the place where the thing ought to have been done. If the non-accounting in this instance was the offence no doubt the omission took place in England (ALDERSON, B.).—*R. v. DAVISON & GORDON* (1855), 7 Cox, C. C. 158.

*Annotation:—As to (2) & (3) Consd. R. v. Rogers* (1877), 3 Q. B. D. 28.

**1166. — — — —.]**—*R. v. ROGERS*, No. 1070, *ante*.

**1167. — — — —.]**—It was the duty of prisoner, a commercial traveller, to remit daily to his employers, who resided in London, the money which he collected, without reduction. Prisoner, on Mar. 1 & 2, 1878, collected at Newark two sums of money which he did not remit or account for till the first week in Apr., when one of his employers went to Grantham where prisoner resided, saw him, & taxed him with receiving money & not accounting to them for it. Prisoner

**1159 i. — Forgery—Whether at place of uttering.]**—Where there was no evidence to show that accused, who was charged with forgery & uttering a forged instrument, had altered the instrument in any place within the jurisdiction of the circuit ct. where he was indicted & tried, the presiding judge directed the jury to return a verdict of not guilty.—*R. v. ACKERMAN* (1917), C. P. D. 108.—S. AF.

**i. — Larceny—Place where apprehended.]**—Prisoner received from prosecutor in the county of W., a quantity of boots & shoes to be sold on commission. He took them to the county of K., where he resided, &

then to the county of G., where he sold them, & fraudulently appropriated the money to his own use. On an indictment for larceny in the county of K., under 27 Vict. c. 8, s. 1, the jury were unable to agree whether prisoner fraudulently intended to appropriate the property in the county of K., or not until he had sold it in the county of G.:—*Held*: he could not be convicted on the indictment.—*R. v. CORMIER* (1865) (1825-1897), N. B. Dig. 229.—CAN.

**i. — Conspiracy — Place where overt acts carried out.]**—A conspiracy was wholly entered into & wholly carried out in the county of M., with

no overt acts outside that county:—*Held*: there was no jurisdiction to try the case in the county of Y.—*R. v. O'GORMAN* (1909), 18 O. L. R. 427; 13 O. W. R. 1189; 15 Can. Crim. Cas. 173.—CAN.

**e. — — — —.]**—In the case of conspiracy the law as to venue is that the common illegal intention must be entertained or manifested within the venue.—*R. v. QUINN* (1898), 33 I. L. T. 154.—IR.

**h. — Abduction — Averment of venue necessary in indictment.]**—An indictment for abduction stated that prisoners did make an assault, & carry

*Sub-sect. 1, A., B. & C. (a) & (b).]*

then & there handed to his employer a list of money he had collected & not accounted for, including the above two sums. There was no evidence that prisoner returned to Grantham on either of the days, or at what time of the respective days he received the two sums of money. He was indicted & convicted at the borough of Grantham quarter sessions for embezzling the above two sums of money:—*Held*: the conviction was bad, as there was no evidence of any embezzlement within the borough of Grantham.—*R. v. TREADGOLD* (1878), 48 L. J. M. C. 102; 39 L. T. 291; 43 J. P. 23; 14 Cox, C. C. 220, C. C. R.

**1168. — Bankruptcy offence—Failure to surrender to district court—Place where court is situate.**—(1) The felony of not surrendering at a district ct. to a *fiat* in bkpcy., under 5 & 6 Viet. c. 122, s. 32, is committed at the place where the district ct. is situate, & an indictment for this offence cannot be sustained in a different county from that in which the person was a trader, or in which he committed an act of bkpcy.

(2) 38 Geo. 3, c. 52, s. 2, which relates to the trial of offences in an adjoining county, only applies to cities & towns corporate which are counties of themselves, & not to towns corporate which are not counties of themselves.—*R. v. MILNER* (1846), 2 Car. & Kir. 310.

*Annotation*:—*As to* (1) *Consd.* *R. v. Davison & Gordon* (1855), 7 Cox, C. C. 158.

*B. Where Offence consists of Series of Acts.*

**1169. Triable where any constituent act done—Offence begun in one county—Completed in another county.**—*R. v. JONES* (1830), 1 Russell on Crimes & Misdemeanours, 8th ed. 21.

**1170. — — — — — Composition & publication of libel.**—*R. v. BURDETT*, No. 1151, *ante*.

*C. Where Offence consists of Continuing Acts.**(a) Involving the Posting of a Letter.*

**1171. Place of posting letter—Challenge to fight.**—If a man writes a letter with intent to provoke a challenge, seals it up, & puts it into the post office in Westminster, addressed to a person in the City of London, who receives it there, the

writer may be indicted for this offence in the county of Middlesex.—*R. v. WILLIAMS* (1810), 2 Camp. 506. *Annotation*:—*Refd.* *R. v. Burdett* (1820), 4 B. & Ald. 95.

**1172. — Libel.**—*R. v. BURDETT*, No. 1151, *ante*.

**1173. — Uttering forged document.**—*PERKIN'S CASE* (1826), 2 Lew. C. C. 150.

**1174. — Possession of stolen property.**—Prisoner, out of the county of W., received a bank note knowing it to have been stolen, & sent it from a place out of the county of W. to bankers in the county of W., by whom the note had been issued, in a letter requesting them to cash it:—*Held*: the Post Office authorities in W. were to be considered agents of prisoner, & therefore, their possession of the note in W. was his possession of it there, consequently he might properly be convicted in W. of the receiving it knowing it to have been stolen, under 7 & 8 Geo. 4, c. 29, s. 56.—*R. v. CRYER* (1857), Dears. & B. 324; 26 L. J. M. C. 192; 29 L. T. O. S. 268; 21 J. P. 455; 3 Jur. N. S. 698; 5 W. R. 738; 7 Cox, C. C. 335, C. C. R.

*Annotation*:—*Foll.* *R. v. Rogers* (1868), 18 L. T. 414.

**1175. — Obtaining property by false pretences.**—If money obtained by means of false statements of the name & circumstances of prisoner in a begging letter reaches prisoner in the county of B., but has been transmitted to him in a letter, posted at his request in the county of A., he is triable in A. When the party solicited puts a letter into the post in the county of A. the Postmaster then becomes the agent of prisoner, & the latter must thus be taken to have received it in the county of A.—*R. v. JONES* (1850), 3 Car. & Kir. 346; 1 Den. 551; T. & M. 270; 4 New Mag. Cas. 92; 4 New Sess. Cas. 353; 19 L. J. M. C. 162; 14 J. P. 322; 14 Jur. 533; 4 Cox, C. C. 198, C. C. R.

*Annotations*:—*Refd.* *R. v. Cryer* (1857), Dears. & B. 324; *R. v. Cooper* (1875), 1 Q. B. D. 19; *R. v. Stoddart* (1909), 73 J. P. 348.

**1176. — — — — —**—Prisoner was convicted of obtaining money by false pretences, the venue being laid in the county of the borough of C. It was proved that prisoner by means of a false pretence, contained in a letter written by him in the county of C., received there the money obtained by it, which money was sent to him by prosecutor

away G.:—*Held*: the indictment was bad, for want of a venue to the averment of the abduction.—*R. v. BROWNE* (1823), Jebb, Cr. & Pr. Cas. 21.—*IR.*

**k. — Sending false recommendation—Evidencer.**—On an indictment for sending to the Lord Lieutenant a false recommendation of persons convicted:—*Held*: proof of the document which contained the false recommendation, being in prisoner's handwriting, & dated in the county in which the venue was laid, was sufficient evidence of acts done in that county.—*R. DWYER* (1836), Jebb, Cr. & Pr. Cas. 198.—*IR.*

**PART II. SECT. 3, SUB-SECT. 1.—B.**

**1. Compound felony—Trial had in other county than one in which offence committed.**—Prisoner was tried at A. upon an indictment containing two counts, one for robbery & the other for receiving stolen goods. Both offences were proved to have been committed at T., & the jury found a general verdict of guilty on both counts:—*Held*: prisoner should have been proceeded against only on the count for receiving, & although he might be guilty of both offences, as the robbery was committed in another county than the one in which prisoner was tried, he must be discharged.—*R. v. RUSSELL* (1878), 12 N. S. R. (3 R. & C.) 254.—*CAN.*

**PART II. SECT. 3, SUB-SECT. 1.—C. (a).**

**1173 i. Place of posting of letter—Uttering forged document.**—A statement in the minor proposition of an indictment, that forged documents were enclosed under cover addressed to a party in England & put into the post office at Edinburgh:—*Held*: sufficient to constitute a relevant charge of uttering in Scotland.—*H.M. ADVOCATE v. JEFFREY* (1812), 1 Broun, 337.—*SCOT.*

**1175 i. — Obtaining property by false pretences.**—W. wrote & posted a letter in Victoria addressed to C. in Tasmania. The letter contained false representations by means of which W. hoped to induce C. to send money to him in Victoria:—*Held*: the Victorian Cts. had jurisdiction to convict W. of attempting to obtain money by false pretences.—*It. v. WAUGH*, [1909] V. L. R. 379.—*AUS.*

**1175 ii. — — — — —**—When a party in Scotland sent a swindling letter to a tradesman in England, & in consequence of it, goods were sent down to Scotland & delivered to him there:—*Held*: the Criminal Cts. of Scotland had jurisdiction to try the offender.—*Re MACGREGOR* (1846), Arkley, 49.—*SCOT.*

**m. — Trading with the enemy.]**

—An indictment set forth that two members of a Glasgow firm wrote to their agents at Rotterdam suggesting that these agents should deliver to a German firm a cargo of iron ore which was stored on the quay at Rotterdam awaiting the Glasgow firm's instructions, & that they thereafter wrote to their agents agreeing to certain proposed terms for delivering the ore to the German firm:—*Held*: if persons resident & carrying on business in Scotland supply goods to an enemy, they are subject to the jurisdiction of the ct. in Scotland, no matter in what country such persons or goods may chance to be when the goods are supplied.—*H.M. ADVOCATE v. HETHERINGTON*, [1915] S. C. (J.) 79.—*SCOT.*

**n. Place of receipt of letter—**

**Offence under Gambling Act, 1895.]**—A shopkeeper at Brisbane received money from B. for the purpose of obtaining for B. a ticket in a lottery, conducted & drawn at Hobart, a place outside the territorial limits of Queensland. The ticket was sent by letter, posted at Hobart, & directed to B. at the address given by him to A., when paying the purchase-money:—*Held*: an offence had been committed under Suppression of Gambling Act, 1895, s. 6, notwithstanding that the lottery was a foreign lottery:—

in the county of the borough of C., & the registered letter containing the money was posted in the county of the borough of C.:—*Held*: the venue was properly laid.—*R. v. LEECH* (1856), *Dears. C. C.* 642; 25 *L. J. M. C.* 77; 27 *L. T. O. S.* 128; 20 *J. P.* 278; 2 *Jur. N. S.* 428; 4 *W. R.* 482; 7 *Cox, C. C.* 100, *C. C. R.*

*Annotation*:—*Reid. R. v. Rogers* (1877), 3 *Q. B. D.* 28.

1177. ———.]—On an indictment for obtaining money by false pretences, which in one count was alleged to have been by sending a certain false return of fees to the Comr. of the Treasury, it appearing that the return was received by them in Westminster, with a letter dated Northampton, & an affidavit sworn there, & that they, on the faith of it, drew up a minute, which operated as an authority to the Paymaster-General to pay a certain amount to the prisoner, as compensation under 7 & 8 *Vict. c. 96*, at Westminster, the venue laid being Northamptonshire:—*Held*: there was reasonable evidence that the false representation was forwarded from Northamptonshire; it was, if false & fraudulent, "false pretence" within the statute; in effect the money was obtained by means of the minute, being a mere matter of regulation, & not a judicial proceeding; & therefore the venue was right, & the indictment supported.—*R. v. COOKE* (1858), 1 *F. & F.* 64.

*Annotations*:—*Reid. R. v. Holmes* (1883), 12 *Q. B. D.* 23. *Mentd. R. v. Cooper* (1875), 45 *L. J. M. C.* 15.

1178. ———.]—*R. v. HURWITZ* (1908), 150 *C. C. Ct. Cas.* 22.

1179. Place of receipt of letter—Demanding money with menaces.]—*ESSER'S CASE* (1767), 2 *East, P. C.* 1125.

1180. ———.]—*Threat to murder*.—*R. v. GIRDWOOD* (1776), 1 *Leach*, 142; 2 *East, P. C.* 1120.

1181. ———.]—*Publication of libel*.—*R. v. JOHNSON*, No. 1073, *ante*.

1182. ———.]—If a libellous letter is sent by the post, addressed to prosecutor at a place out of the county in which the venue is laid in an indictment for the libel, still, if it was first received by him within that county, this is a sufficient

publication by deft. to support the indictment.—*R. v. WATSON* (1808), 1 *Camp.* 215.

*Annotations*:—*Reid. Woodcock v. Houldsworth* (1846), 16 *M. & W.* 124. *Mentd. R. v. Burdett* (1820), 4 *B. & Ald.* 95.

1183. ———.]—*R. v. BURDETT*, No. 1151, *ante*.

1184. ———.]—*Denial of embezzlement*.—*R. v. ROGERS*, No. 1070, *ante*.

#### (b) Particular Instances.

1185. Treason—Where war levied.]—*Held*: treason laid being the compassing of the King's death in Middlesex, levying war in Surrey might be given in evidence as an overt act to prove it. But if an indictment were for levying war, it must be laid in the county where in truth it was.

The consultation & advising together of the means to destroy the King & his govt. is an overt act to prove the compassing of the King's death. The day laid in the indictment is not material & the jury are not bound to find the accused guilty that day but may find the treason to be as it was in truth, either before or after the time laid in the indictment.—*VANE'S CASE* (1662), *Kel.* 14; 6 *State Tr.* 120; 84 *E. R.* 1060.

*Annotation*:—*Mentd. R. v. Dowling* (1848), 3 *Cox, C. C.* 509.

1186. ———.]—Where any overt act takes place.]—*R. v. GRAHME* (1691), 12 *State Tr.* 645; *sub nom. R. v. PRESTON*, *Fost.* 196.

*Annotations*:—*Mentd. H. v. Knowles* (1694), 12 *Mod. Rep.* 55; *R. v. Crosby* (1695), 12 *Mod. Rep.* 72; *R. v. Layer* (1722), 8 *Mod. Rep.* 82.

1187. Offence against Foreign Enlistment Act, 1870 (c. 90)—Where preparation made.]—*R. v. JAMESON*, No. 1050, *ante*.

1188. Shooting—Triable where man struck.]—*R. v. COOMBES*, No. 1068, *ante*.

1189. Abduction—Triable in county from which woman taken—Or in which married.]—Deft., on an indictment for forcibly taking a woman in one county & marrying her in another, may be found guilty in either county.—*FULWOOD'S CASE* (1800), *Cro. Car.* 488; 79 *E. R.* 1021.

*Annotations*:—*Mentd. Brown's Case* (1673), 1 *R. v. Fezas* (1690), 4 *Mod. Rep.* 8; *Cooper* [1891] *P.* 369; *Moss v. Moss*, [1897] *P.* 263.

*GRISE v. HENNESSEY* (1904), *S. Q. R.* 37.—*AUS.*

*o.* ———.]—*Attempt to procure false affidavit of bastardy—Postmark not proved*.—Attempting to bargain with or procure a woman falsely to make the affidavit provided for by *C.S.U.C.* (c. 77), s. 6, that A. is the father of her illegitimate child, is an indictable offence. The attempt proved consisted of a letter written by deft., dated at Bradford, in the county of Simcoe, purporting, but not proved, to bear the Bradford postmark, & addressed to the woman at Toronto, where she received it.—*Held*: the case could be tried at York.—*R. v. CLEMENT* (1867), 26 *U. C. R.* 297.—*CAN.*

*p.* ———.]—*Obtaining property by false pretences*.—S., residing in the county of Carleton, ordered by telegram goods from G. in the county of Charlotte. The goods were shipped by G. from Charlotte, & received by S. in Carleton. An indictment having been preferred against S. in the county ct. of Charlotte for obtaining the goods by false pretences, on an application for a prohibition:—*Held*: as S., by ordering the goods by telegram, had made the telegraph co. his agent, the crime was partially committed in the county of Charlotte, & the county ct. of that county had jurisdiction.—*Ex p. SLIPP* (1893), 32 *N. B. R.* 4.—*CAN.*

*q.* ———.]—Objection to the jurisdiction of the High Ct. of Justiciary by a domiciled Englishman, indicted for obtaining articles the property of others by false pretences by means of

letters written & posted in England, inducing persons in Scotland to forward the articles to him in England, that the crime charge was committed in England, was repelled on the ground, that the crime was directed against Scottish subjects; & that deceptive instruments were set in motion which took effect in Scotland where also the injury was inflicted.—*H.M. ADVOCATE v. BRADBURY* (1872), 45 *Sc. Jur.* 1; 2 *Couper*, 311.—*SCOT.*

*r.* ———.]—A domiciled Englishman, resident in England, had been lawfully apprehended in England & brought to Scotland for trial on a charge of sending letters from England to traders in Scotland, containing false statements & representations, whereby he had fraudulently induced them to forward goods to him in England without paying & without intending to pay for the same.—*Held*: he was subject to the jurisdiction of the Criminal Cts. of Scotland as the *forum delicti*.—*H.M. ADVOCATE v. WITHERINGTON* (1881), 8 *R. (Ct. of Sess.)* 41; 18 *Sc. L. R.* 576.—*SCOT.*

*s.* ———.]—*Qu*: Whether a domiciled Englishman, resident in England, who addresses letters to persons in Scotland containing false & fraudulent statements, is subject to the jurisdiction of the Criminal Cts. in Scotland.—*H.M. ADVOCATE v. HALL* (1881), 8 *R. (Ct. of Sess.)* 28; 18 *Sc. L. R.* 444.—*SCOT.*

*t.* ———.]—*Abduction*.—Prisoner was indicted for having, at the City of Victoria, unlawfully caused to be taken

a certain unmarried girl, R., being under the age of sixteen years, out of the possession & against the will of her father, contrary to sect. 283 of the Criminal Code. The girl, by persuasion of letters written by prisoner in Victoria, Canada, addressed to & received by her within the State of Washington, U.S.A., was induced to leave her father's house in that State & meet the prisoner at Victoria, where they spent the night together:—*Held*: the reception by the girl of the letters was the motive cause of her abandoning her father's possession & the offence in part took place outside the jurisdiction.—*R. v. BLYTHE* (1895), 4 *B. C. R.* 276.—*CAN.*

*a.* ———.]—*False statements intended to deceive*.—Where the offence charged was the making, circulation, & publication of false statements of the financial position of a co., & it appeared that the statements were mailed from a place in Ontario to the parties intended to be deceived on Montreal:—*Held*: the Ct. of Queen's Bench in Montreal had jurisdiction to try accused.—*R. v. GILLESPIE* (1898), *Q. R.* 8 *Q. B.* 8.—*CAN.*

*b.* ———.]—*Incitement to commit crime*.—Where one person instigates another to the commission of an offence by means of a letter sent through the post, the offence of abetment by instigation is completed so soon as the contents of such letter become known to the addressee, & such offence is triable at the place where such letter is received.—*R. v. SHEO DIAL MAL* (1894), 1 *L. R.* 16 *All.* 389.—*IND.*



*Sect. 3.—Venue: Sub-sect. 1, C. (b); sub-sect. 2, A. & B.]*

**1190.** ——— *Or through which taken.]—R. v. GORDON (1804), 3 Russell on Crimes & Misdemeanours, 6th ed. 256.*

**1191. Simple larceny—Transportation of property after theft.]—R. v. COUNTRY (1816), 2 Russell on Crimes & Misdemeanours, 8th ed. 1149.**

—*]—If a man steal in one county & carry into another, it will be larceny in the latter, though the goods are not carried into the latter county until long after the original theft.*

*Though a verdict is recorded, yet if it appear promptly that it is not according to the intention of the jury, it may be vacated & set right.—R. v. PARKIN (1824), 1 Mood. C. C. 45, C. C. R.*

**1193.** ——— *]—If a man kill a sheep in county A. & carry the carcass into county B. he may be convicted upon an indictment for stealing, taking & driving away the sheep in county B.*

*If a man kill a sheep in county A. & carry the carcass into county B. he cannot be convicted of killing the sheep with intent to steal the carcass in county B.—R. v. NEWLAND (1847), 9 L. T. O. S. 395; 2 Cox, C. C. 283.*

**1194.** ——— *]—A person who has committed a larceny in one part of the United Kingdom may be tried & convicted for it in any other part of the United Kingdom wherein he has constructive possession of the stolen property.—R. v. ROGERS (1868), L. R. 1 C. C. R. 136; 37 L. J. M. C. 83; 18 L. T. 414; 16 W. R. 733; 11 Cox, C. C. 38, C. C. R.*

**1195.** ——— *]—If a stolen chattel is carried over a considerable space by the thief, the *asportavit* continues so long as the removal continues, & the taking, in point of law, continues too (COCKBURN, C.J.).—GRIFFITH v. TAYLOR (1876), 2 C. P. D. 194; 46 L. J. Q. B. 152; 36 L. T. 5; 41 J. P. 340; 25 W. R. 196, C. A.*

**1196.** ——— *Offence made felony by statute.]—A. was indicted at common law for simple larceny, in stealing in Middlesex, a quantity of lead. It appeared that the lead was stolen from the roof of the church of I., in Buckinghamshire. Prisoner was indicted at the Central Criminal Ct., which has jurisdiction in Middlesex but not in Buckinghamshire:—Held: he could not be convicted there, on the ground that the original taking not being a larceny, but created by statute a felony, the subsequent possession could not be considered a larceny.—R. v. MILLAR (1837), 7 C. & P. 665.*

**1197.** ——— *Transportation of property after arrest.]—On an indictment for stealing two horses in Kent, the only evidence of stealing in Kent was that the constable having taken prisoner in Surrey, & prisoner having offered on some pretence to go to a place in Kent, the constable & prisoner rode the horses there, & prisoner escaped, leaving the horses with the constable:—Held this was not sufficient.—R. v. SIMMONDS (1834), 1 Mood. C. C. 408.*

**1198.** ——— *Transformation of nature of property.]—Upon an indictment for stealing a live animal,*

*evidence cannot be given of stealing a dead one. An indictment for stealing a dead animal should state that it was dead; for upon a general statement that a party stole the animal, it is to be intended that he stole it alive.*

*Prisoners were convicted in the county of H. for stealing live turkeys. It appeared that they stole them alive in C., & killed them there, & then brought them into H.:—Held: as prisoners had not the turkeys in a live state in H., the charge as laid was not proved & the conviction was wrong.—R. v. EDWARDS (1823), Russ. & Ry. 497, C. O. R.*

**1199.** ——— *]—An indictment for stealing “a brass furnace” in the county of H. is not supported by evidence of stealing a brass furnace in the county of R. & breaking it there, & bringing the pieces into the county of H.—R. v. HALLOWAY (1823), 1 C. & P. 127.*

**1200. Larceny by several—Individual transportation after theft—Separate indictments.]—R. v. BARNETT (1818), 2 Russell on Crimes & Misdemeanours, 6th ed. 284.**

**1201. Larceny of husband's goods by wife—Transfer of goods to paramour—Not triable where goods not in possession of paramour.]—A wife took her husband's goods from Notting Hill, & she was found committing adultery with prisoner at Liverpool, the husband's goods being then in prisoner's possession. There was no evidence that they were under his control at any place within the jurisdiction of the Central Criminal Ct.:—Held: that ct. had no jurisdiction to try prisoner for the offence.—R. v. PRINCE (1868), 32 J. P. 615; 11 Cox, C. C. 145.**

**1202. Killing with intent to steal—Triable where actual killing takes place.]—R. v. NEWLAND, No. 1193, ante.**

**1203. Compound larceny—Transportation of property after theft.]—Prisoner robbed the mail in either Wiltshire or Berkshire, but he did not quit the mail coach till it got into Middlesex. He was there tried for robbing the mail:—Held: on an indictment for robbing the mail it must be proved that the robbery was committed in the county laid in the indictment.—R. v. THOMAS (1794), 2 Leach, 634.**

**1204.** ——— *]—The venue in an indictment charging the compound larceny of stealing from the person was laid in the county of the City of Gloucester, whither the stolen property was taken by prisoners, it having been proved that the theft was committed in the county of Wilts:—Held: there was no jurisdiction to try the prisoners in the City of Gloucester, as there would have been if they had been charged with simple larceny only.—R. v. FENLEY (1903), 20 Cox, C. C. 252.*

**1205. Receiving stolen property—Absence of evidence of original theft.]—A., B. & C. were indicted for stealing sheep in Dorsetshire. The indictment in count 7 also charged C. as for a substantive felony, with receiving the sheep in Somersetshire, without naming any one as the thief. The indictment was laid, found & tried in Dorsetshire. C. was found guilty on the 7th count**

## PART II. SECT. 3, SUB-SECT. 1.—C. (b).

**1191 i. Simple larceny—Transportation of property after theft.]—Theft is a continuous crime as long as the property stolen is in the physical possession of the thief. The conviction of an inhabitant of Cape Colony of the crime of theft, committed in having stolen certain rough diamonds from some person unknown, & at some place beyond the Colony unknown, & bringing them within the Colony, sustained.**

—*R. v. PHILANDER JACOBS (1876), Buch. 171.—S. AF.*

**1191 ii.** ——— *]—The act of stealing is a continuous one & though the original taking may have occurred without the jurisdiction, the fact that the thief has conveyed the stolen goods within the jurisdiction renders him indictable for theft.—R. v. HERBST (1880), K. 187.—S. AF.*

**1191 iii.** ——— *]—R. v. JANTJES (1884), 3 H. C. 236.—S. AF.*

**1191 iv.** ——— *]—R. v. LEPAL*

*(1892), 9 S. C. 263.—S. AF.*

**1191 v.** ——— *]—R. v. JUDELMAN (1893), 10 S. C. 12.—S. AF.*

*c. Receiving stolen property—Transportation after receipt.]—Accused was convicted of receiving & resetting a stolen watch in Edinburgh & brought a suspension, pleading that as the panel had received the watch in Glasgow, not in Edinburgh, the Sheriff had no jurisdiction. The ct. refused the suspension, being of opinion that reset was a *crimen continuum*, & the*

*County*:—*Held*: the 7th count was bad, as showing no jurisdiction in Dorsetshire.—*R. v. MARTIN* (1849), 2 Car. & Kir. 950; 1 Den. 398; T. & M. 78; 3 New Sess. Cas. 575; 18 L. J. M. C. 137; 13 L. T. O. S. 217; 13 J. P. 282; 13 Jur. 368; 3 Cox, C. C. 447, C. C. R.

*Annotation*:—*Mentd.* *R. v. Faderman* (1850), 4 New Sess. Cas. 161.

**1206. Obtaining by false pretences—Triable where false pretences made.**—*R. v. BUTTERY* (prior to 1820), cited 4 B. & Ald. 170; 106 E. R. 904.

*Annotations*:—*Fold.* *R. v. Ellis*, [1899] 1 Q. B. 230. *Refd.* *Il. v. Burdett* (1820), 4 B. & Ald. 95; *Pearson v. McGowan* (1825), 3 B. & C. 700; *R. v. Jones* (1850), 1 Den. 551; *Il. v. Cooper* (1875), 1 Q. B. D. 19; *R. v. Oliphant* (1905), 53 W. Ir. 556.

**1207.** ————*]*—Prisoner obtained sheep by false pretences in Middlesex & subsequently removed them into the county of Essex, where he was apprehended:—*Held*: that the ct. of quarter sessions for the county of Essex had no jurisdiction to try the offence.

Prisoner continues liable to be indicted in the county in which he made the false pretences (*ERLE, C.J.*).—*R. v. STANBURY* (1862), Le. & Ca. 128; 31 L. J. M. C. 88; 5 L. T. 686; 26 J. P. 84; 10 W. R. 236; 9 Cox, C. C. 94, C. C. R.

**1208.** ————*]*—**Triable also where money received.**—*R. v. HOLMES*, No. 1085, *ante*.

**1209.** ————*]*—An indictment at the place where the false pretence is made is good.—*R. v. RICHARDS* (1884), 48 J. P. Jo. 149, C. C. R.

**1210.** ————*]*—**Triable where goods supplied.**—*R. v. ELLIS*, No. 1079, *ante*.

**1211.** ————*]*—**Triable where property obtained.**—Where pretences are made in one place whereby goods are obtained from another place, there is jurisdiction to try the case at the latter place.—*R. v. ALLINGTON* (1893), 9 T. L. R. 199, C. C. R.

**1212. Bankrupt obtaining credit—Triable where credit is obtained.**—A., an undischarged bankrupt in England, wrote to B. in Ireland asking the price of a black cob, & on receiving answer telegraphed to Ireland for the horse to be sent to England, which was done, but no time for payment was stipulated for. A. did not inform B. before or at the time of the sale that he was an undischarged bankrupt. A. refused to pay for the horse:—*Held*: A. was rightly convicted of "obtaining credit" within Bkpcy. Act, 1883 (c. 52), s. 31, & the offence was committed in England.—*R. v. PETERS* (1886), 16 Q. B. D. 636; 55 L. J. M. C. 173; 54 L. T. 545; 50 J. P. 631; 34 W. R. 399; 2 T. L. R. 359; 16 Cox, C. C. 36, C. C. R.

*Annotations*:—*Refd.* *R. v. Dawson* (1889), 5 T. L. R. 87. *Mentd.* *R. v. Juby* (1886), 55 L. T. 788; *R. v. Dyson*, [1894] 2 Q. B. 176.

**1213.** ————*]*—An undischarged bkpt. residing in the county of L. while in the county of S. purchased a quantity of fish at an auction, for which he obtained credit. Part of the fish he disposed of in the county of S. & the remainder he sent to the county of L. Upon an indictment laid

in the county of L. which charged him with having, while he was an undischarged bkpt., unlawfully obtained credit to the extent of £20 & upwards without informing the persons from whom credit was obtained of the fact that he was an undischarged bkpt., contrary to Bkpcy. Act, 1883 (c. 52), s. 31:—*Held*: the credit was obtained in the county of S., & the indictment was therefore wrongly laid in the county of L.—*R. v. DAWSON* (1888), 59 L. T. 932; 53 J. P. 280; 5 T. L. R. 87; 16 Cox, C. C. 556, C. C. R.

**1214. Issuing false certificate—Contagious Diseases (Animals) Act, 1878 (c. 74), s. 62.**—O. ordered animals, bought at a market in the county of S., to be forwarded to T., in the county of C. A form of certificate was there given to the drover, who showed it in course of the journey to railway porters & others at two places in the county of C., but it was destroyed by order of O. On O. being charged, under above Act, for uttering a false certificate, & notice to produce the original being served:—*Held*: the justices at T. were right in receiving secondary evidence of the certificate, & had jurisdiction to convict O. of uttering the certificate within their jurisdiction.—*Oakey v. Stretton* (1884), 48 J. P. 709.

**1215. Conspiracy—Triable where any overt act committed.**—*R. v. BOWES* (1787), cited 4 East, 171; 102 E. R. 795.

*Annotations*:—*Refd.* *R. v. Brisac* (1803), 4 East, 164; *R. v. Burdett* (1820), 4 B. & Ald. 95.

**1216.** ————*]*—*R. v. BRISAC*, No. 1088, *ante*.

**1217. Procuring commission of offence—Procuring triable where full offence committed—Murder.**—*ANON.* (1504), Keil. 67; 72 E. R. 227.

**1218.** ————*]*—**Libel.**—*R. v. JOHNSON*, No. 1073, *ante*.

**1219.** ————*]*—**Forgery.**—*R. v. BULL & SCHMIDT*, No. 443, *ante*.

## SUB-SECT. 2.—STATUTORY PROVISIONS.

### A. Offences triable in any County.

**1220. Assault upon revenue officer.**—9 Geo. 2, c. 35, s. 26, which enacts that prosecutions for assaults on revenue officers may be tried in any county, only extends to assaults on them *qua* officers, & a deft. having been found guilty on an indictment of a common assault on prosecutor who was an Excise officer, this ct. arrested the judgment, though prosecutor was described to be an Excise officer, the offence being laid in Surrey & the venue in Middlesex.—*R. v. CARTWRIGHT* (1791), 4 Term Rep. 490; 100 E. R. 1136.

*Annotation*:—*Mentd.* *Coomber v. Berks JJ.* (1882), 9 Q. B. D. 17.

### B. Offences committed on Boundaries of Counties.

**1221. Concurrent jurisdiction of adjoining counties—Applies to all offences—Criminal Law Act,**

objection to the jurisdiction bad.—*GRACE v. STUART* (1884), 11 R. (Ct. of Sess.) 22; 21 Sc. L. R. 526.—*SCOT.*

**d.** ————*]*—**Triable where sale effected.**—An indictment for receiving stolen pigs in Londonderry is supported by evidence that the pigs were first brought to the prisoner in Donegal, & afterwards sold by him, slaughtered, in Londonderry.—*R. v. CONNOR* (1833), Jebb, Cr. & Pr. Cas. 150.—*IR.*

**1215i. Conspiracy—Triable where any overt act committed.**—The ct. has jurisdiction to hear a charge of conspiracy to defraud if any overt act is done in pursuance of the conspiracy within the jurisdiction, although the original agreement between the conspirators

is made outside the jurisdiction.—*R. v. KELLOW*, [1912] V. L. R. 162.—*AUS.*

**e. Fraudulent conversion—Begun in one district, finished in another—Triable in either district.**—Where fraudulent conversion of the proceeds of a valuable security is begun in one district & the continuation & completion are in another district, accused may be arrested & proceeded against in either district.—*R. v. HOGLE* (1896), Q. R. 5 S. C. 59.—*CAN.*

## PART II. SECT. 3, SUB-SECT. 2.—B.

**f. Concurrent jurisdiction of adjoining counties.**—9 Geo. 4, c. 54, s. 26—*Form of indictment.*—In an indictment under 9 Geo. 4, c. 54, s. 26, the county

in which the offence was actually committed should be stated in the indictment, with an averment that such offence took place within 500 yards of the county in which the indictment was laid.—*R. v. BROWN* (1837), Craw. & D. Abr. C. 46.—*IR.*

**g.** ————*]*—**Whether applicable to river boundary.**—An offence committed within 500 yards of the centre of a river which is the boundary of two counties, is not within 9 Geo. 4, c. 54, ss. 26, 27.—*NOON'S CASE* (1841), Ir. Cr. Rep. 110.—*IR.*

**h. Offence outside Northern Ireland—Trial in Northern Ireland.**—Accused was charged with armed robbery under Larceny Act, 1916, sect. 23, sub-s. 1,



*Sect. 3.—Venue: Sub-sect. 2, B., C. & D.]*

**1826 (c. 64).—***R. v. RUCK* (1829), 2 Russell on Crimes & Misdemeanours, 8th ed. 1057.

**1222. Distance to be measured in direct line.]—**The enactment of Criminal Law Act, 1826 (c. 64), s. 12, that offences committed on the boundaries of two counties "or within the distance of 500 yards of any such boundary or boundaries," may be tried & punished in either county, means a distance of 500 yards measured in a direct line from the border, & not 500 yards by the nearest road.—*R. v. WOOD & PARKER* (1841), 5 Jur. 225.

**1223. —.]—***LAKE v. BUTLER* (1855), 5 E. & B. 92; 24 L. J. Q. B. 273; 25 L. T. O. S. 128; 19 J. P. 692; 1 Jur. N. S. 499; 3 W. R. 458; 3 C. L. R. 1124; 119 E. R. 416.

*Annotations:—***Consd.** *Jewel v. Stead* (1855), 6 E. & B. 350; *Duignan v. Walker* (1859), John. 446; *Moufflet v. Cole* (1872), L. R. 8 Exch. 32.

**1224. —.]—***MOUFFLET v. COLE* (1872), L. R. 8 Exch. 32; 42 L. J. Ex. 8; 27 L. T. 678; 21 W. R. 175, Ex. Ch.

**1225. Where court has limited jurisdiction.]—**The provision in 7 Geo. 4, c. 64, s. 12, as to offences committed within 500 yards of the boundaries of counties, is confined to county boundaries & to prosecutions in counties. It does not apply to prosecutions in limited jurisdictions.

Prisoner was tried at the general quarter sessions of the peace for the town & borough of Southwark on an indictment charging him with stealing within the town & borough, & the larceny from the person, the apprehension of prisoner, & the finding the property upon him, were all within the City of London, but within 500 yards of the county of Surrey. The recorder directed the jury to acquit prisoner, on the ground of their being incompetent to try felony, which had been committed certainly in the City of London, & prosecutor was then bound over to prefer his bill at the Old Bailey, & prisoner on his arraignment at the Old Bailey, on the bill found by the London grand jury for the same felony, pleaded *autrefois acquit* in Southwark, founded on 7 Geo. 4, c. 64, s. 12:—*Held*: the plea was properly overruled, on the ground that 7 Geo. 4, c. 64, s. 12, did not extend to trials in limited jurisdictions, but only to county trials.—*WELSH'S CASE* (1827), 1 Mood. C. C. 175, C. C. R.

*Annotation:—***Consd.** *R. v. G. W. Ry.* (1842), 3 Q. B. 333.

**1226. Offence in borough situate in two counties—Triable in either county.]—**Where an offence is committed in a borough, which is situate partly in one county & partly in another, the offence is triable in either county, under Criminal Justice Administration Act, 1851 (c. 55), s. 19.—*R. v. GALLANT* (1859), 1 F. & F. 517.

**1227. Offence commenced in one county & completed in another—Triable in either county.]—***R. v. JONES* (1830), 1 Russell on Crimes & Misdemeanours, 8th ed. 21.

**1228. —.]—****Must be tried where laid.]—**An indictment, at quarter sessions for the borough of S., stated that A., late of the parish of M., in the county of N., & in the borough of S., on, etc., at

committed on Oct. 19, 1922, in the County of L. He was apprehended in the County of T., & in custody in the County of F. on Nov. 29, 1922, & was indicted, tried, & convicted at B. Jan. 5, 1923, at the Winter Assizes for the Winter Assize County of Northern Ireland:—*Held*: there was jurisdiction to try the accused at the assizes in Northern Ireland.—*R. v. M'QUILLAN*, [1923] 2 I. R. 93.—**IR.**

**1222 i. Distance to be measured in direct line.]—**In computing the artificial

extension of the geographical limits of the jurisdiction of Cts. of Petty Sessions given by Justices Acts, 1886, s. 139, distance is to be measured in a straight line from the boundary of the district.—*UNION BANK v. BROOM*, [1904] S. R. Q. 215.—**AUS.**

**PART II. SECT. 3, SUB-SECT. 2.—C.**

**1230 i. Whether triable in county at large.]—**Defts. were indicted & tried in the county of the town of D., for a

the parish aforesaid, in the borough aforesaid, committed an assault. The marginal venue was "Borough of S." The parish is entirely in the county of N., the rest of the borough in the county of L. Deft. removed the indictment by *certiorari*, & a venire was awarded into the county of L., where he was tried & convicted. The offence was committed in a part of parish which is in the borough, & within 500 yds. from the boundary of L.:—*Held*: the venue, as laid, was in N., & notwithstanding the proceedings under the *certiorari*, the trial was without jurisdiction, & judgment must be arrested; the words "at the parish aforesaid" could not be rejected; & for the trial to be good in either county, under 7 Geo. 4, c. 64, s. 12, the offence must have been laid & tried in one & the same county.—*R. v. MITCHELL* (1842), 2 Q. B. 636; 2 Gal. & Dav. 274; 11 L. J. M. C. 55; 6 Jur. 505; 114 E. R. 249.

*Annotations:—***Refd.** *R. v. O'Connor* (1843), 4 State Tr. N. S. 935; *R. v. Martin* (1849), 13 J. P. 282.

**1229. Where part of county is detached.]—***R. v. LOADER* (1840), 1 Russell on Crimes & Misdemeanours, 8th ed. 24.

*Annotation:—***Refd.** *R. v. Martin* (1849), T. & M. 78.

*C. Offences committed in Counties of Cities.*

**1230. Whether triable in county at large.]—***GLOUCESTER TOWN CASE* (1593), Poph. 16; 79 E. R. 1138.

**1231. —.]—***R. v. GOUGH*, No. 1150, *ante*.

**1232. —.]—**An indictment for forgery stated the offence to have been committed in the county of Nottingham; it was proved to have been committed in the county of the town:—*Held*: although under 38 Geo. 3, c. 52, it was triable in the county at large, the offence should have been laid in the county of the town.—*R. v. MELLOR* (1808), Russ. & Ry. 144, C. C. R.

*Annotation:—***Consd.** *R. v. Hinley* (1843), 1 Cox, C. C. 12.

**1233. —.]—**An indictment in the next adjoining county, for an offence within an inferior county, need not aver that the former is the next adjoining county. When the record is regularly drawn up that may be stated in the caption; but the indictment must state the offence to have been committed in the inferior county.—*GOFF'S CASE* (1810), Russ. & Ry. 179, C. C. R.

**1234. —.]—**In Easter Term, 1832, the A.-G. filed ten informations against the mayor & nine aldermen of Bristol. The venue was laid in the city of Bristol & county of the same name. Defts. appeared & pleaded guilty. On June 6, 1833, it was ordered that the trials in these several prosecutions be had by jurors of the county of Berks, & that proper suggestions for that purpose be entered in the rolls in these several prosecutions.—*R. v. PINNEY* (1832), 3 B. & Ad. 947; 5 C. & P. 254; 3 State Tr. N. S. 11; 1 Nev. & M. M. C. 307; 110 E. R. 349.

*Annotations:—***Refd.** *R. v. Holden* (1833), 5 B. & Ad. 347; *R. v. Glamorgan County Council*, [1899] 2 Q. B. 536. **Mentd.** *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1.

**1235. —. Effect of Municipal Corporations Act,**

sedition libel, & the jury did not agree upon a verdict. The county of the town of D. was situated in the county of L., which latter was adjoining to the county of M. Some of the publications in question were circulated in the county of M. On the application of the counsel for the Crown, under 6 Geo. IV. c. 51, s. 4, an order was made for the transfer of defts. to the county of M., for the purpose of standing their trial there.—*R. v. TRAYNOR* (1839), 1 Craw. & D. 237.—**IR.**

**1835 (c. 76).]**—Since the passing of the above Act all offences committed in Bristol, & the cities & towns named in sched. C. of that act, are triable at assizes for Gloucestershire & the other counties named in that sched., & the jurisdiction of assizes is not affected by the grant of a recorder & a quarter sessions in such cities or towns.—*R. v. HOLDEN* (1838), 8 C. & P. 606.

*Annotation* :—**Mentd.** *R. v. Edwards, Underwood & Edwards* (1848), 11 L. T. O. S. 50.

**1236. —.]**—A felony committed in a county of a town, the style of which is "Town of Kingston-upon-Hull & county of the same town":—*Held*: sufficiently laid in the venue of an indictment tried in the next adjoining county as "Yorkshire, being the next adjoining county to the town & county of Kingston-upon-Hull, to wit," the venue being imperfect, there being no "county of Kingston-upon-Hull."—*R. v. GRUNDY* (1847), 2 Cox, C. C. 357.

**1237. City & corporate town must be county in itself.]**—*R. v. MILNER*, No. 1168, *ante*.

**1238. Effect of enlarging area of county of town.]**—If a felony be committed in that part of the county of a town which has been added to it by Parliamentary Boundaries Act, 1832 (c. 64), & Municipal Corpn. Act, 1835 (c. 76), it is triable in the county of the town.—*R. v. PILLER* (1836), 7 C. & P. 337; 3 Nev. & M. M. C. 439.

**1239. —.]**—By Parliamentary Boundaries Act, 1832 (c. 64), s. 36, sched. (O), 30, Clifton is made a part of the parliamentary borough of Bristol, which is a county of itself. Except so far as that Act operated, it was in the county of Gloucester:—*Held*: after the passing of Corporation Act, 1836 (c. 76), ss. 7, 8, the Gloucestershire justices had no longer the power to make an order diverting a footway in Clifton, their jurisdiction, in such cases, being transferred to the justices of Bristol.—*R. v. GLOUCESTERSHIRE J.J.* (1836), 4 Ad. & El. 689; 7 C. & P. 338, n.; 1 Har. & W. 682; 6 Nev. & M. K. B. 115; 5 L. J. M. C. 79; 111 E. R. 947.

*Annotation* :—**Mentd.** *R. v. New Sarum* (1845), 1 New Mag. Cas. 372.

See Criminal Procedure Act, 1851 (c. 100), s. 23; Municipal Corporations Act, 1882 (c. 50), s. 188, Sched. 6.

#### *D. Offences committed upon Journeys.*

**1240. Journey partly within jurisdiction.]**—On an indictment for assault, it was proved that the offence was committed in one of the carriages of a train running from Brighton to New Cross & before the train arrived at the T. station, in the county of Sussex. At that station prosecutrix left the carriage in which she had been riding with deft., & rode in another carriage of the same train to New Cross, which is within the jurisdiction of the Central Criminal Ct.:—*Held*: by the joint operation of Criminal Law Act, 1826 (c. 64), s. 13, & Central Criminal Ct. Act, 1834 (c. 36), s. 2, the

indictment was properly preferred & tried at the Central Criminal Ct.—*R. v. FRENCH* (1859), 8 Cox, C. C. 252.

**1241. —.]**—Prisoner was indicted for the murder of her infant child. She was seen to leave W., a place within the jurisdiction of the Central Criminal Ct., by train, & she then had the child with her. She arrived the same evening at a house near G., a place outside the jurisdiction of the Central Criminal Ct. She was then alone but was carrying a brown paper parcel. She returned the next day to a place within the jurisdiction of the Central Criminal Ct., taking the parcel with her:—*Held*: there was jurisdiction to try prisoner at the Central Criminal Ct.—*R. v. BEXLEY* (1906), 70 J. P. 263.

**1242. Journey through several jurisdictions—Criminal Law Act, 1826 (c. 64), s. 13.]**—Sect. 13 of the above Act is not confined in its operation to the carriages of common carriers, or to public conveyances; but if property is stolen from any carriage employed in any journey, the offender may, by virtue of that section, be tried in any county through any part whereof such carriage shall have passed in the course of the journey during which such offence shall have been committed.

The object of the statute was to enable a prosecutor, whose property is stolen from any carriage on a journey, to prosecute in any county through any part of which the carriage shall have passed in the course of that journey; because, in many cases, it might be quite impossible for a prosecutor to ascertain at what part of the journey the offence was actually committed (*JERVIS, C.J.*).—*R. v. SHARP* (1854), Dears. C. C. 415; 24 L. J. M. C. 40; 24 L. T. O. S. 170; 18 J. P. 743; 3 W. R. 21; 6 Cox, C. C. 418, C. C. R.

**1243. What is offence committed in course of journey—Criminal Law Act, 1826 (c. 64), s. 13.]**—Prisoner was indicted in the county of C. for larceny committed on a journey under sect. 13 of the above Act. It appeared that, as the guard of the coach from P. in the county of C. to K. in the county of W., he had been entrusted with a bankers' parcel & when changing horses some distance from P., & in the county of W., he took the parcel from the coach, & while at a privy abstracted two sovereigns therefrom:—*Held*: the stealing was not "in or upon the coach," so not within the statute, & the indictment should be preferred in the county of W.—*SHARPE'S CASE* (1836), 2 Lew. C. C. 233.

**1244. —.]**—Where the evidence is consistent with the fact of an article having been abstracted from a railway carriage, either in the course of the journey through the county of A. or after its arrival at its ultimate destination, in the county of B., & prisoner is indicted in A. under sect. 13 of the above Act, the case must go to the jury, who are to say whether they are satisfied that the larceny was committed in the course of the journey or afterwards.—*R. v. PIERCE* (1852), 20 L. T. O. S. 182; 6 Cox, C. C. 117.

#### **PART II. SECT. 3, SUB-SECT. 2.—D.**

*rough several jurisdictions.* c. 30, s. 24.]—By the — an indictment for an assault committed on board a steamboat, on its passage between A. & B., but before it came within the county of B. it is sufficient to allege that the assault took place within the county of B.—*R. v. WEBSTER* (1850), 1 All. 589.—**CAN.**

1. — *Refusal to account for fare*

*received.*]—Deft., the conductor of a train, was charged with the theft of \$3.05 from a railway co., his employers, that sum having been paid to deft. as a passenger fare. The money was received in the province of Alberta, in the course of a trip from a point in Alberta to a point in British Columbia:—*Held*: the Alberta Ct. had jurisdiction, it being shown that deft. had refused in Alberta to account for the \$3.05, as well as in British Columbia.—*R. v. MARTIN* (1912), 21 W. L. R. 658;

2 W. W. R. 602; 4 D. L. R. 650; 4 Alta. L. R. 329.—**CAN.**

m. *Journey on High Sea—Larceny—Whether within 1 Rev. Stat. c. 158, s. 10.]*—Larceny committed on the high sea, on a voyage from Ireland to St. John, does not come within the above sect., relating to the place of trial of offences committed during a voyage, but may be tried under 18 & 19 Vict. c. 91.—*R. v. DILLON* (1863), 6 All. 61.—**CAN.**

Sect. 3.—*Venue: Sub-sect. 2, E. & F.; sub-sects. 3 & 4. Part III. Sect. 1.]*

*E. Death in One Place caused by Criminal Act in Another.*

1245. Shot fired from shore killing man on water.]—*R. v. COOMBS*, No. 1068, *ante*.

1246. Injury received on foreign ship—Death in England—9 Geo. 4, c. 31, s. 8.]—*R. v. LEWIS*, No. 1089, *ante*.

*F. Offences triable in King's Bench Division.*

1247. Treason abroad.]—*R. v. LYNCH*, No. 1001, *ante*.

1248. —.]—*R. v. CASEMENT*, No. 1002, *ante*.

1249. Offences by public officials abroad—Criminal Jurisdiction Act, 1802 (c. 85).]—*R. v. PICTON* (1805), 30 State Tr. 225.

*Annotations:—Mentd.* Lacon v. Higgins (1822), 3 Stark. 178; Rowe v. Brenton (1828), 3 Man. & Ry. K. B. 133; Barnes v. Stuart (1834), 1 Y. & C. Ex. 119; De Bodes Case (1845), 8 Q. B. 208; Scott v. Seymour (1862), 1 H. & C. 219; *Re Eyre* (1868), 16 W. R. 754; Anderson v. Gorrie [1895] 1 Q. B. 668.

#### PART II. SECT. 3, SUB-SECT. 2.—E.

*n. Murder—Jurisdiction of court where blow inflicted.]—The Circuit Ct. of G. has jurisdiction to try the murder of A., when the blow that occasioned the death of A. is inflicted within the jurisdiction of that ct., although the death itself may have happened out of the jurisdiction.—R. v. BLACK PETER* (1863), 2 N. S. W. S. C. R. 207.—*AUS.*

#### PART II. SECT. 3, SUB-SECT. 3.

*Deft. applying for a certiorari to remove an indictment from the sessions must show that it is probable the case will not be fairly or satisfactorily tried in the ct. below.—Re KELLETT & PORTER* (1856), 2 P. R. 102.—*CAN.*

1254 ii. —.]—Under s. 651 of the Criminal Code, where, at a trial of deft., at which the jury disagreed, a crowd of persons congregated round the ct. house while the jury were deliberating, & endeavoured to intimidate the jurors & influence them in favour of deft., & afterwards made riotous demonstrations towards the judge who presided at the trial, the venue was changed before the second PONTON (1899), 18 P. R.

1254 iii. —.]—In a prosecution for criminal libel it is not sufficient in order to obtain a change of venue, to allege that prosecutor is interested in politics in the place where the libel is alleged to have been committed, & that, therefore accused cannot obtain a fair trial.—*R. v. NICOL* (1900), 7 B. C. R. 278.—*CAN.*

1254 iv. —.]—The principle on which a change of venue in a criminal case will be ordered under s. 651 of the Criminal Code is, that there is fair & reasonable probability of partiality & prejudice in the district, county, or place, within which the indictment would otherwise be tried. On a motion to change the venue, notwithstanding that a strong case was made out for the change, if the balance of convenience alone was to be considered, still, as it was not shown that there was or was likely to be any prejudice against accused, & certainly no more where the indictment was found than in the place to which it was proposed to change the venue, the motion was refused.—*R. v. O'GORMAN* (1907), 9 O. W. R. 928; 14 O. L. R. 102.—*CAN.*

1254 v. —.]—Accused, who had been sheriff of the judicial district of C., was tried in that district upon a charge of fraudulently converting moneys in his hands to his own use &

thereby stealing it. The jury disagreed, & the Crown asked that, before accused should be put on trial for the second time, the place of trial should be changed.—*Held:* in a proper case, under s. 884 of the Criminal Code, a change of the place of trial can be ordered. There was no real danger that a jury could not be obtained in the judicial district of C., who would render a fair & impartial verdict on the trial, & the application would be refused.—*R. v. STAUFFER* (1911), 16 W. L. R. 722; 4 Sask. L. R. 284.—*CAN.*

1254 vi. —.]—A prothonotary, more than four days before the opening of the term, permitted a newspaper reporter to take a list of the names of the petit jurors summoned to try a certain criminal cause.—*Held:* Acts of Nova Scotia, 1912 (c. 52), had been violated, & accused was entitled to a change of venue.—*R. v. GRAVES* (1912), 11 E. L. R. 292.—*CAN.*

1254 vii. —.]—*R. v. Upton* (1922), 37 Can. Crim. Cas. 15.—*CAN.*

1254 viii. —.]—When it appears clearly by the affidavits that a fair impartial trial cannot be had in the county in which the offence charged in the information has been committed, the ct. has jurisdiction to change the place of trial from that county to another county which it may consider to be convenient & proper, & whereby the ends of justice, not only as regards the Crown, but also as regards deft., may be more effectually attained, & will permit a suggestion to be entered on the record for that purpose.—*R. v. CONWAY* (1858), 7 I. C. L. R. 507; 10 Ir. Jur. 193.—*IR.*

1254 ix. —.]—When it *prima facie* appears to the ct. that a fair & impartial trial cannot be had in a particular place, & such is not displaced by a strong case in answer thereto, the ct. will grant a *certiorari* to remove the proceedings into the Queen's Bench, to enable an application to be made to have such case tried in some other jurisdiction.—*R. v. BELL* (1859), 11 Ir. Jur. 283.—*IR.*

1254 x. —.]—A. was tried for felony, but the jury were not able to agree upon a verdict, & were discharged. The Crown moved to have a second trial in some other county, on the ground that a fair trial could not be had in the county where the offence was committed. Affidavits were made on both sides:—*Held:* the ct. had the same jurisdiction to change the place of trial in felony as in misdemeanour, & the place of trial should be changed in this case, as the ct. was of opinion, upon the affidavits, that a fair trial could not be had in the county where the offence was committed.—*R. v.*

1250. —.]—*R. v. JONES*, No. 997, *ante*.

1251. —.]—Does not include felonies.]—*R. v. SHAW*, No. 998, *ante*.

1252. —.]—*R. v. EYRE*, No. 1451, *post*.

1253. —.]—*R. v. TURNER* (1889), 24 L. Jo. 469, N. P.

#### SUB-SECT. 3.—CHANGE OF VENUE.

1254. Grounds for—Fair trial.]—Evidence of partiality must be extremely strong, to change the place of trial in a criminal information.—*R. v. HARRIS* (1762), 1 Wm. Bl. 378; 3 Burt. 1330; 96 E. R. 213.

*Annotations:—Consd.* *R. v. Barrett* (1870), 18 W. R. 671. *Reid*, Mylock v. Saladine (1764), 1 Wm. Bl. 480; *Watson v. Quilter* (1843), 12 L. J. Ex. 405.

1255. —.]—It is no reason for changing the venue in an indictment for a conspiracy to destroy foxes & other vermin by placing poison on lands, that the gentry of the county in which

*BARRETT* (1870), 18 W. R. 671.—*IR.*

1254 xi. —.]—Thect., on June 18, 1872, refused an order to enter a suggestion that a fair trial could not be had in the county, although evidence was adduced to show that a system of intimidation had been practiced by prisoner's father & friends, both upon the Crown witnesses & the jurors on the panel from which the jurors who tried him were called.—*R. v. FAY* (1872), 1 R. 6 C. L. 436.—*IR.*

1254 xii. —.]—In a criminal information, filed by the A.-G., the venue was changed at the instance of the traverser, upon an affidavit by him, referring to, but not setting out in detail, facts of such public notoriety as to be matters of contemporaneous history.—*R. v. DUGGAN* (1873), 1 R. 7 C. L. 94.—*IR.*

1254 xiii. —.]—In a case of murder the venue was changed from the county where the alleged crime was committed to another county, on an affidavit by prisoner's solr. that from conversations he had had with the jurors of the county where the alleged crime was committed, he was convinced a strong prejudice existed against prisoner, & that an impartial trial could not take place there, even though no abortive trial has taken place in the county where the venue was originally laid.—*R. v. McENEANY* (1878), 14 Cox, C. C. 87; 2 L. R. Ir. 236.—*IR.*

1254 xiv. —.]—In an indictment for murder the trial was postponed on the ground that an impartial trial could not be had. It appeared on affidavit that large numbers of the jurors who would try the case, were members of an assoc. called "The Land League," which assoc. had subscribed to the defence of prisoners, the crime being of an agrarian nature. The venue was changed from the local one to a district where it appeared probable a fair & impartial trial could be had.—*R. v. PHELAN* (1881), 14 Cox, C. C. 679.—*IR.*

1254 xv. —.]—The Crown moved for a change of venue from Nelson to Wellington in a case in which a Nelson doctor was charged with abortion, on the ground that a fair trial of the case could not be had in Nelson, accused having practised there for many years & having a considerable popularity there, much sympathy having been expressed for him, many people in Nelson thinking abortion not wrong or criminal, & the jury-panel there being limited. The motion was refused.—*R. v. LEGGATT* (1900), 19 N. Z. L. R. 317.—*N.Z.*

*o. c. 29, s. 11.]—32 & 33 Vict. c. 29,*

the indictment is found are addicted to foxhunting.—*R. v. KING* (1820), 2 Chit. 217.

1256. ———.]—Where the ct. grants a rule to change the venue in an indictment, on the ground that deft. is unlikely to have a fair trial where it is laid, the ct. will change it to some other county on the same circuit.—*R. v. ———* (1842), 6 Jur. 131.

1257. ———.]—In a criminal case, where there was a prospect of a fair trial, the ct. refused to change the venue, though the witnesses resided in another county.—*R. v. DUNN* (1846), 11 Jur. 287; 10 J. P. Jo. 740.

1258. ———.]—The ct. will not permit the venue in an indictment to be changed for any other cause than the inability to obtain a fair trial in the original jurisdiction.

An indictment for a nuisance was found against defts. at the last assizes for Cheshire, & an action

for the same nuisance was brought against defts in the Ct. of C. P., & an application was then made to such Ct. of C. P. for an injunction under C. L. P. Act, 1854 (c. 125), s. 82, which was discharged upon the undertaking of defts. to consent to the indictment being tried at the ensuing winter assizes for the city of Manchester, the Ct. of Q. B. refused to permit the trial to be had at such assizes.—*R. v. PATENT EURIKA & SANITARY MANURE CO., LTD.* (1865), 13 L. T. 365; 30 J. P. 86.

See, further, CROWN PRACTICE, Vol. XVI., pp. 407-409.

#### SUB-SECT. 4.—CHOICE OF VENUE BY CROWN.

See CONSTITUTIONAL LAW, Vol. XI., p. 524, Nos. 294-309a; CROWN PRACTICE, Vol. XVI., p. 487, Nos. 3693-3700.

## Part III.—Limitation of Time for Criminal Proceedings.

### SECT. 1.—IN GENERAL.

1259. Prosecution by indictment—No limitation at common law.]—There is no limitation at common law to a prosecution by indictment (LORD ELLENBOROUGH, C.J.).—*DOVER v. MAESTAER* (1803), 5 Esp. 92, N. P.

Annotations:—*Mentd.* *R. v. Castle Morton* (1820), 3 B. & Ald. 588; *Strother v. Barr* (1828), 5

1260. ——— Offence committed twenty years before.]—*WALL'S CASE* (1802), 28 State Tr. 51.

1261. ——— Bestiality committed nearly two years before complaint made to justices.]—When a long period of time, nearly two years, had elapsed from the time of the committing of the offence of bestiality before complaint was made to the justices:—*Held*: the case would not be permitted to go to the jury.—*R. v. ROBINS* (1844), 4 L. T. O. S. 196; 1 Cox, C. C. 114.

1262. Proceedings by criminal information—Statutory limitation of one year—Proceedings by Crown after six years.]—*ANON.* (1564), Moore, K. B. 58; 72 E. R. 439.

1263. ——— Delay must be accounted for—Although no precise limitation.]—Motion for an information for attempting to bribe C. to vote at the election of an alderman.

As to the time of application there is no precise

s. 11, does not authorise any order for the change of the place of trial of a prisoner in any case where such change would not have been granted under the former practice, the statute only affecting procedure.—*R. v. McLEOD* (1870), 6 P. R. 181.—*CAN.*

p. ——— Whether difficulty in securing attendance of witnesses sufficient.]—The ct. has no power to change the venue in a criminal case, nor will they order a suggestion to be entered on the roll to change the place of trial in an information for libel, on the ground of inconvenience & difficulty in securing the attendance of deft.'s witnesses.—*R. v. CAVENISH* (1847), 2 Cox, C. C. 175.—*IR.*

q. ———.]—In a criminal information for libel, it is no ground to enter a suggestion that a fair trial cannot be had at a particular venue, that many of the witnesses sworn to be necessary for the defence reside at a distance from the local where the venue is laid, & deft. has no funds to bring them to that venue.—*R. v. CASEY* (1877), 13 Cox, C. C. 614.—*IR.*

r. Order made under statute—No

provision for expenses.]—An order made pursuant to 32 & 33 Vict. c. 29, s. 11, directing a change of venue, would be sufficient although containing

expenses, when the indictment has been pleaded to & the trial proceeded with without objection & even in a Ct. of Error there could be no valid objection to a conviction founded on such order.—*SPOULE v. R.* (1886), 1 B. C. R., pt. II., 219; 12 S. C. R. 140.—*CAN.*

s. Jurisdiction of county to which venue changed—Further offence appearing in depositions charged in indictment.]—Prisoner was committed for trial in one county upon a charge of perjury alleging an offence committed in that county. The venue was changed to another county, where he was tried & found guilty upon an indictment containing two counts, alleging two offences arising out of the same matter. The facts relating to both of the charges appeared in the depositions taken by the committing magistrate:—*Held*: there was jurisdiction to try for both offences in the county to which

number of weeks, months or years, but if delayed the delay must be reasonably accounted for (LORD MANSFIELD, C.J.).—*R. v. ROBINSON* (1765), 1 Wm. Bl. 541; 96 E. R. 313.

1264. ——— Must be without delay.]—A criminal information must, in all cases, be moved for promptly & without delay.—*R. v. HEXT* (1840), 4 J. P. 283; 4 Jur. 339.

1265. ———.]—The ct. refused to grant a rule nisi for a criminal information, where the libel complained of came to the knowledge of appt. two years ago.—*Ex p. HOPPER* (1854), 23 L. T. O. S. 164; 18 J. P. 378; 2 W. R. 517.

1266. Offences under Criminal Law Amendment Act, 1885 (c. 69), s. 5—Conviction on charge of rape.]—*R. v. COTTON* (1896), 60 J. P. 824.

1267. ———.]—A prosecution for rape is in fact a prosecution for any of the offences of which a person tried on an indictment for rape may be found guilty. Although it is provided by sect. 5 of the above Act, that a prosecution for an offence under sect. 5 (1) shall not be commenced more than three months after the commission of the offence, a person originally charged with rape within the period limited may be subsequently convicted of the offence under sect. 5 (1).—*R. v. WEST*, [1898] 1 Q. B. 174; 67 L. J. Q. B. 62; 77

the venue had been changed.—*R. v. COLEMAN* (1898), 30 O. R. 93.—*CAN.*

t. Exercise of power—Only after indictment found.]—The power to change the venue & remove an indictment from a certain petty jury can only be exercised after indictment found.—*BENJAMIN'S CASE* (1889), 8 N. Z. L. R. 107.—*N.Z.*

### PART III. SECT. 1.

a. Offence against a step-child—No limit of time for prosecution.]—There is no limit of time, under Code, s. 1140, or otherwise, within which a prosecution for illicit connection with a step-child, under Code, s. 213, must be commenced.—*R. v. STEWART*, [1910] 1 W. W. R. 977; 45 D. L. R. 480; 12 Sask. L. R. 131.—*CAN.*

b. Whether different offence can be charged—Original offence limitation of time having expired—Carnal knowledge.]—Where the offence actually committed by accused is unlawfully carnally knowing a girl of or above the age of twelve years & under the age of sixteen years, & the time within which a prosecution for that offence must be

*Sect. 1.—In general.]*

L. T. 536; 46 W. R. 316; 14 T. L. R. 121; 42 Sol. Jo. 116; 18 Cox, C. C. 675, C. C. R.

*Annotations:—***Refd.** R. v. Harcastle (1907), 71 J. P. Jo. 580. **Mentd.** Jones v. Robson, [1901] 1 K. B. 673.

**1268. — Effect of Prevention of Cruelty to Children Act, 1904 (c. 15).—**Prisoner was convicted under sect. 5 (1) of the 1885 Act of an offence committed on July 15, 1904. The prosecution was not commenced until Dec. 27, more than three months but less than six months after the commission of the offence. On Oct. 1 the 1904 Act came into operation, by sect. 27 of which the time for commencing a prosecution for an offence under sect. 5 (1) of the earlier Act was extended from three months to six months:—**Held:** sect. 27 of the 1904 Act related to procedure only & was therefore retrospective, & the conviction must be upheld.—R. v. CHANDRA DHARMA, [1905] 2 K. B. 335; 74 L. J. K. B. 450; 92 L. T. 700; 69 J. P. 198; 53 W. R. 431; 21 T. L. R. 353; 49 Sol. Jo. 366, C. C. R.

*Annotations:—***Mentd.** R. v. James & Mid. Ry., *Ex p.* Bath R. C., [1908] 1 K. B. 958; Welby v. Parker, [1916] 2 Ch. 1. —. **—.**—**See, now,** Criminal Law Amendment Act, 1922 (c. 56), s. 2.

**1269. — Evidence of acts done more than six months before.]—**Accused was indicted for unlawfully & carnally knowing a girl under the age of sixteen within six months of the commencement of the prosecution, under sect. 5 of the above Act, which, as amended by Prevention of Cruelty to Children Act, 1904 (c. 15), s. 27, provides that no prosecution of this offence shall be commenced more than six months after its commission. At the trial evidence was admitted of previous acts & conduct of accused which tended to prove that he had had connection with the girl more than six months before the commencement of the prosecution:—**Held:** the evidence was admissible to prove the offence with which prisoner was charged, although it might prove a previous offence for which he could not be prosecuted.—R. v. SHEL-LAKER, [1914] 1 K. B. 414; 83 L. J. K. B. 413; 110 L. T. 351; 78 J. P. 159; 30 T. L. R. 194; 24 Cox, C. C. 86; 9 Cr. App. Rep. 240, C. C. A.

*Annotations:—***Refd.** R. v. Lovegrove, [1920] 3 K. B. 613.

**1854 (c. 104)—Who are “parties” to the proceedings.]—**Sect. 257 of the above Act makes it an offence to persuade or attempt to persuade any seaman to neglect or refuse to join or to desert from his ship. By sect. 525 no conviction for any offence shall be made under the Act in any summary proceeding, unless such proceeding is commenced within six months after the commission of the offence, or, if both or either of the parties to such proceeding happen during such time to be out of the United Kingdom, unless the same is commenced within two months after they both first happen to arrive or to be at one time within the “parties to the proceeding” meant the seaman & the person persuading or attempting to persuade, & if either of them leaves the kingdom during six months after the com-

mission of the offence, an information may be laid within two months of his return.—AUSTIN v. OLSEN (1868), L. R. 3 Q. B. 208; 9 B. & S. 46; 37 L. J. M. C. 34; 17 L. T. 537; 32 J. P. 183; 16 W. R. 426; 3 Mar. L. C. 52.

**1271. Offences relating to customs—Does not apply to conspiracy.]—**R. v. THOMPSON, No. 847, ante.

**1272. Proceedings for riot—Limitation only applies to criminal proceedings.]—**MARRIOTT v. COOKE (1797), 1 Price, 349, n.; 145 E. R. 1426.

**1273. Effect of continuing offence.]—**A water co. were bound to complete a reservoir on a certain day, otherwise a penalty for every week would be incurred. Prosecutor applied for a summons to justices five years after date, but they refused it on the ground that more than six months had elapsed, under Summary Jurisdiction Act, 1848 (c. 43), s. 11. Again prosecutor applied for a second summons on the ground of its being a continuing offence:—**Held:** the justices were wrong in declining to issue the summons & to hear & determine the matter.—R. v. BYRDE & PONTYPOOL GAS CO., *Ex p.* WILLIAMS (1890), 60 L. J. M. C. 17; 63 L. T. 645; 55 J. P. 310; 39 W. R. 171; 17 Cox, C. C. 187, D. C.

*Annotation:—***Mentd.** R. v. Kennedy (1902), 86 L. T. 753.

**1274. —.]—**Resp. was owner of a building of a height prohibited by Metropolis Management Act, 1862 (c. 102), s. 85. No proceedings were taken against him in respect of the erection of the building. More than six months after its completion the London County Council served a notice requiring him to comply with the law with respect to the building subject to the penalties provided by sect. 85 & afterwards summoned him for penalties for each day after the date of the notice:—**Held:** (1) the continuance at a prohibited height, after notice, of a building already erected was a continuing offence within the meaning of the Act; (2) complaint had been made within six months next after the commission or discovery of the offence, & resp. was liable.—LONDON COUNTY COUNCIL v. WORLEY, [1894] 2 Q. B. 826; 63 L. J. M. C. 218; 71 L. T. 487; 59 J. P. 263; 43 W. R. 11; 10 T. L. R. 652; 18 Cox, C. C. 37; 10 R. 510, D. C.

**1275. —.]—**The offence arising under London Building Act, 1894 (c. cxxiii.), ss. 73 (8) & 200 (3) is not a continuing offence, & the offence is complete when the projection is erected, & an information laid more than six months after such erection is bad under Summary Jurisdiction Act, 1848 (c. 43), s. 11.—HULL v. LONDON COUNTY COUNCIL, [1901] 1 K. B. 580; 70 L. J. K. B. 364; 84 L. T. 160; 65 J. P. 309; 49 W. R. 396; 17 T. L. R. 270; 45 Sol. Jo. 295; 19 Cox, C. C. 635, D. C.

*Annotations:—***Distd.** Chepstow Electric Light & Power Co. v. Chepstow Gas & Coke Consumers' Co., [1905] 1 K. B. 198.

**Refd.** L. C. C. v. Illuminated Advertisements Co., [1904] 2 K. B. 886; L. C. C. v. Schenzlik, [1905] 2 K. B. 695; L. C. C. v. Hancock (1907), 76 L. J. K. B. 526; Pears v. L. C. C. (1911), 105 L. T. 525.

**1276. —.]—**In Oct. 1903, an electric light co. were laying in the streets of a town new electric

commenced, as provided by The Criminal Code Act, 1893, s. 196, has expired, accused cannot be prosecuted for the act as an indecent assault under sect. 188.—R. v. BLIGHT (1903), 22 N. Z. L. R. 837.—N.Z.

**C. —.**—**Incest.]—**The crime of incest constituted by Criminal Code Act, 1893, Amendment Act, 1900, s. 2, includes intercourse between persons who are related to one another naturally or by blood, though not legiti-

mately, in the modes specified in that sect.:—**Held:** an act which constitutes an offence under sect. 196 cannot be prosecuted as an offence under sect. 188 after the time limit prescribed by sect. 196 has expired.—R. v. MINNIS (1903), 22 N. Z. L. R. 856.—N.Z.

**d. Prosecution out of time—**Whether prosecution can be revived under amending Act increasing time limit.]—An indictment was preferred

against prisoner charging him, under Criminal Code Act, 1893, s. 196, with the commission of an offence on July 25, 1905. The prosecution was not commenced until Oct. 6, 1905, more than one month & less than six months after commission of the offence. The time limit of one month in the above-mentioned Act expired on Aug. 26, 1905. On Aug. 30, 1905, Criminal Code Act Amendment Act, 1905, came into operation, & by sect. 2 the time

lines (other than service lines) near the mains of a gas co. On Oct. 2, 1903, the gas co. by letter to the electric light co. complained that the lines were being laid in a manner which was injurious to the gas mains, & required the lines to be relaid in a proper manner. Correspondence then ensued between the two co.'s, in the course of which the gas co., by letters of Oct. 27 & Nov. 2, 1903, respectively, specified their requirements with respect to the laying of the electric lines. Throughout the correspondence the electric light co., who completed the work of laying their lines on or before Oct. 31, 1903, disputed the reasonableness of the gas co.'s requirements, & they did not at any time comply with them. The questions & differences which had arisen between the two co.'s were, shortly after Nov. 2, 1903, referred to arb'n. under Electric Lighting (Clauses) Act, 1899 (c. 19), Sched., s. 18, & on Feb. 12, 1904, the arbitrator made his award, finding in effect that the electric light co. had not conformed with the requirements of the gas co., & awarding to the latter a sum as full compensation for the loss & injury they had thereby sustained. On Apr. 29, 1904, the gas co.'s solrs. wrote to the electric light co.'s solrs. pointing out that the electric light co. had made no attempt to comply with the gas co.'s requirements, & threatening proceedings for penalties under sect. 18 of the Act unless an undertaking were given that those requirements would be fully complied with. On May 31, 1904, a complaint was made on behalf of the gas co. alleging that "on & since Oct. 2, 1903," the electric light co. had made default in complying with certain requirements of sect. 18 of the Act; that they had laid their new electric lines too near the gas co.'s mains, & did not conform & had not conformed with the gas co.'s requirements for protecting from injury their mains, & for securing access thereto. On the hearing of the complaint before justices they convicted the electric light co. of the offence alleged in it:—*Held*: the complaint & conviction sufficiently alleged an offence completed within six months before the time when the complaint was made, & were, therefore, not bad on the face of them under Summary Jurisdiction Act, 1848 (c. 43), s. 11, nor did the facts proved before the justices & above stated show a completed offence before the statutory period of limitation began to run.

*Semle*: whether the complaint was or was not made within the statutory period, the offence was a continuing offence, so that Summary Jurisdiction Act, 1848 (c. 43), s. 11, did not apply.—*CHEPSTOW ELECTRIC LIGHT & POWER CO. v. CHEPSTOW GAS & COKE CONSUMERS' CO.*, [1905] 1 K. B. 198; 92 L. T. 27; 69 J. P. 72; 21 T. L. R. 35; 49 Sol. Jo. 33; *sub nom.* *CHEPSTOW GAS & COKE CONSUMERS CO. v. CHEPSTOW ELECTRIC LIGHT & POWER CO.*, 74 L. J. K. B. 28; 3 L. G. R. 49, D. C.

1277. —.]—Appl't., an inspector of factories, visited resps.' factory in May, 1905, & found that the fly-wheel of an engine was not securely fenced as required by Factory & Workshop Act, 1901 (c. 22), s. 10. He again visited the factory on Mar. 12, 1908, & found that the same wheel was not securely fenced, & finding it, on a third visit

on July 1, 1908, still not securely fenced, he laid an information on July 22, 1908, against resps. in respect thereof. The justices dismissed the information on the ground that the information had not been laid within three months after the date at which the offence came to appl't.'s knowledge:—*Held*: there was a continuing offence in not securely fencing the fly-wheel & the justices were therefore wrong in dismissing the information on the ground that it had not been laid in time.—*VERNEY v. FLETCHER (MARK) & SONS, LTD.*, [1909] 1 K. B. 444; 78 L. J. K. B. 292; 100 L. T. 348; 73 J. P. 131; 25 T. L. R. 248; 21 Cox, C. C. 783, D. C.

*See, generally, FACTORIES & SHOPS.*

1278. *How time computed—Day of offence not reckoned.*—*PELLEW v. EAST WONFORD HUNDRED (1829)*, 4 Man. & Ry. K. B. 130.

*Annotations*:—*Refd.* *Hardy v. Ryle* (1829), 4 Man. & Ry. K. B. 295. *Mentd.* *Webb v. Fairmanner* (1838), 2 Jur. 397.

1279. —.]—*WILLIAMS v. BURGESS (1840)*, 12 Ad. & El. 635; 9 Dowl. 544; Arn. & H. 65; 4 Per. & Dav. 443; 10 L. J. Q. B. 10; 5 Jur. 71; 113 E. R. 955.

*Annotations*:—*Appld.* *Radcliffe v. Bartholomew*, [1892] 1 Q. B. 161. *Refd.* *Re Higham & Jessop* (1840), 9 Dowl. 203; *R. v. St. Mary, Whitechapel JJ. & Overseers* (1843), 7 Jur. 602.

1280. —.]—Where a criminal statute enacts that proceedings are to be taken within a limited time after the commission of an offence:—*Held*: the day on which the offence was committed was not to be reckoned in computing the time.—*RADCLIFFE v. BARTHOLOMEW*, [1892] 1 Q. B. 161; 61 L. J. M. C. 63; 65 L. T. 677; 56 J. P. 262; 40 W. R. 63; 36 Sol. Jo. 43.

1281. —.]—*Sundays reckoned.*—A conviction having taken place under 4 Geo. 4, c. 95, on Monday, May 2, & notice of appeal served on the following Monday, May 9:—*Held*: it was too late, for that it was not "within six days after the cause of complaint," within sect. 87 of the Act.—*R. v. MIDDLESEX JJ.* (1843), 2 Dowl. N. S. 719; 12 L. J. M. C. 59; 7 J. P. 240; 7 Jur. 396.

*Annotations*:—*Appld.* *Rowberry v. Morgan* (1854), 9 Exch. 730. *Consd.* *Peacock v. R.* (1858), 4 C. B. N. S. 264; *Ex p. Simpkin* (1859), 2 E. & E. 392. *Refd.* *R. v. Middlesex JJ.* (1845), 5 L. T. O. S. 221; *R. v. Leicestershire JJ.* (1859), 8 W. R. 66; *Radcliffe v. Bartholomew*, [1892] 1 Q. B. 161.

1282. —.]—*ROWBERRY v. MORGAN* (1854), 9 Exch. 730; 23 L. J. Ex. 191; 23 L. T. O. S. 129; 18 Jur. 452; 2 W. R. 431; 2 C. L. R. 1029; 156 E. R. 313.

*Annotations*:—*Consd.* *Peacock v. R.* (1858), 4 C. B. N. S. 264. *Refd.* *R. v. Leicestershire JJ.* (1859), 8 W. R. 66; *Ex p. Simpkin* (1859), 2 E. & E. 392; *Hughes v. Griffiths* (1862), 13 C. B. N. S. 324; *Mumford v. Hitchcocks* (1863), 14 C. B. N. S. 361; *Milch v. Frankau*, [1909] 2 K. B. 100. *Mentd.* *Lewis v. Calor* (1858), 1 F. & F. 306; *Pritchard v. Pritchard* (1884), 14 Q. B. D. 55.

1283. —.]—*Months reckoned as lunar months.*—A statute required an offender against it to be prosecuted within twelve months:—*Held*: it must be construed strictly & lunar months was meant.—*R. v. PECKHAM* (1697), Carth. 406; Comb. 439; 5 Mod. Rep. 321; 90 E. R. 835.

*Annotation*:—*Mentd.* *R. v. Cleg* (1722), 1 Stra. 475.

1284. *Right to raise objection.*—*R. v. PRIESTLEY (1885)*, 49 J. P. Jo. 148, D. C.

for commencing a prosecution was extended to six months:—*Held*: as the time limit under the principal Act had expired before the amending Act came into operation, & the provision of the latter Act extending the time limit did not enable a prosecution to be maintained, even within the extended period of six months from the offence.—

*R. v. PEARD* (1905), 25 N. Z. L. R. 568. —N.Z.

•. —.]—An indictment which set forth that accused did have unlawful carnal knowledge of a domestic servant girl above the age of thirteen & under the age of sixteen years on numerous occasions between May 1,

1889, & May 21, 1890, was irrelevant in reference to the alleged criminal acts between these dates, the prosecution having been commenced more than three months after the alleged commission of the offence.—*H.M. Advocate v. PHILP* (1890), 2 White, 525.—SCOT.



## SECT. 2.—WHAT IS COMMENCEMENT OF PROSECUTION.

**1285. Laying the information.]**—If information be in due time, conviction may be at any time afterwards.—*R. v. BARRET* (1710), 1 Salk. 383; 91 E. R. 334.

*Annotation:—Mentd.* *R. v. Hawks* (1729), 1 Barn. K. B. 212.

**1286. —.]**—Prisoner was indicted at assizes for high treason in colouring a piece of base coin to resemble a shilling. The time limit for such a prosecution was three months from the commission of the offence. The offence was committed on or before May 5, 1797. Prisoner was committed on May 8, but the bill of indictment was not prepared till on or after Aug. 8, the commission day of the assizes:—*Held*: on the construction of the words in 8 & 9 Will. 3, c. 26, s. 9, "unless such prosecution be commenced within three months next after such offence committed," the proceeding before the magistrates was the commencement of the prosecution.—*WILLACE'S CASE* (1797), 1 East, P. C. 186.

*Annotations:—Folld.* *R. v. Brooks & Gibson* (1847), 1 Den. 217. *Consd.* *R. v. Smith* (1862), 9 Cox, C. C. 110. *Appl.* *Thorpe v. Priestnall*, [1897] 1 Q. B. 159. *Refd.* *R. v. Stokes* (1813), 2 M. & S. 71; *R. v. Hull* (1860), 2 F. & F. 16; *R. v. O'Connor* (1913), 8 Cr. App. Rep. 167.

**1287. —.]**—The suing out of the process is to be considered the commencement of an information within 31 Eliz. c. 5, s. 5.—*A.-G. v. BROWN* (1801), For. 110; 145 E. R. 1129.

### PART III. SECT. 2.

**1285 i. Laying the information.]**—When a person committed for trial by justices on a charge of offence against a female under Crimes Act, 1915, s. 48, is afterwards presented for trial on such charge, the commencement of the proceedings before justices is the commencement of the prosecution within sect. 47 of that Act.—*R. v. CONLEY*, [1916] V. L. R. 639.—*AUS.*

**1285 ii. —.]**—Laying the information is the commencement of a prosecution before a magistrate. By 32 Vict. c. 32 (O), s. 25, all prosecutions under this sect. shall be commenced within twenty days after the commission of the offence or after the cause of action arose, & not afterwards. The information against deft. was taken on Dec. 30, 1872, laying the offence on Dec. 16. On Jan. 15, 1873, a summons was issued on the information, & on Jan. 30 deft. was tried & convicted:—*Held*: the prosecution was commenced in time.—*R. v. LENNOX* (1873), 34 U. C. R. 28.—*CAN.*

**1285 iii. —.]**—Prisoners were indicted under Insolvent Act, 1869, s. 147, for having within three months preceding the execution of an assignment in insolvency pawned, pledged, & disposed of, otherwise than in the way of trade, certain goods which had remained unpaid for during the said three months. The goods, which had been purchased on credit, the period of which had not expired when prisoners were indicted, were given on the day of assignment, but before its execution, to a clerk on account of salary due to him, & to indemnify him against accommodation indorsements, to a carter in their employ, in satisfaction of a sum of money previously deposited with them, & to a son who had given them accommodation notes. The indictment was found on Oct. 23, but the information had been laid & prisoners arrested before Sept. 1, when the Insolvent Act, 1875, came into force:—*Held*: the disposal of the goods as above was an offence within sect. 147; & it was no objection that such disposal was not to their own use but to satisfy creditors, & the time of credit on which the insolvents had purchased the goods had not expired when defts. made their assignments.

**1288. — Indictment ignored & a fresh information laid.]**—*Qu.*: whether the preferring of an indictment against a party for night poaching which is ignored, is a commencement of the prosecution within Night Poaching Act, 1828 (c. 69), s. 4, so as to warrant the conviction of the party on another indictment preferred four years after the offence.—*R. v. KILLMINSTER* (1835), 7 C. & P. 228; 3 Nev. & M. M. C. 413.

**1289. —.]**—Night Poaching Act, 1828 (c. 64), s. 4, requires prosecutions under that Act to be commenced within a year. Upon an indictment under this Act:—*Held*: the provision is complied with if the information is laid before the magistrates, & prisoners are apprehended within the year, although the indictment is not preferred till after the year has elapsed.—*R. v. BROOKS & GIBSON* (1847), 2 Car. & Kir. 402; 1 Den. 217; 2 Cox, C. C. 436, C. C. R.

*Annotations:—Consd.* *Thorpe v. Priestnall*, [1897] 1 Q. B. 159. *Refd.* *R. v. Hull* (1860), 2 F. & F. 16; *R. v. Smith* (1862), 9 Cox, C. C. 110; *R. v. Parker & Smith* (1864), Le. & Ca. 459; *Yates v. R.* (1885), 52 L. T. 305; *R. v. Clarke, Ex p. Crippen* (1910), 103 L. T. 636.

**1290. —.]**—*Appl.*—The conviction under Sunday Observance Act, 1876 (c. 7). The chief constable gave a verbal consent before the information was laid, & gave consent in writing, as required by Sunday Observance Prosecution Act, 1871 (c. 87), after the information was laid & the summons issued:—*Held*: the prosecution was

By 1875 Act, s. 149, 1869 Act was repealed, but there was a saving clause as regarded proceedings commenced & pending thereunder, & as regarded all contracts, etc. made & done before such repeal, to which 1869 Act would have applied:—*Held*: the prosecution as well as the offence came within the saving clause, the laying of the information being the commencement of the prosecution.—*R. v. KERR* (1876), 26 C. P. 214.—*CAN.*

**1285 iv. —.]**—There was an amendment of the original information by changing the date of the offence from Feb. 10 to Feb. 23, & the parties agreed that the evidence taken should stand for the purpose, of the amended charge instead of having a needless repetition of it:—*Held*: this course was unobjectionable, & the deft.'s application for a *certiorari* was refused with costs.—*R. v. HALL* (1887), 12 P. R. 142.—*CAN.*

**1285 v. —.]**—S. was convicted under the Liquor License Act, 1889, of selling liquor without a license. The information was laid before one justice of the peace, but the prosecution was heard before two justices. Deft. was convicted, & a sum for witness fees was included in the costs awarded him against. Deft. obtained a rule *nisi* to quash the conviction. On its return rule was made absolute. At this stage the A.-G., although not a party to the proceedings, intervened & moved before the full ct. against this decision. The parties to the proceedings did not complain of the decision:—*Held*: the laying of the information was the bringing of the prosecution; it ought to have been laid before two justices; the matter of the prosecution was not, therefore, properly before the two justices on the hearing of the case, & they had no jurisdiction to determine it.—*R. v. STARKEY* (1891), 7 Man. L. R. 489.—*CAN.*

**1285 vi. —.]**—A prosecution for an indictable offence is "pending" within Criminal Code, 1892, s. 683, when an information has been laid charging such an offence.—*R. v. VERRALL* (1895), 16 P. R. 444; 17 P. R. 61.—*CAN.*

**1285 vii. —.]**—The laying of the information is the commencement of the prosecution.—*Ex p. FLANAGAN* (1899), 34 N. B. R. 577.—*CAN.*

**1285 viii. —.]**—Where an informa-

tion for an offence against the Canada Temperance Act was laid on Mar. 11, 1908, & deft. was convicted for an offence between Mar. 8 & Mar. 11, the conviction was held not bad for uncertainty as to whether the offence had been committed before the information was laid.—*R. v. KAY, Ex p. WILSON* (1908), 38 N. B. R. 503; 5 W. L. R. 160.—*CAN.*

**1285 ix. —.]**—Where an information under Canada Temperance Act was laid within three months after the offence, but no summons was issued thereon for a year & fourteen days after information laid:—*Held*: the delay in issuing summons did not deprive the magistrate of jurisdiction.—*R. v. PECK, Ex p. O'NEILL* (1910), 40 N. B. R. 339; 9 E. L. R. 524.—*CAN.*

**1285 x. —.]**—*R. v. PECK, Ex p. BEAL* (1910), 40 N. B. R. 320; 9 E. L. R. 501.—*CAN.*

**1285 xi. —.]**—A conviction made in the absence of accused on a summons charging an offence during a period of one day in excess of three months of the alleged date of laying the information is good where the information charges an offence within three months from the date of laying it.—*Ex p. JOHNSON* (1917), 44 N. B. R. 353.—*CAN.*

**1285 xii. —.]**—A prosecution commences when a complaint is made, the reception of the complaint being a stage of the judicial proceedings towards conviction.—*R. v. LAKSHMAN SAKHARAM* (1877), 1 L. R. 2 Bom. 481.—*IND.*

**1285 xiii. —.]**—*AHME'DBHAI v. FRAMJI EDULJI* (1904), 1 L. R. 28 Bom. 226.—*IND.*

**1285 xiv. —.]**—The term "information" means the initiatory step in proceedings of a criminal nature which are to be disposed of summarily; the term "complaint" designates the initiatory step in summary proceedings of a civil nature.—*Re DILLON* (1859), 11 I. C. L. R. 232.—*IR.*

**1. Committal of defendant.]**—The committal of deft. to take his trial on the charge is a commencement of the prosecution within I. S. C. o., s. 117.—*R. v. CARBRAY* (1888), 14 Q. L. R. 223.—*CAN.*

instituted when the information was laid, & therefore was not instituted with the consent in writing of the chief constable, & the conviction was bad.—*THORPE v. PRIESTNALL*, [1897] 1 Q. B. 159; 66 L. J. Q. B. 248; 60 J. P. 821; 45 W. R. 223; 13 T. L. R. 95, D. C.

*Annotations*:—*Refd.* *Re Vexatious Actions Act, 1896, Re Boaler*, [1914] 1 K. B. 122. *Mentd.* *Beardsley v. Giddings* (1904), 2 L. G. R. 719.

**1291. — Even though conviction is for offence not originally changed.**—*R. v. WEST*, No. 1267, ante.

**1292. — Not service of summons.**—The laying of the information, & not the service of the summons, is the "institution of the prosecution" under Sale of Food & Drugs Act, 1899 (c. 51), s. 19 (1).—*BEARDSLEY v. GIDDINGS*, [1904] 1 K. B. 847; 73 L. J. K. B. 378; 90 L. T. 651; 68 J. P. 222; 53 W. R. 78; 20 T. L. R. 315; 48 Sol. Jo. 352; 20 Cox, C. C. 645; 2 L. G. R. 719, D. C.

*Annotations*:—*Consd.* *Brooks v. Bagshaw*, [1904] 2 K. B. 798. *Refd.* *Re Vexatious Actions Act, 1896, Re Boaler*, [1914] 1 K. B. 122.

**1293. —**—A prosecution is instituted when the information is laid.—*BROOKS v. BAGSHAW*, [1904] 2 K. B. 798; 73 L. J. K. B. 839; 91 L. T. 535; 68 J. P. 514; 53 W. R. 13; 20 T. L. R. 655; 48 Sol. Jo. 623; 20 Cox, C. C. 727; 2 L. G. R. 1007, D. C.

*Annotations*:—*Refd.* *Re Vexatious Actions Act, 1896, Re Boaler*, [1914] 1 K. B. 122. *Mentd.* *Williams v. Letheron*, [1919] 2 K. B. 262.

**1294. — Not the amending of the information — Unless a different offence is charged.**—By Criminal Law Amendment Act, 1885 (c. 69), s. 5, as amended by Prevention of Cruelty to Children Act, 1904 (c. 15), s. 27, a prosecution for the offence of unlawfully having carnal knowledge of a girl between thirteen & sixteen years of age must be commenced within six months after the commission of the offence.

Applt. was charged with having had carnal knowledge of a girl between thirteen & sixteen years of age. The information, which was sworn on May 3, 1919, charged the offence as having been committed between Nov. 6 & 7, 1918. Subsequently, on May 13, 1919, the information was amended, the date when the offence was alleged to have been committed being altered to between Nov. 3 & 8, 1918. The girl gave evidence at the trial that applt. had connection with her on Nov. 4, 1918. Applt., who was convicted, appealed against his conviction on the ground that the proceedings were out of time, having been commenced on May 13, when the information was amended, which date was more than six months after Nov. 4, the date of the commission of the offence:—*Held*: the amendment of the information on May 13, 1919, was not the commencement of the prosecution, which took place on May 3, when the information was originally laid, as the amendment did not charge a different offence from that charged in the information as originally laid, & that as the dates inserted in the amended information as the dates within which the offence had been committed were all within six months of May 3, when the information was laid, the prosecution was not out of time.—*R. v. WAKELEY*, [1920] 1 K. B. 688; 89 L. J. K. B. 97; 122 L. T. 623; 84 J. P. 31; 64 Sol. Jo. 360; 26 Cox, C. C. 569; 14 Cr. App. A.

**1295. — Proceedings are "pending" after arrest.**—A person accused of an offence under

Criminal Law Amendment Act, 1885 (c. 69), s. 2, was arrested & charged before, & tried & convicted after, the commencement of Criminal Law Amendment Act, 1912 (c. 20). He was sentenced to be whipped under sect. 3 of the 1912 Act:—*Held*: proceedings were pending at the commencement of the 1912 Act, within the meaning of sect. 8, & there was no power to impose the sentence of whipping.—*R. v. O'CONNOR*, [1913] 1 K. B. 557; 82 L. J. K. B. 335; 108 L. T. 384; 77 J. P. 272; 29 T. L. R. 245; 57 Sol. Jo. 287; 23 Cox, C. C. 334; 8 Cr. App. Rep. 167, C. C. A.

*Annotation*:—*Refd.* *Re Vexatious Actions Act, 1896, Re Boaler*, [1914] 1 K. B. 122.

**1296. Not issue of warrant.**—The issuing of a warrant of apprehension is not a "commencement of proceedings" within Night Poaching Act, 1828 (c. 69), s. 4.—*R. v. HULL* (1860), 2 F. & F. 16. *Annotation*:—*Consd.* *R. v. Casbolt* (1869), 21 L. T. 263.

**1297. Proof of commencement of proceedings — Whether oral evidence of apprehension sufficient.**—On an indictment on 8 & 9 Will. 3, c. 26, it is incumbent on prosecutor to show that the prosecution was commenced within three months. Proof by parol that prisoner was apprehended for treason respecting the coin within the three months will not be sufficient if the indictment is after the three months, & the warrant to apprehend or to commit is not produced.—*R. v. PHILLIPS* (1818), Russ. & Ry. 369, C. C. R.

*Annotations*:—*Refd.* *R. v. Brooks & Gibson* (1847), 1 Den. 217; *R. v. Hull* (1860), 2 F. & F. 16.

**1298. —**—On the trial of an indictment under Night Poaching Act, 1828 (c. 69), s. 9, it appeared that the offence was committed on Jan. 12, 1844. The indictment was preferred on Mar. 1, 1845. The warrant of commitment by which deft. was committed to take his trial for this offence was given in evidence, & was dated Dec. 11, 1844:—*Held*: it was sufficiently shown that the prosecution was commenced "within twelve calendar months after the commission" of the offence, within sect. 4 of the Act.—*R. v. AUSTIN* (1845), 1 Car. & Kir. 621.

*Annotations*:—*Refd.* *R. v. Hull* (1860), 2 F. & F. 16; *R. v. Parker & Smith* (1864), 12 W. R. 765; *R. v. Casbolt* (1869), 21 L. T. 263; *Beardsley v. Giddings* (1904), 73 L. J. K. B. 378.

**1299. — Warrant produced but not the information.**—On an indictment for offences under Night Poaching Act, 1828 (c. 69), the warrant without the information is not legal evidence that the proceedings were commenced within the twelve months fixed by the Act.—*R. v. PARKER & SMITH* (1864), Le. & Ca. 459; 4 New Rep. 115; 33 L. J. M. C. 135; 10 L. T. 463; 28 J. P. 359; 10 Jur. N. S. 596; 12 W. R. 765; 9 Cox, C. C. 475, C. C. R.

**1300. — Neither warrant nor information produced.**—C. was indicted for night poaching on Feb. 6, 1863. He pleaded guilty, but subsequently applied by his counsel for leave to withdraw the plea, & to move in arrest of judgment, upon the ground that the proceedings against him had not been commenced within twelve calendar months, as directed by Night Poaching Act, 1828 (c. 69), s. 4:—*Held*: the application to withdraw the plea was one which ought to be granted, & as no warrant & information was produced showing that proceedings had been commenced within twelve months, the objection was fatal.—*R. v. CASBOLT* (1869), 21 L. T. 263; 11 Cox, C. C. 385.

*Annotations*:—*Refd.* *R. v. West* (1897), 46 W. R. 316; *R. v. Brown* (1913), 8 Cr. App. Rep. 173.



## Part IV.—Bail.

## SECT. 1.—IN GENERAL.

**1301. Object of bail—To secure attendance of accused at trial.**—(1) It is no objection to the persons proposed as bail in a criminal case, that they are indemnified by or on behalf of prisoners.

(2) The object of bail is to secure, by a pecuniary penalty, the appearance of prisoner at the trial (MARTIN, B.).—*R. v. BROOME* (1851), 18 L. T. O. S. 19; *sub nom. R. v. BROOME, Ex p. STADEN, Ex p. JAMES*, 15 J. P. 644.

*Annotations*:—As to (1) *Fold. R. v. Stockwell* (1902), 66 J. P. 376. *Dbtd. R. v. Porter*, [1910] 1 K. B. 369. We have been asked to follow the opinion expressed by Martin, B., in *R. v. Broome* that there is no objection to the indemnification of bail, which opinion was acted on by the Recorder of London in *R. v. Stockwell* (1902), 66 J. P. 376; it is sufficient to say that we do not agree with the opinion of Martin, B. (LORD ALVERSTONE, C.J.).

**1302. Right of bail to surrender accused—May take him on Sunday.**—ANON. (1704), 6 Mod. Rep. 231; 87 E. R. 982.

**1303. — Consent of accused immaterial.**—Bail above put in by the sheriff, who had discharged deft. without a bail bond, may surrender deft.

The bail has a right to surrender deft. whether with or without his consent, which is immaterial (LORD KENYON, C.J.).—*R. v. BUTCHER* (1792), Peake, 226, N. P.

**1304. — Accused not protected by privilege.**—A witness attending to give evidence in a ct. of justice, who absconded from his bail, may be re-taken by the bail in ct. & he is not protected by his *subpoena*.—HORN v. SWINFORD (1822), Dow. & Ry. N. P. 20; 1 Dow. & Ry. M. C. 361.

**1305. — Deemed to be in custody of his bail.**—A witness is not privileged from arrest by his bail on his return from giving evidence.

A witness who has given bail is always supposed to be in the custody of his bail, even whilst he is attending as a witness in ct. (ABBOTT, C.J.).—*Ex p. LYNE* (1822), 3 Stark. 132, N. P.

**1306. — Admission to bail only a change of custody.**—The admitting to bail is only a change of custody. The bail might retake the person bailed, & send him back to prison at any time (COLERIDGE, J.).—FOXALL v. BARNETT (1853), 2 E. & B. 928; 22 L. T. O. S. 100; 2 W. R. 61; 2 C. L. R. 273; 118 E. R. 1014; *sub nom. FOXHALL v. BARNETT*, 23 L. J. Q. B. 7; 18 J. P. 41; 18 Jur. 41.

*Annotation*:—*Refd. Everett v. Griffiths*, [1921] 1 A. C. 631.

**1307. Who may act as bail—Not solicitor of accused.**—ANON. (1773), Lofft, 263; 98 E. R. 642.

**1308. — — — — —**—*R. v. SCOTT JERVIS* (1876), *Times*, Nov. 20.

## PART IV. SECT. 1.

**g. Object of bail—To secure attendance of accused at trial—Larceny of letter containing money.**—*Ex p. HUOT* (1882), 8 Q. L. R. 28.—CAN.

**1301 i.** — — — — —.]—The propriety of admitting to bail for indictable offences should be determined with reference to accused person's opportunities for escape, & to the probability of his appearing for trial.—*R. v. FORTIER* (1902), Q. R. 13 K. B. 251.—CAN.

**1301 ii.** — — — — —.]—On an appln. for bail on a charge which before the criminal code would have been a felony, the probability of prisoner appearing for trial is the principal consideration in determining whether or not bail should be granted.—*R. v.*

MCMAMARA (1913), 18 B. C. R. 125.—CAN.

**1301 iii.** — — — — —.]—Persons charged with seditious conspiracy were admitted to bail in the absence of evidence showing either that they would not be likely to appear for trial if granted bail, or that permitting them to be at large on bail would be likely to endanger the public peace.—*R. v. RUSSELL*, [1919] 3 W. W. R. 306.—CAN.

— — — — —.]—*R. v. MANDACOS* S. R. 309; 50 D. L. R.

**1301 v.** — — — — —.]—The ct. will grant an order to retake a prisoner charged with a misdemeanour, who has been out on bail to abide his trial at the

**1309. — Solicitor's clerk.**—The clerk of an attorney, deft. may be bail for him.—*DIXON v. EDWARDS* (1793), 2 Anst. 356; 145 E. R. 901.

**1310. — Not privileged person—Tipstaff of Court of Chancery.**—ANON. (1662), 1 Sid. 68; 82 E. R. 974.

**1311. — — — — — Servant of foreign ambassador.**—LOCK'S BAIL CASE (1831), 1 Dowl. 124.

**1312. — Political opinions not to be considered.**—In the case of a bailable misdemeanour, bail, if otherwise sufficient, ought not to be refused on account of the personal character or opinions of the party proposed.—*R. v. BADGER* (1843), 4 Q. B. 468; 1 Dav. & Mer. 375; 12 L. J. M. C. 66; 7 J. P. 128; 7 Jur. 216; 114 E. R. 975; *previous proceedings* (1842), 6 J. P. 717.

*Annotations*:—*Consd. R. v. Broome* (1851), 18 L. T. O. S. 19. *Refd. Linford v. Fitzroy* (1849), 13 Q. B. 240.

**1313. — Accused need not be joined.**—In civil actions it is not necessary for deft. to join in recognisance of bail, & in criminal may be dispensed with by the ct.—*SMITH v. VILLARS* (1702), 1 Salk. 3; 7 Mod. Rep. 38; 91 E. R. 3.

*Annotation*:—*Refd. Digby v. Alexander* (1832), 9 Bing. 412.

**1314. Sufficiency of bail—Duty of justices to ascertain—But not to interfere to prevent person going bail.**—It is the duty of a magistrate to ascertain the sufficiency of the bail who tender themselves on behalf of accused, but he ought not to interfere in any way to dissuade them from becoming bound as bail.—*R. v. SAUNDERS* (1847), 9 L. T. O. S. 246; 2 Cox, C. C. 249.

**1315. — Statement on oath not to be rejected.**—If a man offering himself as a bail will swear he has effects in such a place, he is not to be rejected, but he may be indicted for perjury.—ANON. (1773), Lofft, 145; 98 E. R. 579.

**1316. — Good debts considered as part of effects.**—Good debts may be considered as part of effects of bail.—ANON. (1773), Lofft, 144; 98 E. R. 578.

**1317. — Value of house not material.**—ANON. (1773), Lofft, 148; 98 E. R. 580.

**1318. — Property abroad may be sufficient—If no other suspicious circumstances.**—*SMITH v. SCANDRETT* (1763), 1 Wm. Bl. 444; 90 E. R. 255.

**1319. — Property abroad not sufficient qualification.**—Property abroad, where the ordinary writs of the Crown go not, signifies nothing, though to any amount.—ANON. (1773), Lofft, 147; 98 E. R. 580.

**1320. — — — — —**—Property abroad is not a sufficient qualification to justify as bail.—*WIGHTWICK v. PICKERING* (1801), For. 138; 145 E. R. 1138.

next assizes, when it is sworn that he intends to leave the country for the purpose of avoiding the prosecution.—*R. v. O'FLAHERTY* (1840), 1 Leg. Rep. 72.—IR.

**1301 vi.** — — — — —.]—The question in bail motions is the likelihood of prisoner being forthcoming to take his trial, if admitted to bail, & the elements to be considered in the determining of that question are, first, the nature of the offence charged; second the character of the evidence against prisoner; & third, the punishment which, in the event of conviction, may be inflicted on prisoner.—*R. v. MCARTIE* (1859), 11 I. C. L. R. 188; 11 Ir. Jur. 249.—IR.

*h. Application for bail—Accused should be informed of his right to apply*

**1321.** — — —.]—Persons resident in Ireland, & having no property in England, will not be accepted as bail for a prisoner confined in England.—*R. v. KEALY* (1850), 14 J. P. 547.

**1322. Justifying bail—In criminal cases bail need not justify.**—*R. v. HALL* (1776), 2 Wm. Bl. 1110; 96 E. R. 655.

**1323.** — — —.]—Costs of rejection of bail.]—The ct. will not require deft. indicted for a misdemeanour, to pay the costs of giving several notices of bail, before they allow the bail to justify.—*R. v. CLIFFORD* (1824), 2 L. J. O. S. K. B. 210.

**1324. Indemnification of bail—Former law.**—*R. v. BROOME*, No. 1301, *ante*.

**1325.** — — —.]—Contrary to public policy—Agreement to indemnify invalid.]—*Semble*: a contract by deft. to indemnify his bail against the consequences of deft.'s non-appearance would be against public policy.—*JONES v. ORCHARD* (1855), 16 C. B. 614; 24 L. J. C. P. 229; 25 L. T. O. S. 182; 1 Jur. N. S. 936; 3 W. R. 554; 3 C. L. R. 1275; 139 E. R. 900.

*Annotations*:—*Consd.* *Wilson v. Strugnell* (1881), 7 Q. B. D. 548. *Refd.* *Cripps v. Hartnoll* (1862), 2 B. & S. 697; *Hermann v. Jeuchner* (1885), 54 L. J. Q. B. 340.

**1326.** — — —.]—The contract to indemnify the bail against his liability is contrary to public policy, & therefore illegal & void (*STEPHEN, J.*)—*WILSON v. STRUGNELL* (1881), 7 Q. B. D. 548; 50 L. J. M. C. 145; 45 L. T. 219; 45 J. P. 831; 14 Cox, C. C. 624.

*Annotations*:—*Consd.* *Herman v. Jeuchner* (1885), 15 Q. B. D. 561; *Consolidated Exploration & Finance Co. v. Musgrave*, [1900] 1 Ch. 37. *Refd.* *R. v. Porter*, [1910] 1 K. B. 369.

**1327.** — — —.]—An agreement to indemnify against liability a person who has entered into recognisances for the appearance of deft. in a criminal matter is invalid as being contrary to public policy, although the indemnity be given by a person other than deft.—*CONSOLIDATED EXPLORATION & FINANCE CO. v. MUSGRAVE*, [1900] 1 Ch. 37; 69 L. J. Ch. 11; 81 L. T. 747; 64 J. P. 89; 48 W. R. 298; 16 T. L. R. 13.

*Annotation*:—*Refd.* *R. v. Porter*, [1910] 1 K. B. 369.

**1328.** — — —.]—*R. v. PORTER*, No. 860, *ante*.

**1329.** — — —.]—Defts. were indicted for that they "contriving & intending to obstruct & pervert the due course of law & justice" unlawfully did conspire together to indemnify certain persons against their liability on their recognisances as bail for the appearance of an accused person at his trial:—*Held*: although it was an unlawful act to indemnify bail it was not a criminal offence to do so unless an intention to pervert justice was

also proved.—*R. v. STOCKWELL* (1903), 66 J. P. 376. *Annotation*:—*Refd.* *R. v. Porter*, [1910] 1 K. B. 369.

**1330.** — — —.]—Contract illegal.]—A contract is illegal, whereby deft. in a criminal case, who has been ordered to find bail for his good behaviour during a specified period, deposits money with his surety upon the terms that the money is to be retained by the surety during the specified period for his own protection against deft.'s default, & at the expiration of that period is to be returned.—*HERMAN v. JEUCHNER* (1885), 15 Q. B. D. 561; 54 L. J. Q. B. 340; 53 L. T. 94; 49 J. P. 502; 33 W. R. 606; 1 T. L. R. 445, C. A.; *revsg.* (1884), 1 Cab. & El. 364, N. P.

*Annotations*:—*Consd.* *Consolidated Exploration & Finance Co. v. Musgrave*, [1900] 1 Ch. 37. *Refd.* *R. v. Porter*, [1910] 1 K. B. 369; *Wild v. Simpson*, [1919] 2 K. B. 544. *Mentd.* *Kearley v. Thomson* (1890), 24 Q. B. D. 742; *Re Cronmire, Ex p. Waud*, [1898] 2 Q. B. 383.

**1331. Bail becoming incompetent—Accused not called upon to find fresh bail.**—Where an indictment for conspiracy had been removed by *certiorari*, & the ordinary bail had been given, but after trial & the conviction of deft. & before judgment, a motion was made to quash the indictment for insufficiency, & pending such motion one of the bail became insolvent & offered a composition to his creditors:—*Held*: deft. would not be required to give fresh bail.—*R. v. JOHNSON* (1843), 1 Dow. & L. 132; 1 L. T. O. S. 292; *sub nom.* *R. v. SHIRLEY*, 12 L. J. Q. B. 346; 7 J. P. 640; 7 Jur. 1038.

**1332. Informality in entering into recognisances.**—*R. v. ENGLAND* (1855), 24 L. T. O. S. 237; 19 J. P. Jo. 98.

**1333. Notice to appear—"Forthwith."**—The word "forthwith," in a notice to a party charged criminally & out on bail, to appear, on pain of forfeiting his recognisance means, "within a reasonable time from the service," & not from the date of the notice.—*R. v. PRICE, Ex p. HEARD* (1854), 8 Moo. P. C. C. 203; 14 E. R. 78, P. C. *Annotation*:—*Refd.* *Re Southam, Ex p. Lamb* (1881), 19 Ch. D. 169.

**1334. Right of peer to bail.**—*R. v. DANBY*, No. 974, *ante*.

**Personation of bail.**—*See* Part XXXV., Sect. 11.

## SECT. 2.—GROUNDS FOR GRANTING.

**1335. Exercise of discretion a judicial duty.**—The power of a magistrate to accept or refuse bail in cases of misdemeanour is a judicial duty.—*LINFORD v. FITZROY* (1849), 13 Q. B. 240; 3 New Mag. Cas. 144; 3 New Sess. Cas. 438; 18 L. J. M. C.

W. L. R. 558; 4 Sask. L. R. 31.—*CAN.*

**k.** — — —.]—*To whom made—Committing magistrates.*—An application to admit a prisoner to bail should be, in the first instance, made to the committing magistrates.—*R. v. FINNISTON* (1826), Batt. 582.—*IR.*

**l.** — — —.]—*Applicant must be in custody.*—On any application to take bail, appt. should be in custody.—*ANON.* (1829), 2 Ir. L. Rec. 1st ser. 452.—*IR.*

**m.** — — —.]—*Who may grant bail—One justice granting.*—Although a statute may require the presence of three justices to convict of an offence, yet one has power to bail the offender; & a second arrest for the same charge, by the same complainant, before the time appointed for the hearing, is illegal.—*KING v. ORR* (1837), 5 O. S. 724.—*CAN.*

**n.** — — —.]—*Judge who committed prisoner.*—Where there is no jail

within the district a prisoner is committed for trial & the prisoner is confined in the common jail for the whole province, the Judge by whose order the prisoner was confined has such constructive possession of the prisoner as to give him jurisdiction to grant bail.—*R. v. GREIG* (1914), 30 W. L. R. 285; 23 Can. Crim. Cas. 352.—*CAN.*

## PART IV. SECT. 2.

**o.** — — —.]—*Exercise of discretion.*—In exercising its discretion under Criminal Procedure Code, s. 498, the High Ct. should not confine its attention only to the question, whether prisoner is likely to abscond or not. There may be other circumstances, which may also affect the question of granting bail to accused persons charged with crimes of a grave character. If a person is accused before a magistrate of a non-bailable offence then, unless he considers that there are no reasonable grounds for believing him to be guilty, he must refuse bail, though he

may be certain that accused will stand his trial.—*NARENDRA LAL KHAN v. R.* (1908), 1 L. R. 36 Cal. 166.—*IND.*

**p.** — — —.]—Where a person charged with any crime except murder or treason applies for bail the ct. to which the application is made must grant it unless in the exercise of its discretionary right of refusal it is of opinion that looking to the public interest, & to securing the ends of justice there is good reason why bail should not be granted, & this right of refusal is not limited to cases where the ct. thinks there is danger of the accused absconding before the trial.—*MACKINTOSH v. MCGILCHY*, [1921] S. C. (J.) 75.—*SCOT.*

**q.** — — —.]—*Judicial not ministerial duty.*—The refusing or accepting bail is a judicial & not merely a ministerial duty, & a mistake in the performance of that duty without malice will not be sufficient to sustain an action.—*PARANKUSAM NARASAYA PANTULU v. STUART* (1865), 2 Mad. 396.—*IND.*

**Sect. 2.—Grounds for granting. Sects. 3 & 4.]**

108; 13 L. T. O. S. 157; 13 Jur. 303; 116 E. R. 1255; *sub nom.* LINDFORD *v.* FITZROY, 13 J. P. 474.

**Annotations:—***Consd.* Everett *v.* Griffiths, [1921] 1 A. C. 631. *Mentd.* Sommerville *v.* Mirehouse (1860), 1 B. & S. 652; Pease *v.* Chaytor (1863), 3 B. & S. 620.

**1336. Probability of accused appearing at trial.]—**The principle on which a party committed to take his trial for an offence may be bailed is founded on the probability of his appearing to take his trial, & not on his supposed guilt or innocence, but the fact of a true bill for felony having been found against him is material in estimating that probability.—*R. v. SCAIFE* (1841), 9 Dowl. 553; Woll. 164; 10 L. J. M. C. 144; 5 J. P. 406; 5 Jur. 700.

**Annotations:—***Consd.* *Re Barronet, Re Barthelomy* (1852), 1 E. & B. 1. *Refd.* *R. v. Andrews* (1844), 2 Dow. & L. 10.

**1337. —.]—**On an application to bail a prisoner charged with a criminal offence, the test to govern the discretion of the ct. is the probability of prisoner's appearing to take his trial, but, in applying that test, the ct. will not look to the character or behaviour of prisoner at any particular time, but will be guided by the nature of the crime charged, the severity of the punishment that may be imposed & the probability of a con-

ROBINSON (1854), 23 L. J. Q. B. 286;

W. R. 424.

**1338. —.]—**Prisoner committed for trial on a charge of murder applied to be liberated on bail, on the ground that, owing to the distance of the gaol from the town at which his solr. resided & from the place where the witnesses to be called for the defence were, it would be unusually difficult for him to get up his defence:—*Held:* having regard to the seriousness of the charge, & to the fact that the test to govern the discretion of the ct. was the probability of prisoner's appearing to trial, the application could not be granted.

**1336 i. Probability of accused appearing at trial.]—**On an appln. for bail the test to govern the ct. is the probability of prisoner appearing to take his trial. In applying the test, the ct. will consider the nature of the crime, the evidence against prisoner, & the severity of the punishment which may be imposed.—*R. v. FRASER* (1892), 13 N. S. W. L. R. 150; 8 N. S. W. N. 144.—**AUS.**

**1336 ii. —.]—**The test whether bail should be allowed is whether it is probable accused will appear at the trial.—*R. v. VALLI* (1903), 23 N. Z. L. R. 27.—**N.Z.**

**r. —Prisoner's home abroad.]—**Prisoner's place of residence was in U. S. A.; he applied for bail that he might return to his home until the time of his trial on a grave charge:—*Held:* the opportunity which would be afforded prisoner to escape while in a foreign country was such as to render the granting of bail impossible in the circumstances.—*R. v. DILENCE*, [1923] 1 W. W. R. 448; 39 Can. Crim. Cas. 168.—**CAN.**

**Surrender of accused on hearing of charge.]—***R. v. RUSSELL* (1843), 2 L. T. O. S. 19.—**IR.**

**Danger to accused's health.]—**A. & B. while walking together, were separately fired at by the same hand. A. was killed by the shot fired at him, B. was not hurt. C. was indicted for the murder of A., & acquitted. A warrant was afterwards issued to arrest C. on the charge of firing at B. with intent to kill. C., being informed of the issuing of the warrant, remained concealed for some time, but surrendered himself in time for trial at the next assizes:—*Held:*

under these circumstances, as there was a probability that prisoner would stand his trial on the charge of firing at B. with intent to kill, & as, according to the certificate of a medical man, his health would be impaired by further confinement, he was entitled to be admitted to bail.—*R. v. GRAY* (1843), 2 Leg. Rep. 267.—**IR.**

**1342 i. Nature of charge—True bill found.]—**Prisoner being confined in gaol upon a charge of arson, in settling down to a dwelling-house, while persons

he had applied for his trial refused at the last session of the Ct. of Queen's Bench, & that there was no sufficient evidence to warrant his detention:—*Held:* although a true bill had been found against him by the grand jury, he might be admitted to bail, inasmuch as the depositions against him were found to create a very slight supposition of his guilt.—*Ex p. MAGUIRE* (1857), 7 L. C. R. 57.—**CAN.**

**1343 i. —Probability of conviction.]—**The guilt or innocence of a prisoner is not the question to decide on application for bail on a criminal charge. The seriousness of the charge, the nature of the punishment & evidence, & probability of prisoner appearing to take his trial, are the important considerations.—*R.*

(1862), 8 C. L. J. O. S. 76.—**CAN.**

**1343 ii. —.]—**Where a serious doubt exists as to prisoner's guilt the application for bail should be granted. If, on the evidence, it seems manifest whether he is guilty or innocent, the

—*Re AN APPLICATION TO ADMIT PRISONER TO BAIL, Ex p. TOMANZIE* (1885), 2 T. L. R. 205.

**1339. —Bail should not be withheld—Unless otherwise impossible to secure appearance.]—***Semble:* bail is not to be withheld unless it is otherwise impossible to ensure prisoner's attendance at the trial.—*R. v. ROSE* (1898), 67 L. J. Q. B. 289; 78 L. T. 119; 14 T. L. R. 213; 42 Sol. Jo. 255; 18 Cox, C. C. 717, C. C. R.

**1340. —Bail on affidavit showing no risk of accused evading trial.]—***R. v. BELL* (1737), Andr. 64; 95 E. R. 300.

**1341. —Necessity for service of notice on prosecutor.]—***Re WRIGHT* (1906), 50 Sol. Jo. 707. *See, also*, No. 1412, *post*.

**1342. Nature of charge—True bill found.]—***R. v. SCAIFE*, No. 1336, *ante*.

**1343. —Probability of conviction.]—**In all cases where a great crime is charged against prisoner, the judge ought not to interfere to bail, if there is a reasonable probability of a conviction at the trial.—*R. v. —* (1851), 15 J. P. 101.

**1344. —Severity of punishment.]—**(1) The ct. has a discretion to admit accused persons to bail in all cases, but, in exercising that discretion, the nature of the charge, the evidence by which it is supported, & the sentence which by law may be passed in the event of a conviction, are in general the most important ingredients for the guidance of the ct., & where these are weighty, the ct. will not interfere.

(2) Four foreigners were committed, on the coroner's inquest & by the warrant of justices, to take their trial for wilful murder committed in a duel. Two of them, when before the committing magistrates, avowed that they acted as seconds to the deceased. An application was made on their behalf to this ct. to admit them to bail, on affidavits, by these prisoners, that they had only as seconds, that the duel was fair, that they were foreigners ignorant of the law & believing

rule generally is to admit him to bail; but the court is bound to inquire the general rule is not to grant the application for bail unless the opportunities to escape do not appear to be possible & it is consequently almost certain that he will appear for trial.—*H. v. FORTIER* (1902), Q. R. 13 K. B. 251.—**CAN.**

**1343 iii. —.]—**Where defts., who were members of an extensive organisation, were accused of a riot arising out of the agitation created by the organisation, bail was refused by the local magistrates:—*Held:* defts. should not be admitted to bail, considering first, the serious nature of the offence charged; secondly, the probability of the assoc. of which defts. were members furnishing them with funds to indemnify the bailsmen in case of default on the part of defts.—*R. v. BUTLER* (1881), 14 Cox, C. C. 530.—**IR.**

**a. —Probability of accused appearing at trial.]—**The main question for consideration in determining matters of bail is whether there are reasonable grounds for believing accused guilty of the offence charged. Other considerations must also arise in deciding this question, & one of these is whether there are any grounds for supposing that accused would abscond. Under Criminal Procedure Code, s. 497, accused should ordinarily be released on substantial bail until reasonable grounds are made out for presuming his guilt. Whether there are reasonable grounds or not must be decided judicially, that is to say, there should be some tangible evidence on the record on which, if un rebutted, the ct. can conclude that accused might

that they were bound as men of honour to act as they did, & that acting as seconds was not punishable in their own country. They pledged themselves, in the event of being admitted to bail, to abide their trial:—*Held*: assuming these facts to be accurate, they afforded no ground for the ct. interfering to bail persons proved by their own confession to be guilty of a capital offence.

(3) An application was afterwards made in favour of the two other prisoners, who had not made any such confession. This application was made on an affidavit containing a copy of the depositions before the coroner's inquest, & the committing magistrates, prisoners making no affidavit:—*Held*: the application would be refused.

Here there is an inquisition finding the parties guilty of wilful murder. The parties are in the situation of persons against whom a grand jury have found a verdict of wilful murder (LORD CAMPBELL, C.J.).—*Re BARRONET & ALLAIN, Re BARTHELEMY & MORNEY* (1852), 1 E. & B. 1; 1 W. R. 6, 53; 118 E. R. 337; *sub nom.* R. v. BARRONET & ALLAIN, Dears. C. C. 51; 20 L. T. O. S. 50; 17 J. P. 245; *sub nom.* R. v. BARTHELEMY, Dears. C. C. 60; 20 L. T. O. S. 125; *sub nom.* *Ex p.* BARONNET, 22 L. J. M. C. 25; *sub nom.* *Re BARONNET & ALLAIN, Re BARTHELEMY & MORNEY*, 17 Jur. 184.

*Annotation*:—*Reid.* R. v. Manning (1888), 5 T. L. R. 139.

1345. ———.]—*Re* ROBINSON, No. 1337, *ante*.

1346. ——— Difficulty of defence not considered.]—*Re* AN APPLICATION TO ADMIT PRISONER TO BAIL, *Ex p.* TOMANZIE, No. 1338, *ante*.

1347. ——— Improbability of prisoner having committed the offence.]—R. v. CRISP (1733), 2 Barn. K. B. 271, 276; 94 E. R. 495, 498.

1348. ——— Eight witnesses to alibi heard.]—R. v. GREENWOOD (1740), 2 Stra. 1138; 7 Mod. Rep. 310; 93 E. R. 1086.

1349. Conduct of prisoner.]—*Ex p.* COLLISON (1858), 22 J. P. Jo. 720.

1350. Medical examination of prosecutor.]—R. v. SALISBURY (1723), 1 Stra. 547; 93 E. R. 691.

1351. Inconvenience to business of accused.]—R. v. FULLER & WARREN (1849), 13 J. P. Jo. 69.

1352. Opportunity to prepare defence.]—*Ex p.* ANDERSON (1872), 38 J. P. Jo. 741.

1353. ———.]—R. v. WISE, No. 1444, *post*.

... convicted. The statement by a witness that he has seen a certain act of an incriminating character done by accused might be sufficient; but if there be no evidence whatsoever, or evidence of a very flimsy character on the face of it, the inference will be, after a reasonable time has elapsed since the beginning of the enquiry, that there are no reasonable grounds for supposing accused to be guilty. The detention of accused under trial is not intended to be penal, but its object is to secure attendance. The gravity of the offence & some evidence of its perpetration by the accused will, however, justify detention.—JAMINI

b. ———.]—The question in bail motions is the likelihood of prisoner being forthcoming to take his trial, if admitted to bail, & the elements to be considered in the determining of that question are, first, the nature of the offence charged; second, the character of the evidence against prisoner; & third, the punishment lon, may —R. v.

c. ——— Whether in serious cases— record of accused.]—H.M. ADVOCATE v. QUIN & MACDONALD (1921), 58 Sc. L. R. 296.—SCOT.

of Queen's Bench has full discretionary power to admit to bail in all cases, no matter how serious the offence charged may be.—R. v. M'CARTIE (1859), 11 L. C. L. R. 188; 11 Ir. Jur. 249.—IR.

#### PART IV. SECT. 3.

e. Exercise of discretion—Delay in bringing prisoner to trial.]—Prisoners arrested in Dec. were committed to gaol in the Jan. following, on a charge of treason felony, under 11 & 12 Vict. c. 12. At the spring assizes, in the following Mar., indictments for treason felony having been preferred & found against prisoners, they were arraigned, pleaded not guilty, & were ready to proceed with their trial, whereupon, the A.-G., on the part of the Crown, applied to the judge of assize to postpone the trial to the next assizes. This application, which was not grounded on affidavit disclosing any cause for the postponement was granted, without discussion, by the judge, who ordered that prisoners

1354. Committal to sessions—Held after assizes.]—The judge of assize will discharge, upon his own recognisance, a prisoner committed to the gaol for trial at quarter sessions, where such sessions are to be held after the assizes, if an indictment be not preferred against him at such assizes.—R. v. ARLETT (1848), 2 Car. & Kir. 596; 3 Cox, C. C. 431.

#### SECT. 3.—IN TREASON.

1355. By High Court.]—CROSBY'S CASE (1695), 12 Mod. Rep. 66; 12 State Tr. 1291; 88 E. R. 1167.

1356. ——— Only granted in exceptional circumstances.]—WITHAM v. DUTTON (1689), Comb. 111; 90 E. R. 374.

1357. ———.]—The Ct. of K. B. will not bail a person committed for murder on account of ill health unless it appear to be the immediate consequence of the confinement, & that his life is in danger, & will not bail a person in custody on an indictment for treason or murder except in very extraordinary circumstances.—KIRK'S CASE (1699), 5 Mod. Rep. 454; Holt, K. B. 86; 87 E. R. 760; *sub nom.* R. v. KIRK, 12 Mod. Rep. 309. *Annotation*:—*Reid.* R. v. Andrews (1844), 13 L. J. M. C. 113.

1358. ———.]—R. v. KIRBY (1714), Gilb. 310; 93 E. R. 338.

1359. ——— Delay in trial.]—R. v. WYNDHAM (1716), 1 Stra. 2; 93 E. R. 347.

*Annotations*:—*Reid.* R. v. Wilkes (1763), 2 Wils. 151; R. v. Platt (1777), 1 Leach, 157; R. v. Despard (1798), 7 Term Rep. 736.

1360. Treason abroad—Bail cannot be granted by justices of gaol delivery.]—Prisoner committed to Newgate for high treason in North America, who is only triable before the K. B., or under a special commission, cannot be admitted to bail under Habeas Corpus Act, 1679 (c. 2), s. 7, by justices of gaol delivery, or discharged by their proclamation for want of prosecution.—R. v. PLATT (1777), 1 Leach, 157.

*Annotation*:—*Reid.* R. v. Casement (1916), 86 L. J. K. B. 467.

#### SECT. 4.—IN MURDER.

1361. High Court has discretion to grant—Only in special circumstances.]—HERBERT & VAUGHAN'S CASE (1625), Lat. 12; 82 E. R. 249.

should, in the meantime, be kept in custody. Upon motion, in the next term, to admit prisoners to bail:—*Held*: the ct., in the exercise of its discretion, ought not to grant the motion.—R. v. M'CARTIE (1859), 11 L. C. L. R. 188; 11 Ir. Jur. 249.—IR.

f. ——— Ill-health of prisoner.]—Motion to admit a prisoner, in custody under a charge of treason felony, to bail, refused, though it appeared that prisoner was in ill-health, & that an assize & two commissions had been allowed to pass without bringing him to trial, the Crown accounting for the delay, & there being no evidence of danger to prisoner's life from confinement, or that he was suffering from any organic disease.—R. v. NAGLE (1867), 1 R. 2 C. L. 253.—IR.

#### PART IV. SECT. 4.

1361 i. High Court has discretion to grant—Only in special circumstances.]—A prisoner charged with murder may in some cases be admitted to bail.—R. v. HIGGINS (1835), 4 O. S. 83.—CAN.

1361 ii. ———.]—Prisoners charged with murder cannot be admitted to bail, except in extreme circumstances; otherwise, with accessories

*Sect. 4.—In murder. Sect. 5.]*

**1362.** ———.]—*WITHAM v. DUTTON* (1689), Comb. 111; 90 E. R. 374.

**1363.** ———.]—The Ct. of K. B. may, in its discretion, bail a person indicted for petty treason & murder.—*BARNEY'S CASE* (1697), 5 Mod. Rep. 323; 87 E. R. 683.

**1364.** ——— **Bail not granted if prisoner is indicted.**—A man found guilty of murder by the coroner's inquest is bailable; otherwise if indicted.—*MOHUN'S (LORD) CASE* (1697), 1 Salk. 104; 91 R. 96; *sub nom.* *R. v. MOHUN (LORD)*, Holt, K. B. 84; Skin. 683.

*Annotations:—Consd. Ex p. Andrews* (1844), 1 New Sess. Cas. 199. *Refd. R. v. Acton* (1729), 1 Barn. K. B. 250; *R. v. Dalton* (1731), 2 Stra. 911; *R. v. Magrath* (1745), 2 Stra. 1242.

**1365.** ——— **Whether after true bill found by grand jury.**—*KIRK'S CASE*, No. 1357, *ante*.

**1366.** ———.]—A judge will not admit a prisoner to bail after the grand jury have returned a true bill against him for murder.

Where it was stated by the grand jury on their returning a true bill for murder that an important witness was too ill to give evidence in ct. the judge directed two surgeons to see him, & on their stating on the *voir dire* that the witness was too ill to give evidence in ct. the judge ordered the trial to be postponed till the next assizes, &

after the fact.—*R. v. MURPHY* (1853), James, 158.—**CAN.**

**1361 iii.** ———.]—*Ex p. CORRIVEAU* (1856), 6 L. C. R. 249.—**CAN.**

**1361 iv.** ———.]—When a party stands charged with murder & nothing can be collected from the depositions of the Crown witnesses to cast a doubt upon his guilt, it is not usual to admit him to bail in the absence of special circumstances.—*R. v. St. JOHN* (1853), 3 Nfld. L. R. 370.—**NFLD.**

**1361 v.** ———.]—Where an indictment was found for murder against a number of prisoners, application was made to postpone trial on the grounds that the witnesses for defence would be away at date of trial, & being a considerable number, if detained, serious loss would result to them.—*Held:* under the unprecedented circumstances of the case, a postponement would be granted & bail taken for prisoners in certain cases.—*R. v. COADY* (1885), 7 Nfld. L. R. 58.—**NFLD.**

**g.** ——— **Whether granted after indictment.**—A bill of indictment, charging A. & B. with murder, was found by the grand jury at the summer assizes of 1838. At the summer assizes of 1840, A. & B. being then in custody, their trial was, on the application of the Crown, postponed until the assizes then next ensuing; & at the next subsequent assizes application was made by the Crown that A. & B. might be discharged from custody upon their own recognizances, conditioned to appear when called on. No affidavit was made on the part of the Crown in support of the last-mentioned application.—*Held:* although A. & B. were not entitled to be discharged of the indictment, yet, in the circumstances, they ought to be allowed to go at large, without giving security for their appearance at a future period.—*R. v. BYRNE & GILMORE* (1841), 2 Craw. & D. 97.—**IR.**

**h.** ———.]—Where a judge of assize who has the facts before him, orders a prisoner, against whom an indictment for murder is pending, to be detained in custody, it is against the practice of this ct. to reverse that order.—*R. v. MCATAVY & McNALLY* (1850), 4 Cox, C. C. 444.—**IR.**

**1365 i.** ——— **Whether after true bill found by grand jury.**—Where the

prisoner to be detained in custody.—*R. v. CHAPMAN* (1838), 8 C. & P. 558.

*Annotations:—Refd. R. v. Guttridge* (1840), 9 C. & P. 228; *R. v. Scaife* (1841), 9 Dowl. 553; *R. v. Andrews* (1844), 2 Dow. & L. 10.

**1367.** ———.]—Where a true bill has been found against a party for a capital felony, as for murder, a judge will not admit him to bail, even though it is clear that the evidence upon which the grand jury found the bill was illegal, & that there was really no case whatever upon which a petty jury could convict.—*Ex p. ANDREWS* (1844), 1 New Sess. Cas. 199; 3 L. T. O. S. 107; *sub nom.* *R. v. ANDREWS*, 2 Dow. & L. 10; 13 L. J. M. C. 113; 8 J. P. 791; 8 Jur. 779.

**1368.** ——— **Special verdict found.**—*R. v. HUGGINS* (1730), 1 Barn. K. B. 358; 2 Ld. Raym. 1574; 94 E. R. 241.

*Annotation:—Mentd. Manton v. Brocklebank* (1923), 92 L. J. K. B. 624.

**1369.** ——— **Not granted on affidavits.**—One indicted of murder ought not to be bailed upon affidavits of the evidence.—*ANON.* (1699), 1 Salk. 104; 91 E. R. 96.

**1370.** ——— **Not granted in serious cases—Refused in murder by duelling.**—*Re BARRONET & ALLAIN, Re BARTHELEMY & MORNEY*, No. 1344, *ante*.

**1371.** ——— **Coroner's inquisition equivalent to a**

grand jury have found a true bill for murder bail will generally be refused.—*R. v. KEELER* (1877), 7 P. R. 117.—**CAN.**

**1365 ii.** ———.]—The single proper purpose of detaining accused in close custody is to insure his trial in due course, & in all applications for bail, resting in the discretion of a ct. or of a judicial officer, in criminal cases, the paramount question should be, whether the presence of accused for trial in due course would be assured if the application were granted.

Where a true bill had been found against accused, who was charged with murder, although his trial had been postponed at the instance of the Crown, he being ready for trial, & although it was represented by counsel for accused that the case for the Crown was not a strong one, bail was refused, having regard to all the circumstances. There is no hard & fast rule that in a case of murder, accused will not, after bill found, be admitted to bail.—*R. v. RAE* (1914), 32 O. L. R. 89.—**CAN.**

**1365 iii.** ———.]—Accused, charged with murder, should not be admitted to bail where the application is made after a preliminary investigation by a judicial officer, who has committed him for trial as a result of such investigation; & still more is this the case where a true bill has been found.—*R. v. GENTILE* (1915), 32 W. L. R. 217.—**CAN.**

**1365 iv.** ———.]—That prisoner against whom a true bill had been found for murder had been ready for trial at the assizes, & that the trial had been postponed at the request of the Crown will not constitute sufficient ground for concurrently making an order to admit to bail. *Semble:* prisoner's recourse is to apply on the first day of the following assize to be brought to trial, under Habeas Corpus Act, & in default that he be granted bail.—*R. v. RAE* (1914), 32 O. L. R. 89; 23 Can. Crim. Cas. 366.—**CAN.**

**1365 v.** ———.]—Application to bail prisoners against whom a true bill for murder had been found by a grand jury, after a finding of manslaughter by a coroner's jury, refused.—*R. v. DANAIHER* (1857), 7 I. C. L. R. 18.—**IR.**

**k.** ——— **Whether granted if depositions show prisoner acted in self-defence.**]

—When the depositions taken at the preliminary hearing of a charge of murder clearly show that deceased died by the hand of prisoner & are such as to justify his commitment for trial & sufficient to establish a case to go to the jury, bail should be refused, although it also appears from the depositions that prisoner might be able to convince the jury at the trial that his act was done in self-defence.—*R. v. MONVOISIN* (1911), 3 Man. L. R. 568.—**CAN.**

**l.** ——— **Whether after committal by coroner.**—On an application by prisoners in custody on a charge of murder, under a coroner's warrant, to be admitted to bail, it is proper to consider the probability of their forfeiting their bail if they know themselves to be guilty. Where in such case there is such a presumption of the guilt of prisoners as to warrant a grand jury in finding a true bill, they should not be bailed. The fact of one assize having passed over since the committal of prisoners, without an indictment having been preferred, is in itself no ground for bail. The application is one of discretion & not of right, prisoners not having brought themselves within 31 Car. II. c. 2, s. 7, by applying on the first day of the assize to be brought to trial.—*R. v. MULLADY & DONOVAN* (1868), 4 P. R. 314.—**CAN.**

**m.** ———.]—Prisoner stood committed under a warrant of the coroner for murder. Bills of indictment for murder & manslaughter had been sent to the grand jury, but ignored by that body. The term of ct. having passed without prisoner being tried, an application was made on his behalf for his discharge under the general proclamation, on for bail.—*Held:* the ignoring by the grand jury of the two bills sent them, weaken the influence which the finding of the coroner would have had on the ct., & the ct. would not therefore be justified in refusing the application of prisoner for bail particularly when one term has passed without putting prisoner on his trial.—*R. v. TYNAN* (1862), 4 Nfld. L. R. 712.—**NFLD.**

**n.** **Opportunity to prepare defence.**—It being proved that a person in custody on a charge of murder would, unless liberated on bail, be hampered

verdict of grand jury.]—*Re* BARRONET & ALLAIN, *Re* BARTHELEMY & MORNEY, No. 1344, *ante*.

1372. —Coroner's verdict of not guilty after committal by magistrate—Bail granted.]—Prisoner was committed by the justices, together with three others, on a charge of murder. Subsequent to each committal an inquest was held at which much additional evidence was given, & which tended to exculpate prisoner, & as against him the coroner's jury returned a verdict of not guilty, but found a verdict of wilful murder as against the other three. On a motion to admit prisoner to bail:—*Held*: the circumstances justified the interference of the ct. to bail him.—*R. v. BLACKBURN* (1853), 17 J. P. 134.

#### SECT. 5.—IN FELONY.

1373. General rule—Not entitled to bail.]—A. is charged with a felony before three magistrates, who, upon hearing evidence, admit him to bail, & afterwards, upon additional evidence, commit him to gaol. A. is not entitled to a *habeas corpus* to

in making inquiries for witnesses for his defence, order made admitting him to bail subject to the condition that he should until the trial report himself daily to a specified officer of police.—*R. v. SEFTON*, [1917] V. L. R. 259.—*AUS*.

c. *Opposition to bail*.]—When the trial of a prisoner, who has been indicted for a capital offence, is postponed by the judge of assize on an application by the Crown, & such prisoner is ordered to remain in custody, this ct. where Crown counsel object, will not permit such prisoner to stand out on bail, no matter how strong a case may be made, or what amount of bail prisoner is prepared to give.—*R. v. MAGINNIS* (1852), 5 Cox, C. C. 511.—*IR*.

d. —Who will be heard in opposition to application for bail—Whether next-of-kin.]—A detachment of soldiers engaged in escorting voters to the poll at a contested election were pelted with stones, & some severely hurt. Two of them fired without orders, & a man in the crowd was killed. There was some evidence as to which of them fired the shot which killed the man. The two soldiers were committed to, & detained in, gaol under two warrants, one of which expired by efflux of time; the other was admittedly invalid. Prisoners having been brought up on *habeas corpus*, the ct. directed the one against whom there was evidence that he fired the fatal shot to be brought before the magistrates at D. in the usual manner, & expressed an opinion that he ought to be admitted to bail, & discharged the other. The Crown refused either to support or oppose the application to have prisoners discharged, & counsel for the next-of-kin of deceased were heard in opposition to the application.—*R. v. RUMBLE & BONELLO* (1868), 1 L. T. C. L. 271.—*IR*.

q. —.]—On a motion to admit to bail persons against two of whom a verdict of murder, & against the other a verdict of manslaughter, had been found by a coroner's jury, the Crown consenting to the application:—*Held*: allowing the next-of-kin of deceased to be heard in opposition was *ex gratia* only.—*R. v. M'NIGHTEN* (1881), 8 L. R. Ir. 156.—*IR*.

#### PART IV. SECT. 5.

1. General rule—Not entitled to bail.]—*R. v. GIFFARD* 38.—*IR*.

J.—VOL. XIV.

be discharged out of custody.—*Ex p. ALLEN* (1834), 3 Nev. & M. K. B. 35; 2 Nev. & M. M. C. 32.

1374. —.]—Prisoner was charged with obtaining money by false pretences, & there was also a charge of embezzlement on a partnership account. The principal indictment was for a misdemeanour. On an application in chambers to admit to bail until next session of the Central Criminal Ct.:—*Held*: debt. was entitled to be liberated on bail, except in cases of treason or felony.—*R. v. BENNETT* (1870), 49 L. T. Jo. 387.

1375. Manslaughter.]—POYNES' CASE (1614), 1 Roll. Rep. 268; 81 E. R. 481.

1376. —.]—*R. v. RAY* (1837), 1 J. P. 169.

1377. —.]—*R. v. HAYNES* (1840), 10 J. P. Jo. 788.

1378. —.]—*Ex p. DEPPERIDGE* (1846), 10 J. P. Jo. 262.

1379. —.]—*R. v. LEDBITTER* (1847), 11 J. P. Jo. 456.

1380. —.]—*R. v. RUTTER* (1847), 11 J. P. Jo. 805.

1381. —.]—*R. v. MORRIS & MASON* (1850), 14 J. P. Jo. 68.

1382. —.]—The ct. will not admit a prisoner committed on a charge of manslaughter to bail,

1373 ii. —.]—Where, from the facts disclosed, it appears doubtful whether an indictment for a felony can be maintained, prisoner is not, therefore, entitled *ex debito justitiæ*, to be admitted to bail as in cases of misdemeanour, no matter what may be the form of offence charged in the committal.—*R. v. CARDEN* (1854), 6 Cox, C. C. 484.—*IR*.

1373 iii. —.]—Prisoner is not of right entitled to bail when committed on an express charge of felony, & the judge will not admit to bail in cases of felony unless there is a strong presumption of the party's innocence.—*R. v. GORMAN* (1861), 4 Nfld. L. R. 577.—*NFLD*.

1373 iv. —.]—A person, charged with administering poison with intent to murder, presented a petition to be liberated on bail. The application was opposed by prosecutor on the ground, *inter alia*, that the recognitions disclosed an aggravated case. The sheriff substitute having refused the application. On appeal:—*Held*: the petition was rightly refused.—*H. M. ADVOCATE v. SAUNDERS*, [1913] S. C. (J.) 44.—*SCOT*.

r. —Whether court will look at information.]—If a committal for a felony be insufficient, the ct. do not admit prisoner to bail without looking at the information.—*R. v. STEWART* (1826), Batt. 138.—*IR*.

s. —.]—*R. v. ROWE* (1826), Batt. 138.—*IR*.

t. —Exercise of discretion.]—All superior cts. of criminal jurisdiction or one of their judges, & also, in the province of Quebec, a judge of the superior ct. have authority to admit to bail persons accused of any crime whatsoever, including treason & capital offences, but as respects indictable offences which, before the enacting of the Criminal Code, were felonies, it is within their discretion to grant or refuse the application for bail.—*R. v. FORTIER* (1902), Q. R. 13 K. B. 251.—*CAN*.

a. —.]—On an application to admit to bail persons charged by a coroner's jury with manslaughter, the ct. will exercise a discretion; & upon substantial bail being given, if satisfied that the offenders will be made amenable to justice, the application will be granted.—*R. v. WOODS* (1845), 9 I. L. R. 71.—*IR*.

b. —.]—Improbability of prisoner having committed the offence.]

—A prisoner is not of right entitled to bail when committed on an express charge of felony, & the judge will not admit to bail in cases of felony unless there is a strong presumption of the party's innocence.—*R. v. GORMAN* (1861), 4 Nfld. L. R. 577.—*NFLD*.

c. —.]—Prisoner stood committed under a warrant of the coroner for wilful murder. Bills of indictment for wilful murder & manslaughter had been sent to the grand jury, but ignored by that body. The term of ct. having passed without prisoner being tried, an application was made on his behalf for his discharge under the general proclamation, or for bail:—*Held*: the ignoring by the grand jury of the two bills sent them, weaken the influence which the finding of the coroner would have had on the ct., & the ct., would not therefore be justified in refusing the application of prisoner for bail, particularly when one term has passed without putting prisoner on his trial.—*R. v. TYNAN* (1862), 4 Nfld. L. R. 712.—*NFLD*.

d. —Delay in bringing prisoner to trial.]—*R. v. NAGLE* (1867), 1 R. 2 C. L. 253.—*IR*.

e. —.]—Where the depositions make out a *prima facie* case of felony against prisoners & show a state of things which indicates that prisoners enjoy a large amount of sympathy & support from the public, the ct. will not be influenced in an application to admit to bail, by the fact that prisoners are able & ready to procure bail.—*R. v. M'CORMICK* (1864), 17 I. C. L. R. 411.—*IR*.

1375 i. Manslaughter.]—A committal, signed by the coroner, stated that the prisoner had inflicted injuries on Catherine Roche, which might have caused her death, her general health having been previously very bad. The prisoner, on hearing of the charge against him, had immediately surrendered himself into custody:—*Held*: prisoner should be discharged on perfecting bail himself in £100, & two sureties in £50 each.—*R. v. RUSSELL* (1843), 2 L. T. O. S. 19.—*IR*.

f. Larceny.]—A prisoner in custody for grand larceny may be admitted to bail.—*R. v. JONES* (1835), 4 O. S. 18.—*CAN*.

g. —escaping from custody.]—*R. v. DRAKE* (1918), 29 Can. Crim. Cas. 174.—*CAN*.



**Sect. 5.—In felony. Sects. 6, 7, 8, 9 & 10.]**

where the circumstances of the case are such as to warrant the belief that the death of deceased was not purely accidental.—*R. v. STOKES* (1854), 3 W. R. 10.

**1383. Rape.]**—On a charge of rape, accused was held to bail, by himself & three sureties.—*R. v. BOOTH* (1757), 2 Keny. 172; 96 E. R. 1145.

**1384. —.]**—*R. v. BALTIMORE* (LORD), No. 629, ante.

**1385. Horse-stealing.]**—A prisoner brought up by *habeas corpus* on a charge of horse-stealing was admitted to bail.—*R. v. —*, (1813), 2 Chit. 110.

**1386. Buggery.]**—ANON. (1700), 12 Mod. Rep. 435; 88 E. R. 1433.

**1387. Accomplice.]**—A man brought up as an accomplice of felony, the principal not being taken, may be bailed.—ANON. (1774), Lofft, 554; 98 E. R. 796.

**SECT. 6.—IN MISDEMEANOURS.**

**1388. Prisoner entitled to bail.]**—Prisoner upon a *habeas corpus* was bailed, because the crime was only a great misdemeanour.—*MARRIOT'S CASE* (1697), 1 Salk. 104; 91 E. R. 96.

*Annotation:—Reid. Linford v. Fitzroy* (1849), 13 Q. B. 240.

**1389. — If bail sufficient.]**—*R. v. BADGER*, No. 1312, ante.

**1390. —.]**—Prisoners have a right to be admitted to bail if it is only a misdemeanour (*PATTESON, J.*).—*R. v. PEATLEY* (1844), 8 J. P. Jo. 854.

**1391. —.]**—*R. v. KINCHAN* (1846), 10 J. P. Jo. 89.

**1392. —.]**—*R. v. PESTLE* (1846), 10 J. P. Jo. 88; *sub nom. Ex p. PESTLE*, 6 L. T. O. S. 326, 354.

**1393. —.]**—*R. v. BENNETT*, No. 1374, ante.

**1394. —.]**—*R. v. ATKINS* (1870), 49 L. T. Jo. 421.

**1395. —.]**—*Re FROST* (1888), 4 T. L. R. 757, D. C.

*Annotation:—Consd. R. v. Phillips* (1922), 128 L. T. 113.

**1396. Fresh commitment—Serious offence.]**—Where prisoner was committed for a misdemean-

our, & after a rule nisi for a *habeas corpus* to bail him had been obtained, a fresh commitment was made out against him for a serious felony, the ct. refused to bail him.—*Re JONES* (1843), 2 L. T. O. S. 169; *sub nom. R. v. JONES*, 7 J. P. 741.

**SECT. 7.—FUGITIVE OFFENDERS.**

See EXTRADITION & FUGITIVE OFFENDERS.

**SECT. 8.—BY HIGH COURT.**

See Crown Office Rules.

**By writ of habeas corpus.]**—See CROWN PRACTICE, Vol. XVI., p. 255, Nos. 564–565.

**Bail pending hearing of habeas corpus.]**—See CROWN PRACTICE, Vol. XVI., p. 268, Nos. 766–778.

**Certiorari to remove depositions for bail.]**—See CROWN PRACTICE, Vol. XVI., pp. 434, 481, Nos. 2970–2982, 3629–3631.

**1397. Discretion of court.]**—*R. v. AILESBURY* (EARL) (1697), 12 Mod. Rep. 117; Holt, K. B. 84; Comb. 421; 88 E. R. 1205; *sub nom. AYLESBURY'S* (LORD) *Case*, 1 Salk. 103.

*Annotations:—Reid. R. v. Acton* (1729), 1 Barn. K. B. 250; *R. v. Bambridge* (1729), 1 Barn. K. B. 166. **Mentd.** *Kearle v. Whiteland* (1756), Say. 313.

**1398. —.]**—Bailing during advisement is discretionary, & the ct. will refuse it if deft. pleads a false plea.—*WATSON'S CASE* (1702), 1 Salk. 106; 91 E. R. 97; *sub nom. LUCY v. ST. DAVID'S* (BP.), 7 Mod. Rep. 56.

*Annotations:—Mentd. Mayo & Parson's Case* (1720), 1 Stra. 391; *St. John's Chapel of Ease* (Within the Parish of St. Andrew's, Holborn) *Case* (1730), Fitz-G. 158; *Middleton v. Crofts* (1736), 2 Atk. 650; *R. v. Dugger* (1822), 5 B. & Ald. 791; *R. v. Hewitt* (1837), 6 Ad. & El. 547, n.; *R. v. Baines* (1841), 5 J. P. 94; *Re York Archbp.* (1841), 2 Q. B. 1; *R. v. Canterbury Archbp.* (1848), 11 Q. B. 483; *Marsden v. Wardle* (1854), 2 W. R. 455; *Shepherd v. Payne* (1863), 9 Jur. N. S. 354; *Blane v. Geraghty* (1866), 15 W. R. 133; *McGeath v. Geraghty* (1866), 15 W. R. 127; *Boyd v. Phillpotts* (1874), L. R. 4 A. & E. 297; *Combe v. De La Bere* (1881), 6 P. D. 157; *Ex p. Bell Cox* (1887), 20 Q. B. D. 1; *Read v. Canterbury Archbp.* (1888), 4 T. L. R. 741; *Reid v. Lincoln Bp.* (1889), 14 P. D. 88; *R. v. Canterbury Archbp.*, [1902] 2 K. B. 503; *R. v. Tristram*, [1902] 1 K. B. 816; *Re Haigh with Aspull, New Parish*, [1919] P. 143.

misdemeanours the King's Bench under Habeas Corpus Act cannot refuse bail although a justice has a discretion in such a case to grant or refuse bail.—*It. v. LARKIN* (1914), 48 L. T. 95.—**IR.**

**o. Refusal to admit to bail—Whether magistrates liable.]**—Before 16 Vict. c. 179, magistrates were not liable for refusing to admit to bail on a charge of misdemeanour, without proof of malice.—*CONROY v. MCKENNY* (1854), 11 U. C. R. 439.—**CAN.**

**p. Whether court will bail accused—Before hearing other parties—Assault.]**—Deft. having applied to be admitted to bail to attend at the next sessions, the charge being one of assault, the ct. declined deciding until the other parties were heard, but allowed him to give bail to be amenable to the order of the ct. in the meantime.—*R. v. CROTTY* (1828), 1 Ir. L. Rec. 1st ser. 185.—**IR.**

**q. Order to retake accused out on bail—Improbability of accused appearing at trial.]**—The ct. will grant an order to retake a prisoner charged with a misdemeanour, who has been out on bail to abide his trial at the next assizes, when it is sworn that he intends to leave the country for the purpose of avoiding the prosecution.—*It. v. O'FLAHERTY* (1840), 1 Leg. Rep. 72.—**IR.**

**l. Rescinding order—Prisoner not committed for trial when order granted—Fictitious bail.]**—Where a prisoner charged with felony had been admitted to bail upon an order of a judge, & an application was subsequently made to rescind such order, & to recommit prisoner, on the grounds that he had not been committed for trial at the time such order was granted, & that the bail put in was fictitious.—*Held*: a judge had power to make the order asked for; but the order in this case was conditional upon the failure of prisoner to find new sureties within a specified time.—*R. v. MASON* (1869), 5 P. R. 125.—**CAN.**

**m. Commitment by judge—Whether he may subsequently bail prisoner—Perjury.]**—A judge who has committed a prisoner for trial for perjury is not thereby *functus officio*, but may subsequently admit prisoner to bail.—*Re RUTHVEN* (1898), 6 B. C. R. 115.—**CAN.**

**PART IV. SECT. 6.**

**1388 i. Prisoner entitled to bail.]**—With respect to indictable offences which were formerly misdemeanours, accused is entitled to be admitted to bail as a matter of right.—*It. v. FORTIER* (1902), Q. R. 13 K. R. 251.—**CAN.**

**n. — Whether King's Bench can refuse to grant.]**—Where a prisoner is charged with offences which are

**1383 i. Rape.]**—When prisoner was committed for trial on a charge of rape & four months would elapse before his trial & certain circumstances appeared in the deposition raising some doubts in prisoner's favour the ct. allowed bail.—*R. v. CLARKSON* (1879), 2 N. S. W. S. C. R. N. S. 101.—**AUS.**

**h. — Non-appearance of accused at trial—Whether sureties liable.]**—After his preliminary hearing before two justices of the peace, one accused of rape was admitted to bail upon a recognisance entered into by him with two sureties. Accused did not appear for trial; an order was made estreating the bail, & a writ of *fi. fa.* & *capias* issued thereon; & the sheriff, failing to find any property belonging to accused or his sureties, took the sureties into custody.—*Held*: as the offence was one punishable with death, the justices had no right to admit to bail, nor to take the recognisance, & no liability, at least no liability enforceable under the procedure taken, was imposed under it upon those who entered into it.—*Re HOPPE'S BAIL* (1913), 23 W. L. R. 751; 10 D. L. R. 216; 4 W. W. R. 1; 5 Alta. L. R. 398.—**CAN.**

**k. Sending threatening letter.]**—The ct. will allow a person against whom a strong case on the information is made out, of sending a threatening letter, to stand out on sufficient bail.—*R. v. HART* (1852), 19 L. T. O. S. 12.—**IR.**

**1399.** —. —.]—The Ct. of K. B. in admitting to bail will look into the depositions & guide their discretion by the circumstances of the case.—*R. v. HORNER* (1783), *Cald. Mag. Cas.* 295; 1 *Leach*, 270.

**1400.** —. —.]—*Re BARRONET & ALLAIN, ETC.*, No. 1344, *ante*.

**1401. Admission to bail—By High Court.**—*R. v. SWAILE* (1823), 1 *Lew. C. C.* 19.

**1402.** —. —.]—*R. v. BRAITHWAITE* (1836), 2 *Lew. C. C.* 55.

**1403.** —. —.]—The ct. will not allow a dejt., who is out of custody, to be bailed before a magistrate in the country, but he must surrender in ct. in order to be bailed.—*R. v. WREN* (1836), 5 *Dowl.* 222.

**1404.** —. —.]—Upon an application to the ct. for a *certiorari* to remove the depositions whereon a party in the country has been committed for trial, in order that he may be admitted to bail, a copy of such depositions should be brought before the ct. in the first instance.—*R. v. SUTCLIFFE* (1855), 25 *L. T. O. S.* 187; *sub nom. R. v. SUTCLIFFE, Ex p. SUTCLIFFE*, 19 *J. P.* 375.

**1405.** —. —.]—**Referred to magistrates.**—Attachment upon arts. of the peace in K. B. bailable before justices of the county.—*R. v. BOMASTER* (1760), 1 *Wm. Bl.* 233; 96 *E. R.* 129; *sub nom. HUTTON'S CASE*, 2 *Burr.* 1039.

**1406.** —. —.]—Where the ct. think that prisoner ought to be bailed for felony, if he be unable to defray the expense of being brought to Westminster for that purpose, they will grant a rule to show cause why he should not be bailed by a magistrate in the country, with a *certiorari* to return the depositions before them.—*R. v. JONES* (1817), 1 *B. & Ald.* 209; 106 *E. R.* 77.

**1407.** —. —.]—Prisoner committed for manslaughter allowed to give bail before a magistrate in the country by reason of his poverty, which rendered him unable to appear with bail in ct.—*R. v. MASSEY* (1817), 6 *M. & S.* 108; 105 *E. R.* 1183.

**1408.** —. —.]—When the Ct. of K. B. grant a *habeas corpus* that prisoner may be admitted to bail for a crime, they always direct a *certiorari* to issue, to bring the deposition into that ct. If the party is poor, they will order him to be bailed before two magistrates in the country.—*R. v. GITTUS* (1824), 3 *L. J. O. S. K. B.* 55.

**1409.** —. —.]—In order to entitle dejt. on a charge of felony to an order to be bailed before a magistrate in the country, it is not necessary to produce an affidavit of poverty, if it appears from the other affidavits in the case that he is in a humble situation of life.—*R. v. BOOKER* (1834), 2 *Dowl.* 446.

**1410.** —. —.]—The ct. will grant a rule *nisi* for bailing in the country a party charged with felony without the production of an affidavit of

his poverty.—*R. v. GREGORY* (1840), 9 *Dowl.* 129; *Woll.* 4; 4 *J. P.* 720; 4 *Jur.* 1015.

#### SECT. 9.—BY COURT OF CRIMINAL APPEAL.

**1411. Application for—Must be by substantive application.**—Upon an application for leave to appeal against a conviction for larceny, which the ct. granted, an application was made for bail on behalf of prisoner who was not present in ct. & against whom there was a previous conviction, though not for felony:—*Held*: a substantive application under Criminal Appeal Act, 1907 (c. 23), must be made.—*R. v. MEYER* (1908), 24 *T. L. R.* 620; 1 *Cr. App. Rep.* 4, *C. C. A.*

**1412. Notice of application should be given to prosecution—Practice of court—Where Director of Public Prosecutions is concerned.**—While the Ct. of Criminal Appeal cannot of its own initiative lay down a general rule that notice must be given to the prosecution when an application for bail is intended to be made, it is very desirable that a judge or the ct., in the exercise of his or its discretion, should direct such notice to be given. In cases where the Director of Public Prosecutions is concerned the application for bail should be refused where no notice has been given of the intended application.—*R. v. RIDLEY* (1909), 100 *L. T.* 944; 25 *T. L. R.* 508; 22 *Cox, C. C.* 127; 2 *Cr. App. Rep.* 113, *C. C. A.*  
*Annotation*:—*Mentd. R. v. Davis & Ridley* (1909), 2 *Cr. App. Rep.* 133.

**1413. Conviction quashed—Other indictments to be tried.**—*R. v. HALIKIOPULO* (1909), 3 *Cr. App. Rep.* 272, *C. C. A.*

**1414.** —. —.]—*R. v. BROWNLOW* (1910), as reported in 4 *Cr. App. Rep.* 131, *C. C. A.*

**1415.** —. —.]—**Counts of previous indictment to be re-tried.**—*R. v. SMITH* (1919), 14 *Cr. App. Rep.* 81, *C. C. A.*

**1416.** —. —.]—**Mistrial—Bail pending retrial.**—*R. v. CRANE*, [1920] 3 *K. B.* 236; 89 *L. J. K. B.* 813; 124 *L. T.* 256; 84 *J. P.* 210; 36 *T. L. R.* 673; 26 *Cox, C. C.* 667; 15 *Cr. App. Rep.* 23, *C. C. A.*; *affd.* on other grounds, *sub nom. CRANE v. PUBLIC PROSECUTOR*, [1921] 2 *A. C.* 299, *H. L.*  
*Annotations*:—*Mentd. R. v. Morton* (1920), 15 *Cr. App. Rep.* 30; *lt. v. Hammer*, [1923] 2 *K. B.* 787.

*See, also, Sect. 12, post.*

#### SECT. 10.—DURING REMAND.

*See Criminal Justice Administration Act, 1911 (c. 58), s. 19.*

**1417. General rule—Misdemeanour—Indictable Offences Act, 1847 (c. 42).**—*Ex p. MULLINS* (1884), *Douglas' Summary Jurisdiction Procedure*, 9th ed. 365, *D. C.*

it being denied by affidavit that the subscription fund would be applied otherwise than for the *bona fide* relief of destitution for which purpose it had been collected.—*R. v. GALLAGHER* (1858), 8 *I. C. L. R.* 93; 10 *Ir. Jur.* 343.—*IR.*

#### PART IV. SECT. 10.

**r. General rule.**—A magistrate made an order under Military Service Acts, 1916-17, remanding in custody a person accused of being an absentee without leave from the Army Reserve, in order that the prosecution might make further inquiries. On an application to admit accused to bail:—*Held*: the K. B. Div. of the High Ct. has jurisdiction, in a proper case, to

#### PART IV. SECT. 8.

**1401 i. Admission to bail—By High Court.**—*R. v. HALL* (1907), 12 *Can. Crim. Cas.* 692; 6 *W. L. R.* 842.—*CAN.*

**1401 ii.** —. —.]—The ct. may admit to bail a person charged with a seditious libel, who has been remanded by the magistrate during his investigation of the case & who has refused to allow accused out on bail.—*R. v. MACLACHLAN & LIVINGSTONE*, [1923] 4 *D. L. R.* 1047; 40 *Can. Crim. Cas.* 280.—*CAN.*

**1401 iii.** —. —.]—The proceeding in which it has to be determined whether accused should be admitted to bail by a magistrate is a judicial proceeding, &, as such, cognisable by the High Ct.—*MANIKAM MUDALI v.*

*R.* (1882), 1 *L. R.* 6 *Mad.* 63.—*IND.*

**1401 iv.** —. —.]—A former motion to bail prisoners, who were charged with sheep stealing, had been refused by the ct., upon the ground that the alleged existence of a widespread conspiracy, & the probable indemnification of the bail by a subscription fund, rendered it unlikely that prisoners would appear to take their trial, if admitted to bail; but no indictment for conspiracy having been preferred against prisoners at the following assizes, & indictments for stealing & maliciously injuring sheep only having been found against them, the ct. now ordered prisoners, whose trial had been postponed by the Crown, & who had been in gaol for seven months, to be admitted to bail;



*Sect. 10.—During remand. Sects. 11 & 12.]*

**1418.** ———.]—It is not the usual practice for this ct. to admit persons charged with misdemeanours to bail during remand in ordinary cases arising in this country (LORD RUSSELL OF KILLOWEN, C.J.).—*R. v. SPILSBURY*, [1898] 2 Q. B. 615; 67 L. J. Q. B. 938; 79 L. T. 211; 62 J. P. 600; 14 T. L. R. 579; 42 Sol. Jo. 717; 19 Cox, C. C. 160, D. C.; *subsequent proceedings, sub nom. SPILSBURY v. R.*, [1899] A. C. 392, P. C.

*Annotations:—Consd. R. v. Brixton Prison, Ex p. Savarkar*, [1910] 2 K. B. 1056; *R. v. Phillips* (1922), 128 L. T. 113. *Refd. R. v. Hole* (1898), 14 T. L. R. 578.

**1419. Direction of High Court to magistrate.]—***R. v. MANNING* (1888), 5 T. L. R. 139, D. C. *Annotation:—Consd. R. v. Phillips* (1922), 128 L. T. 113.

**1420. Extradition proceedings—Misdemeanour committed abroad—Magistrate's discretion.]—**A deft. who has been arrested in extradition proceedings on a charge of a misdemeanour committed abroad, & who is remanded pending the receipt of further information from the foreign country, is not entitled as of right to be granted bail either by the magistrate or by K. B. Div., but the matter is in the magistrate's discretion.—*R. v. PHILLIPS* (1922), 128 L. T. 113; 86 J. P. 188; 38 T. L. R. 897; 67 Sol. Jo. 64; 27 Cox, C. C. 332, D. C.

**SECT. 11.—ON POSTPONEMENT OF TRIAL.**

**1421. Discretion of judge.]—**It is in the discretion of the judge to bail prisoner or not, when his trial is postponed on account of the absence of prosecutor.—*ANON.* (1836), 2 L. W. C. C. 260.

**1422.** ———.]—When a trial for felony is postponed on the application of counsel for the prosecution, on the ground of the absence of a material witness, it is in the discretion of the judge whether, on consideration of the circumstances of each particular case, he will order prisoner to be detained till the next assizes, or admit him to bail, or discharge him on his own recognisance.—*R. v. OSBORN* (1837), 7 C. & P. 799.

*Annotation:—Mentd. R. v. Austen* (1856), 7 Cox, C. C. 55.

**1423. Whether bail granted—Murder.]—***R. v. CHAPMAN*, No. 1366, *ante*.

**1424.** ———.]—Prisoners being acquitted of rape counsel for the prosecution moved to put off their trial for murder. The trial was postponed, & prisoners were not admitted to bail.—*R. v. OWEN, ELLIS & THOMAS* (1839), 9 C. & P. 83. *Annotation:—Refd. R. v. Adams* (1886), 50 J. P. 136.

**1425.** ———.]—An application was granted, on behalf of a prisoner charged with murder, to put off the trial in consequence of the absence of a material witness for the prosecution, whose deposition had been taken before the coroner & who was expected to give evidence favourable to

prisoner, prisoner meanwhile being continued in custody.—*R. v. TAYLOR* (1840), 4 J. P. 509.

*Annotation:—Refd. R. v. Bridgeman* (1840), 4 J. P. 557.

**1426.** ———.]—Although in ordinary cases, upon indictments for murder, the ct., upon postponing the trial, will continue prisoner in custody, yet, if it appear tolerably clear upon the face of the depositions that the offence amounts only to manslaughter, the ct. will depart from this rule, & suffer prisoner to be discharged from custody upon his entering into his own recognisance with sufficient sureties to appear & take his trial. But on a serious charge of this nature, the ct. will not discharge prisoner upon his own recognisances merely.—*R. v. BRIDGEMAN* (1840), 4 J. P. 557; *subsequent proceedings* (1841), Car. & M. 271.

**1427.** ———.]—The ct. refused to bail a prisoner, who was charged on a coroner's inquest with murder, & against whom a bill for the same crime had been found by the grand jury, although his trial had been postponed in consequence of the absence of witnesses for the prosecution, & it was alleged that on the face of the depositions taken before the coroner the charge of murder could not be sustained.—*R. v. ANDREWS* (1844), 2 Dow. & L. 10; 13 L. J. M. C. 113; 8 J. P. 791; 8 Jur. 779; *sub nom. Ex p. ANDREWS*, 1 New Sess. Cas. 199; 3 L. T. O. S. 107.

**1428.** ——— **Manslaughter.]—***R. v. BRIDGEMAN*, No. 1426, *ante*.

**1429.** ——— **Felonious wounding—Probability of more serious charge.]—**Where prosecutor is unable to attend at the trial in consequence of personal injuries received at the hands of prisoner, & which are the subject of the indictment for felonious wounding, the ct., on postponing the case until the next assizes, will not admit prisoner to bail, particularly where it is probable that his conduct will resolve itself into an offence of a higher nature.—*R. v. BOURTON* (1843), 7 J. P. 115.

**1430.** ——— **Larceny—Absence of material witness—Caused by accused.]—**If it be moved on the part of the prosecution in a case of larceny to postpone the trial on the ground of the absence of a material witness, the practice, where the absence of the witness can be traced to the acts of prisoner or his friends, is not to discharge prisoner from custody except on very sufficient bail, but where no collusion appears between the absent witness & prisoner or his friends, the practice is to discharge prisoner on his own recognisance.—*R. v. BEARDMORE* (1836), 7 C. & P. 497.

*Annotation:—Refd. R. v. Osborn* (1837), 7 C. & P. 799

**1431.** ——— **Rape—Prosecutrix kept out of the way by prisoner.]—**A true bill was found against several prisoners for a rape. Prisoners had been on bail, & prosecutrix did not appear either before the grand jury or to give evidence on the trial. An application being made to the judge to postpone the trial, founded on affidavits stating that, in

admit accused remanded in custody to bail; but the ct. will be slow to overrule a magistrate who in his discretion has decided not to accept bail pending a remand.—*R. v. ISRAELOVITCH*, [1919] 2 I. R. 47, 524.—**IR.**

**PART IV. SECT. 11.**

**s. Whether bail granted—Breaking & entering—Disagreement of jury.]—**Where, on the trial of prisoners indicted for breaking & entering a bank, the jury disagreed, & there was no time left for a second trial during the then sittings of the ct.:—*Held*: a trial could be obtained by the issue of a commission by the Govt. & the ct. could not order a new trial of the cause,

or discharge prisoners on their own recognisances.—*R. v. WATSON* (1876), 11 N. S. R. (2 R. & C.) 1.—**CAN.**

**1423 i.** ——— **Murder.]—**A bill of indictment charging A. & B. with murder, was found by the grand jury at the summer assizes, 1838. At the summer assizes of 1840, A. & B. being then in custody, their trial was, on the appln. of the Crown, postponed until the assizes then next ensuing; & at the next subsequent assizes, application was made by the Crown that A. & B. might be discharged from custody upon their own recognisances, conditioned to appear when called on. No affidavit was made on the part of the Crown in support of the last-mentioned application:—*Held*: in the circum-

stances prisoners ought to be allowed to go at large without giving security for their appearance at a future period.—*R. v. BYRNE & GILMORE* (1841), 2 Caw. & D. 97.—**IR.**

**1423 ii.** ———.]—Where an indictment was found for murder against a number of prisoners, application was made to postpone trial on the grounds that the witnesses for defence would be away at date of trial, & being a considerable number, if detained, serious loss would result to them:—*Held*: in the unprecedented circumstances of the case, a postponement would be granted & bail taken for prisoners in certain cases.—*R. v. COADY* (1885), 7 Nfld. L. R. 58.—**NFLD.**

the belief of deponent, prosecutrix was kept out of the way in consequence of money having been given to her by some of the prisoners, the judge postponed the trial, & would not admit prisoners to bail.—*R. v. GUTTRIDGE* (1840), 9 C. & P. 228.

*Annotations*:—*Folld. Ex p. Andrews* (1844), 1 New Sess. Cas. 199. *Refd. R. v. Scaife* (1841), 9 Dowl. 555.

**1432. — Embezzlement.**—If the trial of a prisoner indicted for embezzlement be postponed on the ground of the absence of prosecutor, who is a material witness for the prosecution, prisoner will not be allowed his costs, but the judge will discharge him on his own recognisance.—*R. v. CROWE* (1829), 4 C. & P. 251.

**1433. — Arson.**—The judges at the Central Criminal Ct., after postponement till the next session, on motion for the prosecution, of the presentation of a bill for arson, refused, on motion for prisoner, to read over very long depositions to enable them to decide whether they would admit him to bail, although the application was made on the ground that there was not sufficient time to prepare proper affidavits before the breaking up of the ct.—*R. v. PALMER* (1834), 6 C. & P. 654.

**1434. — Forgery.**—It being suggested, before the commencement of a trial for forgery, that the party whose name was forged was not forthcoming, though under recognisance, the judge directed prisoner to be placed at the bar, & the party to be called on his recognisance; & on its appearing by affidavit that he had applied to prosecutor to know if the matter could not be settled without a trial, & that the money should not be wanting if it could, the judge directed the trial to be postponed & prisoner remanded till the next assizes, unless he found sureties for his appearance, & gave seven days' notice of bail.—*R. v. PARISH* (1837), 7 C. & P. 782.

## 2.—PENDING APPEAL.

### 1435. By Court of Criminal Appeal—Application

application is purpose of delaying the appeal.—*R. v. HORNER* (1910), 4 Cr. App. Rep. 189, C. C. A.

**1436. — Not when term of imprisonment**—The ct. does not usually grant bail, pending appeal, when the term of imprisonment is long.—*R. v. GARNHAM* (1910), 4 Cr. App. Rep. 150, C. C. A.

**1437. — Conviction quashed—Appeal to House of Lords—Criminal Appeal Act, 1907 (c. 23), s. 1 (6).**—The Ct. of Criminal Appeal has no power to hold deft., whose conviction has been quashed, to bail, or to keep him in custody pending an application by the Director of Public Prosecutions, or prosecutor, to the A.-G., under Criminal Appeal Act, 1907 (c. 23), s. 1 (6), for his certificate that the

decision of the ct. involves a point of law of exceptional public importance & that it is desirable that a further appeal should be brought to the House of Lords, or pending an appeal if the certificate is granted.—*R. v. BALL, R. v. BALL*, [1911] A. C. 47; 80 L. J. K. B. 689; 104 L. T. 47; 22 Cox, C. C. 364; 5 Cr. App. Rep. 238; 74 J. P. Jo. 545, C. C. A.; *on appeal*, [1911] A. C. 61, H. L.

*Annotations*:—*Mentd. R. v. Stone* (1910), 6 Cr. App. Rep. 89; *R. v. Bloodworth* (1913), 9 Cr. App. Rep. 80; *R. v. Curtis* (1913), 9 Cr. App. Rep. 9; *R. v. Rodley*, [1913] 3 K. B. 468; *R. v. Thompson* (1913), 78 J. P. 212; *R. v. Cooper* (1914), 10 Cr. App. Rep. 195; *R. v. Shellaker*, [1914] 1 K. B. 414; *R. v. Thompson*, [1917] 2 K. B. 630.

**1438. — Appeal dismissed—Appeal to House of Lords—Before certificate of Attorney-General granted.**—The ct. has no power, after dismissing an appeal, to admit applt. to bail until the A.-G. decides whether he will grant his fiat to appeal to the House of Lords.—*R. v. THOMPSON* (1917), as reported in 33 T. L. R. 506; 12 Cr. App. Rep. 261, C. C. A.; *subsequent proceedings, sub nom. THOMPSON v. R.*, [1918] A. C. 221.

*Annotation*:—*Refd. R. v. Manning* (1923), 17 Cr. App. Rep. 85.

**1439. — Appeal to House of Lords—After certificate of Attorney-General given.**—*R. v. THOMPSON* (1917), 12 Cr. App. Rep. 278, C. C. A.; *subsequent proceedings, sub nom. THOMPSON v. R.*, [1918] A. C. 221.

**1440. —**—The ct. will not, as a rule, grant bail to a prisoner pending his appeal.—*R. v. GORDON* (1912), 7 Cr. App. Rep. 182, C. C. A.

*Annotations*:—*Folld. R. v. Gott* (1921), 16 Cr. App. Rep. 86; *R. v. Leinster* (1923), 17 Cr. App. Rep. 147.

**1441. —**—The rule of the ct. is to refuse bail pending appeal.—*R. v. GOTT* (1921), 16 Cr. App. Rep. 86, C. C. A.

*Annotation*:—*Folld. R. v. Leinster* (1923), 17 Cr. App. Rep. 147.

**1442. — Only in exceptional circumstances.**—It is only in very exceptional cases that bail is allowed by this ct. (LORD HEWART, C.J.).—*R. v. GREENBERG* (1923), 17 Cr. App. Rep. 106, C. C. A.

**1443. — During adjournment of court.**—*R. v. SMITH* (1919), 14 Cr. App. Rep. 74; *subsequent proceedings*, 14 Cr. App. Rep. 81, C. C. A.

**1444. — Prospect of success on appeal—And release of assistance in preparing case.**—In order to adjudicate on the question of bail it is useful to see if there is any prospect of success on appeal, or if it is a case where it would be of assistance for the preparing of a real case for appeal if the appellant were released (LORD STEWART, C.J.).—*R. v. WISE* (1922), 17 Cr. App. Rep. 17; 154 L. T. Jo. 168, C. C. A.

*Annotation*:—*Folld. R. v. Leinster* (1923), 17 Cr. App. Rep. 147.

**1445. —**—*R. v. LEINSTER (DUKE)* (1923), 17 Cr. App. Rep. 147, C. C. A.

**1446. By court of trial—Discretion of court—Misdemeanour.**—Where a case has been reserved

gone by prisoner, & the Privy Council had subsequently granted leave to appeal against the decision of the Ct. of Appeal on the points reserved:—*Held*: neither the Supreme Ct. nor the Ct. of Appeal had power to admit prisoner to bail or to suspend the execution of the sentence pending the determination of the Privy Council on the appeal.—*Re BROWN v. A.-G.* (1896), 15 N. Z. L. R. 165.—**N.Z.**

**c. By court of trial.**—Execution by a sentence of imprisonment by justices is suspended upon the due completion of the requirements of Justices Act, 1902, upon appeal, & the release of the prisoner upon recognisance pending the hearing of the

## PART IV. SECT. 12.

**t. By Court of Appeal.**—An application to a judge of the Ct. of Appeal to admit to bail a person committed for extradition, pending an appeal to that ct. from an order of a judge of the High Ct. refusing, upon *habeas corpus*, to discharge the applicant, was refused on the grounds that it was doubtful whether a judge of the Ct. of Appeal had power to make the order, a matter of bail not being incidental to the appeal.

**a. —**—Dft. was indicted, tried & convicted for arson. A reserved

case was granted, as a result of which the conviction was affirmed. Subsequently a new trial was ordered by the Minister of Justice, & application was made to admit prisoner to bail:—*Held*: in the absence of jurisdiction specially given, the ct. had no power to admit to bail after conviction affirmed. If the ct. had ordered a new trial, bail might have been allowed under Code, s. 1023, ss. (3).—*R. v. PEEL* (No. 2) (1921), 54 N. S. R. 349.—**CAN.**

**b. — Where accused has appealed to Privy Council.**—Where points reserved at the trial had been decided by the Ct. of Appeal against prisoner, & sentence of imprisonment with hard labour had been passed by the Supreme Ct., & was being under-

jurisdiction the accused might be, applied to charges under the above statutes, & the Ct. of Q. B. was included in the term "next Ct. of oyer & terminer" in sect. 20.—*R. v. EYRE* (1868), L. R. 3 Q. B. 487; 37 L. J. M. C. 159; 18 L. T. 511; 32 J. P. 518; 11 Cox, C. C. 162; *Finlasons' Report*; *sub nom. R. v. VAUGHAN & EYRE*, 9 B. & S. 329; *sub nom. Re EYRE*, 16 W. R. 754.

*Annotation*:—*Mentd. Marais v. General Officer Commanding Lines of Communication & A.-G. of Cape Colony* (1901), 71 L. J. P. C. 42.

**1452. By Secretary of State**—In case of high treason.]—*MELVINE'S CASE* (1628), *Palm.* 558; 81 E. R. 1219.

**1453.** ———.]—*R. v. KENDAL & ROWE* (1695), *Holt*, K. B. 144; *Comb.* 343; 1 *Ld. Raym.* 65; 1 *Salk.* 347; *Skin.* 596; 90 E. R. 267; *sub nom. KENDAL'S CASE*, 5 *Mod. Rep.* 78; *sub nom. R. v. ROW & KENDALL*, 12 *Mod. Rep.* 82.

*Annotations*:—*Reidf. R. v. Derby* (1712), *Fortes. Rep.* 140; *R. v. Wyndham* (1716), 1 *Str.* 2; *R. v. Earbury* (1733), 2 *Barn. K. B.* 346; *Butt v. Conant* (1820), 1 *Brod. & Bling.* 548. *Mentd. Entick v. Carrington* (1765), 19 *State Tr.* 1029; *R. v. Platt* (1777), 1 *Leach*, 157; *R. v. Bartlett* (1843), 12 L. J. M. C. 127.

**1454.** ———.]—*R. v. WYNDHAM* (1716), 1 *Str.* 2; 93 E. R. 347.

*Annotations*:—*Mentd. R. v. Soane* (1738), *Andr.* 272; *R. v. Wilkes* (1763), 2 *Wils.* 151; *R. v. Platt* (1777), 1 *Leach*, 157; *R. v. Despard* (1798), 7 *Term Rep.* 736.

**1455.** ———.]—*Deft.* had been committed for treasonable practices by a warrant of one of His Majesty's principal Secretaries of State:—*Held*: the offence was described with sufficient certainty & the commitment was good.—*R. v. DESPARD* (1798), 7 *Term Rep.* 736; 101 E. R. 1226.

*Annotations*:—*Consd. Ex p. Terraz* (1878), 4 *Ex. D.* 63. *Mentd. R. v. Jacobi & Hiller* (1881), 46 L. T. 595, n.

of L. by a justice of the peace for the county only, not for the city:—*Held*: the magistrate, acting out of his jurisdiction, had no authority whatever.—*HUNT v. MCARTHUR* (1865), 24 U. C. R. 254.—*CAN.*

#### PART V. SECT. 1, SUB-SECT. 1.—B.

**1456 i.** *Warrant must be grounded on legal information.*]—The production of the evidence prescribed by Infant Protection Act, s. 4, is a condition precedent to the jurisdiction to issue a summons or warrant under that section, & a summons having been issued without the production of such evidence:—*Held*: prohibition was the proper remedy.—*RIPLEY v. WHITE* (1916), 22 C. L. R. 381.—*AUS.*

**1456 ii.** ———.]—*Qu.*: whether a complaint against A. B. that he "was seen in the act of destroying or injuring private property" without alleging that the property belonged to another person, or that the act was wilfully or maliciously done, would authorise a warrant for malicious injury to property under 4 & 5 Vict. c. 26.—*POWELL v. WILLIAMSON* (1844), 1 U. C. R. 154.—*CAN.*

**1457 i.** *Definite charge must be made.*]—An information was laid before a magistrate, stating that G., the keeper of a licensed tavern, kept a disorderly house, & prayed a warrant against G., & all others found & concerned in her house. A warrant was directed to all constables, commanding them to apprehend G., "& all others found & concerned in her house to answer," etc. Under this warrant G. & several others were arrested, among them *pltf.*, a traveller & guest at the house:—*Held*: the arrest of *pltf.* was illegal, there being no charge against him.—*ROBINSON*

—The information stated the informant had "good

reason to believe the death of E. S. was caused by the administration of some poisonous drug by J. S., his wife," & on this charge a warrant was procured for the apprehension of J. S.:—*Held*: no felony being charged, there was nothing on which to found the magistrate's jurisdiction.—*STEVENS v. STEVENS* (1874), 24 C. P. 424.—*CAN.*

**1457 iii.** ———.]—A person cannot, under 6 & 7 Vict. c. 34, legally be arrested or detained here for an offence committed out of Canada, unless upon a warrant issued where the offence was committed, & indorsed by a judge of a superior ct. in this country. Such warrant must disclose a felony according to the law of this country.—*R. v. McHOLME* (1881), 8 P. R. 452.—*CAN.*

**1457 iv.** ———.]—*Deft.* laid an information charging that *pltf.* "came to my house & sold me a promissory note for the amount of \$90, purporting to be made against M. in favour of A., & I find out the said note to be a forgery." Upon this a warrant was issued reciting the offence in the same words, & *pltf.* was under it apprehended & brought before the justice of the peace who issued it, & by him committed for trial by a warrant reciting the offence in like terms:—*Held*: the information sufficiently imported that *pltf.* had uttered the forged note, knowing it to be forged, to give the magistrate jurisdiction, & therefore the warrant was not void.—*v. WILSON* (1894), 25 O. R.

91.—*CAN.*

*Information must be on oath.*]—The warrant of a magistrate is only *prima facie* evidence of its contents, as for instance, of an information on oath & in writing having been laid before him. Such information must be not only on oath, but in writing, & except on an information thus laid there is no authority to issue

#### B. When Issued.

**1456. Warrant must be grounded on legal information.**]—*ANON.* (1702), 7 *Mod. Rep.* 99; 87 E. R. 1121.

**1457.** *Definite charge must be made.*]—A magistrate is not justified in issuing his warrant to arrest on a charge of felony, unless complainant makes a distinct & positive charge of felony against the party.—*BAINBRIDGE v. WARD* (1830), 3 J. P. 514.

**1458.** *Information must be on oath*—*Want of jurisdiction cured if no objection is taken.*]—*Appls.* were apprehended & brought before a magistrate charged with setting fire to the letters in a pillar box. On their appearance at a petty sessions to answer the charge, after witnesses had been examined & cross-examined, they were, at the application of prosecutor, remanded on bail for a week. At the adjourned sessions the attorney for the prosecution stated that he should proceed against *appls.* under Malicious Damage Act, 1861 (c. 97), s. 52, & asked their attorneys whether they would plead guilty to such charge, or whether further evidence should be offered in support of it; they answered that he must go on & prove his case. Other witnesses were then cross-examined, & after the case for the prosecution was closed, the attorneys for *appls.* objected that as no information on oath had been taken as required by sect. 62, & *appls.* were not found committing the offence, they were not legally in custody, & therefore the justices had no jurisdiction to convict them of the offence then charged. The offence with which *appls.* were first charged was a felony punishable under sect. 10; the offence of which they were convicted was punishable on

the warrant.—*FRIEL v. FERGUSON* (1865), 15 C. P. 584.—*CAN.*

**n.** ———.]—*Deft.*, a justice, issued his warrant against *pltf.* on a charge of stealing, without any information being laid, upon which warrant *pltf.* was arrested & brought before him:—*Held*: liable in trespass, as without information on oath he had no jurisdiction over the person of *pltf.*—*APPLETON v. LEPPER* (1869), 20 C. P. 138.—*CAN.*

**o.** ———.]—Complaint under oath of an assault was made before a justice, on which he issued a summons; *deft.* not appearing, the justice, on proof of service, issued a warrant under Summary Convictions Act upon which *deft.* was arrested, brought before the justice & convicted:—*Held*: as there was a complaint under oath, the justice had authority to issue a warrant in the first instance.—*R. v. PERKINS* (1872), (1825-1897), N. B. Dig. 475.—*CAN.*

**p.** ———.]—A sworn information, stating that complainant has just cause to suspect & believe, & does suspect & believe, that the party charged has committed a specified offence triable under Summary Convictions Act, will not authorise a justice to arrest in the first instance.—*Ex p. BOYCE* (1885), 24 N. B. R. 347.—*CAN.*

**q.** ———.]—A justice of the peace who issues his warrant for the arrest of a person charged with felony without the information having been sworn, is liable in trespass.—*McGUINNESS v. DAFOE* (1896), 23 A. R. 704; 27 O. R. 117.—*CAN.*

**1458 i.** *Want of jurisdiction cured if no objection is taken.*]—Where accused has the right to insist upon an information being re-sworn & does not avail himself of the right, he thereby waives the irregularity.—

**Sect. 1.—Securing attendance of accused person:**  
**Sub-sect. 1, B., C. & D.]**

**summary conviction:—Held:** the want of an information & a summons was cured by the appearance of appts. before the justices, & they had waived the objection that they were not legally in custody on a charge under sect. 52, & therefore the justices had jurisdiction to convict under that sect.—**TURNER v. POSTMASTER GENERAL** (1864), 5 B. & S. 756; 34 L. J. M. C. 10; 11 Jur. N. S. 137; 122 E. R. 1011.

**Annotations:—Consd.** R. v. Hughes (1879), 4 Q. B. D. 614. **Refd.** R. v. Shaw (1865), L. C. & C. 579; Egginton v. Pearl (1875), 33 L. T. 428; R. v. Dobbins (1883), 48 J. P. 182. **Mentd.** Blake v. Beech (1876), 1 Ex. D. 320; R. v. D'Eyncourt (1888), 21 Q. B. D. 109; *Ex p.* Hopkins (1891), 61 L. J. Q. B. 240.

**1459.** ————**—H.**, a police constable, procured a warrant to be illegally issued, without a written information or oath, for the arrest of S. Upon such warrant S. was arrested & brought before justices, & was, without objection, tried by them & convicted. H. was afterwards indicted for perjury committed on the said trial of S., &

withstanding that there was neither written information, nor oath, to justify the issue of the warrant, & the justices had jurisdiction to hear the charge, though the warrant upon which the accused was brought before them was illegal.—**R. v. HUGHES** (1879), 4 Q. B. D. 614; 48 L. J. M. C. 151; 40 L. T. 685; 43 J. P. 556; 14 Cox, C. C. 284, C. C. R.

**Annotations:—Consd.** Gray v. Customs Comrs. (1884), 48 J. P. 343; R. v. Fletcher (1884), 51 L. T. 334; Dixon v. Wells (1890), 25 Q. B. D. 249; *Ex p.* Hopkins (1891), 61 L. J. Q. B. 240. **Refd.** R. v. D'Eyncourt (1888), 21 Q. B. D. 109; R. v. Garrett-Pogge, *Ex p.* Brown, [1911] 1 K. B. 880; Inkpin v. Roll (1922), 126 L. T. 517. **Mentd.** *Re* Maltby (1881), 7 Q. B. D. 18; R. v. Beckley (1887), 20 Q. B. D. 187; R. v. Tabrum, *Ex p.* Dash (1907), 97 L. T. 551.

**1460. When warrant should not be issued.—When summons will effect purpose.]—O'BRIEN v. BRABNER** (1885), 49 J. P. Jo. 227, D. C.

**1461. Issue of second warrant.]—Where** a warrant has been granted against an indietee who was in Ireland, a second warrant will be granted on an affidavit that it is apprehended he is coming to England.—**R. v. HAYES** (1844), 8 J. P. 139.

**C. Discretion to Issue.**

**1462. Justices not compellable to issue summonses or warrants.]—The** magistrate must be satisfied that there is a *prima facie* case. It can hardly be maintained that although the magistrate thinks there is really no ground whatever for the charge, he is nevertheless bound to call upon the parties to answer it (**COCKBURN, C.J.**).—**R. v. NORTH SHIELDS JJ.** (1875), 39 J. P. Jo. 761.

**1463. —Mandamus not granted if discretion is exercised.]—Where** justices entertain an applica-

tion for a summons for a criminal offence, & have considered the materials on which the application is based, & refused to hear more, or to grant the summons, the High Ct. will not interfere by *mandamus* to order them to hear it again.—*Ex p.* **MACMAHON** (1883), 48 J. P. 70, D. C.

**1464.** ————**—]**—Where a magistrate has refused a summons on the ground that the information does not disclose an indictable offence, the High Ct. has no jurisdiction to review his decision either as to law or as to fact, & therefore in such a case a rule under Justices Protection Act, 1848 (c. 44), s. 5, calling upon the magistrate to show cause why he should not hear & determine the application for a summons will not be granted.—*Ex p.* **LEWIS** (1888), 21 Q. B. D. 191; 57 L. J. M. C. 108; 59 L. T. 338; 52 J. P. 773; 37 W. R. 13; 16 Cox, C. C. 449, D. C.

**Annotations:—Refd.** R. v. Byrde & Pontypool Gas Co., *Ex p.* Williams (1890), 60 L. J. M. C. 17; R. v. Kennedy (1902), 86 L. T. 753.

**1465.** ————**—]**—Where, in their refusal to issue a summons, it appeared that the justices had merely declined jurisdiction & had not exercised

**—Held:** a rule would be granted ordering them to consider the evidence & decide whether the summons ought or ought not to issue.—*Re* **MONMOUTHSHIRE JJ.**, *Ex p.* **WILLIAMS** (1890), 7 T. L. R. 79, D. C.

**1466.** ————**Even if prima facie case is made out.]—On** an application for a summons, if the magistrate, after hearing appt.'s statement, is of opinion that if the summons were issued & the offence were proved he would nevertheless under the circumstances, dismiss the summons at the hearing, he may in the exercise of his discretion refuse to issue the summons, & *mandamus* will not lie.—**R. v. BROS** (1901), 85 L. T. 581; 66 J. P. 54; 18 T. L. R. 39; 20 Cox, C. C. 89, D. C.

**1467.** ————**—]**—Upon a rule *nisi* for a *mandamus* to command a metropolitan magistrate to hear & determine an application for a summons for an offence under Roman Catholic Relief Act, 1829 (c. 7), s. 34:—**Held:** though the information disclosed a *prima facie* case that the offence was committed, nevertheless the magistrate was entitled in the exercise of his discretion to refuse to issue a summons, & if he did so, the ct. had no jurisdiction to compel him to review his decision unless the discretion was exercised on improper & extraneous grounds.—**R. v. KENNEDY** (1902), 86 L. T. 753; 50 W. R. 633; 18 T. L. R. 557; 20 Cox, C. C. 230, D. C.

**Annotation:—Mentd.** *Re* Smith, Johnson v. Bright-Smith, [1914] 1 Ch. 937.

**—]**—*See, generally,* CROWN PRACTICE, Vol. XVI., pp. 255, 208, 434.

*See, further,* MAGISTRATES.

**R. v. TALLY** (1915), 30 W. L. R. 396; 7 W. W. R. 1178.—**CAN.**

**1460 i. When warrant should not be issued.—When summons will effect purpose.—Discretion of justice.]—The** mere fact that a summons might have been issued or would have been sufficient in the opinion of a judge is no ground for interfering with the discretion of a J.P. in issuing a warrant so long as there were some facts upon which that discretion might reasonably have been exercised.—**WHITE v. DUNNING & BROWN** (1915), 30 W. L. R. 585; 7 W. W. R. 1210.—**CAN.**

**1461 i. Issue of second warrant.]—A** second arrest for the same charge, by the same complainant, before the time appointed for the hearing, is illegal.—**KING v. ORR** (1837), 5 O. S. 724.—**CAN.**

**PART V. SECT. 1, SUB-SECT. 1.—C.**

**1462 i. Justices not compellable to issue summonses or warrants.]—Where** an information contained every material averment necessary to give a magistrate jurisdiction to make an order upon plt. to find sureties to the peace, but contained also additional matter, which, it was contended, rendered them nugatory:—**Held:** this was a judicial question for the magistrate, & therefore in issuing his warrant for the appearance of accused he was not acting without jurisdiction, even although a superior ct. might quash his order to find sureties.—**SPRUNG v. ANDERSON** (1873), 23 C. P. 152.—**CAN.**

**1462 ii.** ————**—]**—It is the duty of the justice before issuing a warrant to examine upon oath the complainant,

or his witness, as to the facts upon which such suspicion & belief are founded, & to exercise his own judgment thereon.—*Ex p.* **BOYCE** (1885), 24 N. B. R. 347.—**CAN.**

**1462 iii.** ————**—]**—Where a solr. states to a justice that he is instructed by his client to apply for a summons, & states to him matters which would justify the issue of the summons the justice is bound to issue it unless he disbelieves, or has reasonable grounds to doubt the statement.—**IRISH INSURANCE COMRS. v. TRENCH**, [1914] 2 I. R. 172.—**IR.**

**1463 i.** ————**Mandamus not granted if discretion is exercised.]—A** magistrate has a discretion to exercise as to the issue of warrant of arrest, & if, after hearing & considering the allegations of the complainant & the evidence, he

*D. Who may institute Criminal Proceedings.*

**1468. Summary proceedings—Complaint “by or on behalf of party aggrieved”**—Common assault—Offences against the Person Act, 1861 (c. 100), s. 42.]—A complaint by or on behalf of a person aggrieved by a common assault or battery is a necessary condition precedent to give justices jurisdiction summarily to convict the offender under sect. 42 of the above Act.

A police-constable who takes a charge of common assault from the person assaulted is not, on the failure of complainant personally to prefer the charge before the justice, a party who can prefer the complaint on behalf of the person aggrieved.—*NICHOLSON v. BOOTH & NAYLOR* (1888), 57 L. J. M. C. 43; 58 L. T. 187; 52 J. P. 662; 4 T. L. R. 346; 16 Cox, C. C. 373, D. C.

*Annotation* :—*Distd.* *Pickering v. Willoughby*, [1907] 2 K. B. 296.

**1469.** ———— **Complaint laid by relative.**—An assault having been committed upon a person who was so old & infirm, & so much under the control of the assailant as to be unable to institute or authorise proceedings, an information was laid by a relative of the person assaulted in respect of the assault, under sect. 42 of the above Act. Two justices of the peace heard the matter & convicted the offender :—*Held* : the matter had been duly brought before the justices, upon complaint on behalf of the party aggrieved, within the meaning of the sect., & they had jurisdiction to hear & determine it.—*PICKERING v. WILLOUGHBY*, [1907] 2 K. B. 296; 76 L. J. K. B. 709; 97 L. T. 244; 71 J. P. 311; 23 T. L. R. 406; 21 Cox, C. C. 493, D. C.

**1470.** ———— **Offences against the Person Act, 1861 (c. 100), s. 46.**—Where proceedings had been instituted before justices in respect of a common assault without the authority of the person assaulted, & the justices committed deft. in such proceedings for trial under sect. 46 of the above Act, & a true bill was found by the grand jury :—*Held* : the grand jury had acted within its jurisdiction in finding a true bill, & deft. had been rightly put upon his trial pursuant to such finding.—*R. v. GAUNT* (1895), 73 L. T. 585; 60 J. P. 90; 12 T. L. R. 62; 40 Sol. Jo. 85; 18 Cox, C. C. 210, C. C. R.

**1471.** ———— **Stealing a growing tree.**—An information, under 7 & 8 Geo. 4, c. 29, s. 39, for stealing a growing tree, the property of M., was preferred by R. to D., a justice of the peace, who

refuses to issue a warrant for the apprehension of the persons accused, a writ of *mandamus* will not lie to compel him to do so.—*THOMPSON v. DESNOYERS*, [1899] Q. R. 16 S. C. 253.—*CAN.*

**PART V. SECT. 1, SUB-SECT. 1.—D.**

**r. Summary proceedings—Complaint “by or on behalf of party aggrieved.”**—Upon a charge of threatening an assault, the information having been sworn to by a person other than the one threatened & who was no relation to him :—*Held* : no objection lay to the information on that ground.—*Ex p. BECKETT* (1871), 11 N. S. W. S. C. R. 1.—*AUS.*

—It is the right of every one to make a complaint with a view to the institution of criminal

proceedings.—*O. W. R.* 710.—*CAN.*

—A general rule, any person having knowledge of the commission of an offence may set the law in motion by a complaint, even though he is not personally interested or affected by the offence.—

summoned the offender. At the time & place fixed in the summons he appeared, & was convicted by another magistrate, D., the summoning magistrate, being present, but not taking any part. An action of trespass & false imprisonment having been brought against deft. :—*Held* : the conviction was good, notwithstanding it had not proceeded on the information of the party aggrieved, or been made by the magistrate who received the original information & issued the summons on which the offender appeared.—*TARRY v. NEWMAN* (1846), 15 M. & W. 645; 2 New Mag. Cas. 7; 2 New Sess. Cas. 449; 15 L. J. M. C. 160; 10 J. P. 678; 153 E. R. 1009.

*Annotations* :—*Refd.* *Caswell v. Morgan* (1859), 1 E. & E. 809. *Mentd.* *Mason v. Mitchell* (1865), 11 Jur. N. S. 89; *Re Shropshire J.J.*, *Ex p. Blewitt* (1866), 14 L. T. 598.

**1472.** ———— **Killing house pigeon—Larceny Act, 1861 (c. 96), s. 23.**—The right to prosecute under sect. 23 of the above Act, for unlawfully & wilfully killing a house pigeon under such circumstances as do not amount to larceny at common law, is not limited to the owner of the pigeon or the person aggrieved, & it is competent to any person to prosecute for an offence committed under that sect., even though compensation has been paid to the owner & the owner is satisfied with such compensation.—*SMITH v. DEAR* (1903), 88 L. T. 664; 67 J. P. 244; 20 Cox, C. C. 458, D. C.

**1473.** ———— **Sunday observance—Consent of chief constable—Sunday Observance Prosecution Act, 1871 (c. 87).**—Applt. was convicted under Sunday Observance Act, 1676 (c. 7). The chief constable gave a verbal consent before the information was laid, & gave consent in writing, under the above Act, after the information was laid & the summons issued :—*Held* : the prosecution was instituted when the information was laid, & therefore was not instituted with the consent in writing of the chief constable, & the conviction was bad.—*THORPE v. PRIESTNALL*, [1897] 1 Q. B. 159; 66 L. J. Q. B. 248; 60 J. P. 821; 45 W. R. 223; 13 T. L. R. 95, D. C.

*Annotations* :—*Consd.* *Re Boulter, Re Vexatious Actions Act*, 1896, [1914] 1 K. B. 122. *Refd.* *Cowling v. Taylor's Drug Co.* (1901), 66 J. P. 11; *Beardsley v. Giddings* (1904), 2 L. G. R. 719.

**1474. Criminal information—Not private person for offence of public nature—Grantable only to Attorney-General.**—The ct. will not grant a criminal information for a breach of a public statute creating a State offence on the application of a

*Re GANESH NARAYAN SATHE* (1889), 1 L. R. 13 Bom. 600.—*IND.*

**a. ———— Complaint by constable.**—Where the issue of a warrant is authorised to seize gaming implements on the report of “the chief constable or deputy chief constable” it does not mean that the report must come from an officer having the exact title mentioned, but only from one exercising such functions & duties as will bring him within the designation used. Therefore, the warrant could properly issue on the report of the deputy high constable. The warrant would be good if issued on the report of a person who filled *de facto* the office of deputy high constable though he was not such *de jure*.—*O'NEILL v. A.-G. of CANADA* (1896), 26 S. C. R. 122.—*CAN.*

**1474 i. Criminal information—Not private person for offence of public nature—Grantable only to Attorney-General.**—In the absence of the A.-G. from the Commonwealth, an indictment was presented against the accused for an offence against a Regulation made under War Precautions Act in the name of the minister

for the time being acting for & on his behalf :—*Held* : the indictment was *void*.—*R. v. JUDD* (1919), 19 S. R. N. S. W. 59; 36 N. S. W. W. N. 44.—*AUS.*

**1474 ii.** ———— *A judge has the power to consent to a charge being preferred by any person, but the power should not be exercised in the face of a deliberate refusal of the Crown to prefer a charge, unless the evidence taken on the preliminary inquiry discloses such a strong prima facie case against the accused as to suggest an abuse of his judicial discretion by the A.-G., or an attempt to stifle prosecution.*—*R. v. WEISS* (1915), 7 W. L. R. 458; 7 W. W. R. 1.—*D. L. R.* 166; 6 Alta. L. R. *CAN.*

**1474 iii.** ———— *be laid by an agent of the out any preliminary inquiry.*—*LEVETON*, [1917] 2 W. W. R. 5; 28 Can. Crim. Cas. 61; 34 D. L. 514; 11 Alta. L. R. 355.—*CAN.*

**1474 iv.** ———— *An acting A. need not be a lawyer & has authority to prefer an indictment. The*

**Sect. 1.—Securing attendance of accused person:**  
**Sub-sect. 1, D. & E.]**

private person, but only on the information of the Law Officers of the Crown.—*Ex p. CRAWSHAY* (1860), 3 L. T. 320; 24 J. P. 805; *sub nom. Ex p. CRAWSHAY v. LANGLEY*, 8 Cox, C. C. 356.

**1475. Corporation—By officer—Whether authority necessary.]**—An inspector of streets may lay an information for an offence under Metropolitan Police Act, 1839 (c. 47), s. 60 (7), & it makes no difference that it purports to be laid "on behalf of" a borough council.—*ALLMAN v. HARCASLE* (1903), 89 L. T. 553; 67 J. P. 440; 20 Cox, C. C. 567; 2 L. G. R. 13, D. C.

**Annotation:—***Folld. Giebler v. Manning*, [1906] 1 K. B. 709.

**1476. ————.]**—Resp., a sanitary inspector of a borough council, entered the premises of applt., a butcher, & seized certain meat, which was then taken before a magistrate & by him condemned as unsound & ordered to be destroyed. On the same day a summons was issued on an information laid by resp., under Public Health (London) Act, 1891 (c. 76), s. 47 (2), charging applt. with having the meat in his possession for the purpose of sale. Both the information & the summons stated that resp. was acting on behalf of the borough council, but he had not been expressly authorised by the council to take proceedings against applt. Applt. was convicted:—*Held*: a private person could prosecute for an offence under sect. 47 (2) of the Act, & the absence of authority on the part of resp. did not invalidate the proceedings, the words "on behalf of" the borough council in the information & summons being merely surplusage.—*GIEBLER v. MANNING*, [1906] 1 K. B. 709; 75 L. J. K. B. 463; 94 L. T. 580; 70 J. P. 181; 54 W. R. 527; 22 T. L. R. 416; 50 Sol. Jo. 377; 21 Cox, C. C. 160; 4 L. G. R. 561, D. C.

**Annotations:—***Reid. Dodd v. Pearson* (1911), 80 L. J. K. B. 927; *Lake v. Smith* (1911), 106 L. T. 41. *Mentd. Kates v. Jeffery*, [1914] 3 K. B. 160.

**1477. ————.]**—Applt., on behalf of the Mayor & Corpn. of L. preferred an information against resps. for damaging a holly tree at B., the property of the corp., to the amount of £5. Applt. was chief ranger of B., & stated on oath that he had a general power to prosecute for offences under the B. bye-laws on behalf of the corp. The present proceedings were initiated, not under the bye-laws, but under Malicious Damage Act, 1861 (c. 97), s. 22. The solr. representing resps. asked for the production of a copy of the minute or resolution authorising applt. to prefer the information. No such authority being produced, he raised the objection that as the information was laid on behalf of the corp. of L. it was laid by a corporate body, & should therefore have been laid by an attorney duly appointed under the common seal or warrant of the corp. It was contended that the justices could not proceed to hear the information. The justices acceded to this view & dismissed the information:—*Held*: the information was properly laid.—*DUCHESNE v. FINCH* (1912),

107 L. T. 412; 76 J. P. 377; 28 T. L. R. 440; 23 Cox, C. C. 170; 10 L. G. R. 559, D. C.

**1478. Illegal society.]**—A mutual society which, in addition to rules for the *bond fide* mutual relief of sick members, & for other ordinary purposes of a friendly society, includes also rules for the encouragement, relief, & maintenance of men on strike is not a friendly society within the meaning of 18 & 19 Vict. (c. 63), ss. 9 & 44, because such last-mentioned purposes are not analogous to those of friendly societies properly so called, & because such purposes are those of a trades union, & are illegal as being in restraint of trade. Consequently the summary jurisdiction given to the justices by sect. 24 of the Act does not apply to cases of fraud or misappropriation of the funds of such a society on the part of any of its members.—*HORNBY v. CLOSE* (1867), L. R. 2 Q. B. 153; 8 B. & S. 175; 36 L. J. M. C. 43; 15 L. T. 563; 31 J. P. 148; 15 W. R. 336; 10 Cox, C. C. 393.

**Annotations:—***Expld. R. v. Dodd* (1868), 18 L. T. 89. *Consid. Farrer v. Close* (1869), L. R. 4 Q. B. 602. *Expld. R. v. Friendly Societies Registrar* (1872), 41 L. J. Q. B. 366. *Mentd. Cowan v. Milbourn* (1867), 16 L. T. 290; *It. v. Stainer* (1870), L. R. 1 C. C. R. 230; *Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598; *Swaine v. Wilson* (1889), 24 Q. B. D. 252; *Russell v. Amalgamated Soc. of Carpenters & Joiners*, [1912] A. C. 421; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244.

**1479. ————.]**—Prisoner was indicted for forging a banker's pass book, with intent to defraud. He was treasurer to a trades union, which was admitted to be within the decision in *Hornby v. Close* (No. 1478, ante). It was contended that such a society, having no legal existence, could possess no funds, & therefore, could not be defrauded:—*Held*: the objection of illegality was applicable only to the summary proceedings before magistrates provided by 18 & 19 Vict. c. 63, but did not extend to deprive the society of its remedy by indictment.—*R. v. DODD* (1868), 18 L. T. 89.

**1480. Not prosecutor in forma pauperis.]**—*R. v. CLARKE* (1762), 3 Burr. 1308; 97 E. R. 847.

**By indictment.]**—See Part VI., Sect. 3, post.

*E. Consent necessary to institute Proceedings.*

**1481. Consent of board of agriculture & fisheries—Fertilisers & Feeding Stuffs Act, 1906 (c. 27).]**—Appls. on behalf of the Department of Agriculture & Technical Instruction for Ireland, laid an information against resps. before a magistrate in B. for failure to deliver an invoice of calf meal sold by them in B. to a purchaser in Ireland. The consent of the Board of Agriculture & Fisheries to the institution of proceedings had not been obtained:—*Held*: the consent of the Board of Agriculture & Fisheries was necessary to such a prosecution in England, by sect. 6 of the above Act, & notwithstanding sect. 12.—*HILL v. PHENIX VETERINARY SUPPLIES, LTD.* (1911), 80 L. J. K. B. 669; 105 L. T. 73; 75 J. P. 321; 22 Cox, C. C. 508; 9 L. G. R. 731, D. C.

**1482. Consent of Attorney-General—Flat need not be proved.]**—It is not necessary to produce & prove the A.-G.'s fiat for the presentment of an

*omnia praesumuntur rite esse acta* has special application in considering acts done by ministers of the Crown.—*R. v. NYCZYK*, [1919] 2 W. W. R. 661.—**CAN.**

**b. Where Act requires particular person to prosecute.]**—Where an Act requires a particular person to prosecute for an offence, the information must be laid by him, or at least by his authority, & in his name; & if it is laid in the name of another person the justice has no jurisdiction to proceed.

—*ST. JOHN (MAYOR) v. MASTERS* (1880), 19 N. B. R. 587.—**CAN.**

**c. Whether person wishing to enforce civil claim.]**—The criminal law cannot be resorted to for the enforcement of civil claims.—*R. v. SULIS* (1881), 7 Q. L. R. 226.—**CAN.**

**d. ————.]**—A pltt. has a legal right to institute criminal proceedings against a deft., & at the same time, to sue him for damages in a civil action.—*HAMILTON v. CROWE* (1897), 40 N. S. R. 217.—**CAN.**

**PART V. SECT. 1, SUB-SECT. 1.—E.**

**1482i. Consent of Attorney-General—Fiat need not be proved.]**—On a trial for perjury the Crown is not bound to prove that leave to prosecute has been obtained; if the fact be that no leave was obtained it is for the prisoner to show it.—*R. v. INWOOD* (1896), 17 N. S. W. L. R. 100; 12 N. S. W. W. N. 118.—**AUS.**

**1482 ii. ————.]**—An information bore on its margin the words "I consent to this prosecution. G. F.



indictment under Vexatious Indictments Act, 1859 (c. 17).—*R. v. DEXTER, LAIDLER & COATES* (1899), 19 Cox, C. C. 360.

*Annotations* :—*Reid*. *R. v. Turner* (1909), 3 Cr. App. Rep. 103; *R. v. Waller* (1909), 3 Cr. App. Rep. 213.

**1483.** —[—]—A prisoner was convicted on an indictment charging him with an offence under Explosive Substances Act, 1883 (c. 3), s. 2. The consent of the A.-G. to the preferment of the indictment, which is required by sect. 7 of that Act, had not been obtained. Prisoner appealed against the conviction:—*Held*: the consent of the A.-G. not having been obtained, there was no jurisdiction to try the indictment, & that being so, the Ct. of Criminal Appeal had no power to deal with the case under Criminal Appeal Act, 1907 (c. 23), s. 4 (1), as one in which no substantial miscarriage of justice had occurred & the conviction must, therefore, be quashed.—*R. v. BATES*, [1911] 1 K. B. 964; 80 L. J. K. B. 507; 104 L. T. 688; 75 J. P. 271; 27 T. L. R. 314; 55 Sol. Jo. 410; 22 Cox, C. C. 459; 6 Cr. App. Rep. 153, C. C. A. *Annotation* :—*Distd.* *R. v. Metz* (1915), 84 L. J. K. B. 1462.

**1484.** — *Proof of consent.*—[—]—A conviction for an offence under Trading with the Enemy Act, 1914 (c. 87), s. 1, shall not be quashed merely because formal proof of the consent of the A.-G. to the prosecution has not been given at the trial.—*R. v. METZ* (1915), 84 L. J. K. B. 1462; 113 L. T. 464; 79 J. P. 384; 59 Sol. Jo. 457; 25 Cox, C. C. 67; 11 Cr. App. Rep. 164, C. C. A.

*See, further*, CROWN PRACTICE, Vol. XVI., p. 400, Nos. 3723–3731.

**1485.** *Consent of Director of Public Prosecutions—Newspaper Libel Act, 1881 (c. 60)—Grant of fiat is discretionary.*—[—]—When the Director of Public Prosecutions in England has refused to grant his

Pearce":—*Held*: as the proper conclusion from the document itself was that the signature was appended as an official act, it was to be regarded as an official signature, & that therefore judicial notice should be taken of the signature.—*HOLLAND v. JONES* (1917), V. L. R. 392.—*AUS.*

**1482 iii.** —[—]—It was objected that no proof was given at the trial that the sanction of the A.-G. had been given:—*Held*: this objection was not open to the ct. upon a case reserved, not being a question that could properly arise at the trial.—*R. v. BARNETT* (1889), 17 O. R. 649.—*CAN.*

**1482 iv.** —[—]—An acting A.-G. is in a different position from that of a deputy or agent of the A.-G.: he is the A.-G. for the time being, & clothed with the powers & authority of the office. But, assuming that the *locum tenens* of the office was not intended to be included in the designation "A.-G.," the power given to Crown counsel is sufficient authority for him to prefer the bill, without any direction.—*R. v. PAULKNER* (1911), 18 W. L. R. 634; 19 Can. Crim. Cas. 47; 16 B. C. R. 229.—*CAN.*

**1482 v.** —[—]—By the direction of the A.-G., an indictment was preferred against accused:—*Held*: the indictment having been preferred at the direction of the A.-G., accused was properly before the ct.—*R. v. PAWLISKI* (1912), 18 W. L. R. 675; 25 D. L. R.

—[—]—Where the Crown declined to lay any charge against one committed to the gaol.

libel & also opposed the private prosecution of the ct. to lay a charge against the accused. The ct. refused its consent as Crown could, notwithstanding

fiat under sect. 3 of the above Act for a criminal prosecution against the proprietor, etc., of a newspaper for a libel published therein, the High Ct. of Justice has no power to interfere, the matter being left by the Act entirely to his discretion.—*Ex p. HURTER* (1883), 47 J. P. 724; *sub nom. Ex p. HUBERT & Co.*, 15 Cox, C. C. 166, D. C.

**1486.** — *Defence of the Realm (Consolidation) Regulations, 1914.*—[—]—The editor of a provincial newspaper, in the course of a conversation over the telephone with a London press agency, said: "For private information. Putting a lot of troops at D. & S. all day; arriving all day; several thousands; expect some liveliness on sea." Proceedings were taken against him under Reg. 18 of the above Regulations by the competent military authority without the matter having been referred to the Director of Public Prosecutions, but the justices dismissed the information:—*Held*: having regard to the circumstances under which the conversation took place, it was a communication or attempted communication of information for publication in a newspaper, notwithstanding the use of the words "for private information," & therefore the alleged offence was a press offence, & the case ought to have been referred to the Director of Public Prosecutions before the proceedings were instituted. If it is possible on investigation that an alleged offence against the regulations may turn out to be a press offence, the matter must be referred to the Director of Public Prosecutions to decide whether or not proceedings shall be instituted.—*Fox v. SPICER* (1917), 86 L. J. K. B. 580; 116 L. T. 86; 81 J. P. 71; 33 T. L. R. 172; 15 L. G. R. 151, D. C.

**1487.** *Consent of chief constable—Sunday Observance Prosecution Act, 1871 (c. 87).*—[—]—*THORPE v. PRIESTNALL*, No. 1290, *ante*.

such consent & laying of the charge, stop all proceedings.—*R. v. EDWARDS*, [1919] 2 W. W. R. 600.—*CAN.*

**1484 i.** — *Proof of consent.*—[—]—A document signed by the A.-G. for the Commonwealth stating that he thereby "consents to a prosecution being instituted against A. of Sydney in the State of N. S. W. for an offence against Trading with the Enemy Act, 1914," is sufficient to authorise a prosecution of A. for an offence against the Act.—*BEIRWIN v. DONOHUE* (1915), 21 C. L. R. 1.—*AUS.*

**1484 ii.** —[—]—*R. v. BECKWITH* (1903), 23 C. L. T. 307.—*CAN.*

**1484 iii.** —[—]—The Deputy A.-G. of Saskatchewan had no authority to prefer a charge without the written consent of the A.-G.—*R. v. DUFF* (1909), 12 W. L. R. 290.—*CAN.*

**1484 iv.** —[—]—The deputy of the A.-G. of a province has no authority to grant leave for a prosecution under Lord's Day Act.—*Re CRIMINAL CODE* (1910), 43 S. C. R. 434; 30 C. L. T. 687.—*CAN.*

**1484 v.** —[—]—When the consent of the Solr.-Genl. has been obtained to the presentment of a bill of indictment, to which the grand jury have returned a true bill, it must be presumed that the grand jury have satisfied themselves as to the sufficiency of consent, & it is too late to question its validity at the trial.—*R. v. ASHER & AWANUI* (1888), 6 N. Z. L. R. 592.—*N.Z.*

**e.** — *Cannot be delegated.*—[—]—The A.-G. cannot delegate the power, which the legislature has authorised him personally to exercise, to direct that a bill of indictment be laid before the grand jury.—*ABRAHAM v. R.* (1881), 6 S. C. R. 10.—*CAN.*

**f.** —[—]—An indictment

for perjury with the A.-G.'s name signed by his representative & not by himself, is not a compliance with R. S. C. c. 174, s. 140.—*R. v. FORD* (1888), 14 Q. L. R. 231.—*CAN.*

**g.** *Written consent of judge—Requisites of consent.*—[—]—The written consent should contain a general statement of the offence alleged to have been committed, mentioning the name of the person in respect of whom the offence is alleged to have been committed & the time & place, with sufficient certainty to identify the particular offence intended to be charged.—*R. v. BRECKENRIDGE* (1905), 6 O. W. R. 501; 10 O. L. R. 459.—*CAN.*

**h.** *Consent of Governor-General.*—[—]—On return of a *habeas corpus* for release of a foreign sailor sent for trial by a justice of the peace on charge of having committed an indictable offence on board a British ship off the coast of British Columbia within the jurisdiction of the Admiralty of England:—*Held*: proceedings before the justice of the peace may be taken before the consent of the Governor-General is given under Imperial Territorial Waters Jurisdiction Act, 1878, s. 391.—*R. v. TANO* (1909), 10 W. L. R. 522.—*CAN.*

**k.** —[—]—Before an offender shall be committed under 41 & 42 Vict. c. 73, Imp., for trial by the magistrate the leave of the Governor-General must be had.—*R. v. JOHANSON & LEWIS*, [1922] 2 W. W. R. 1105; 38 Can. Crim. Cas. 60.—*CAN.*

**l.** —[—]—A municipal corpn. is not a public servant within the meaning of Act IV of 1877, s. 39, & may therefore be prosecuted under the Penal Code without the preliminary sanction of the Govt. required by that section.—*R. v. CALCUTTA MUNICIPAL CORPN.* (1878), 1 L. R. 3 Calc. 758; 2 C. L. R. 520.—*IND.*

*Sect. 1.—Securing attendance of accused person:*

## SUB-SECT. 2.—ARREST.

## A. Nature of Arrest.

**1488. What amounts to arrest—Whether physical contact necessary.]**—An arrest must be by corporal seizing or touching deft.'s body. Therefore if a bailiff only pronounce words of arrest, & show his warrant, & deft. escape, the ct. will not grant an attachment for a rescue, for he was not legally arrested.—*GENNER v. SPARKS* (1701), 6 Mod. Rep. 173; 1 Salk. 79; 87 E. R. 928.

*Annotations:—***Consd.** Williams v. Jones (1735), *Lee temp. Hard.* 298. **Fold.** Russen v. Lucas (1824), Ry. & M. 26. **Consd.** Nicholl v. Darley (1828), 2 Y. & J. 399. **Fold.** Sandon v. Jervis (1859), E. B. & E. 942. **Refd.** Hampshire v. Godfrey (1739), 7 Mod. Rep. 288; Grainger v. Hill (1838), 1 Arn. 42; Brown v. Chapman (1848), 6 C. B. 365. **Mentd.** Rich v. Woolley (1831), 7 Bing. 651.

**1489. ———.]**—An actual touching of the person is not necessary to constitute an arrest.—*BERRY v. SEMPRONIUS* (1827), 5 L. J. O. S. K. B. 215.

**1490. ——— Mere words insufficient.]**—Words such as "I arrest you," *per se*, will not constitute an arrest, but if, after the words of arrest, the party goes with the officer, & so acquiesces, it is an arrest.—*RUSSEN v. LUCAS* (1824), 1 C. & P. 153; Ry. & M. 26, N. P.

**1491. ——— Power of capture unnecessary.]**—To effect a good arrest it is not necessary to have the power of actual capture; & therefore where a bailiff put his hand through a broken pane in a window of pltf.'s dwelling-house & touched him:—*Held*: there was a good arrest, the window not having been broken by the bailiff.—*SANDON v. JERVIS* (1859), E. B. & E. 942; 28 L. J. Ex. 156; 32 L. T. O. S. 375; 5 Jur. N. S. 860; 7 W. R. 290; 120 E. R. 760, Ex. Ch.

*Annotations:—***Refd.** Thomas v. Rawlings (1859), 28 L. J. Ex. 347; Nash v. Lucas (1867), L. R. 2 Q. B. 590.

**1492. ——— Submission to authority sufficient.]**—On a motion for an attachment against three persons who rescued a person taken in execution, the person who had been taken in execution having never been touched by the bailiff, it was therefore objected that there had been no legal arrest.

This is a good arrest because although the bailiff never touched him he submitted to the process (*per cur.*).—*HORNER v. BATTEN* (1739), Bull. N. P. 61.

*Annotations:—***Refd.** Nicholl v. Darley (1828), 2 Y. & J. 399; Grainger v. Hill (1838), 1 Arn. 42. **Mentd.** Bird v. Jones (1845), 7 Q. B. 742.

**1493. ———.]**—*RUSSEN v. LUCAS*, No. 10, *ante*.

**1494. ———.]**—Placing a party under restraint of a sheriff's officer who holds a writ of *capias*, is an arrest, without proceeding to actual contact.—*GRAINGER v. HILL* (1838), 4 Bing. N. C. 212; 1 Arn. 42; 5 Scott, 561; 7 L. J. C. P. 85; 132 E. R. 769; *sub nom.* GRANGER v. HILL, 2 Jur. 235.

*Annotations:—***Consd.** Warner v. Riddiford (1858), 4 C. B. N. S. 180.

*Development Co. v. Close* (No. 2) (1901), 46 Sol. Jo. 12; *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600.

*MEERING v. GRAHAME-WHITE AVIATION CO., LTD.*, No. 1739, *post*.

**1496. ——— Accompaniment of officer—After warrant shown.]**—If a magistrate's warrant be

shown by the constable who has the execution of it to the person charged with an offence, & he thereupon, without compulsion, attend the constable to the magistrate, & after examination be dismissed:—*Semble*: this is not such an arrest as will support trespass & false imprisonment.—*ARROWSMITH v. LE MESURIER* (1806), 2 Bos. & P. N. R. 211; 4 Dow. & Ry. M. C. 538, n.; 11 Moore, C. P. 440, n.; 127 E. R. 605.

*Annotations:—***Distd.** Berry v. Adamson (1827), 6 B. & C. 528. **Fold.** Berry v. Sempronius (1827), 5 L. J. O. S. K. B. 215. **Consd.** Warner v. Riddiford (1858), 4 C. B. N. S. 180. **Refd.** Bates v. Pilling (1834), 4 Tyr. 231; Wood v. Lane & Cleaton (1834), 6 C. & P. 774; Brown v. Ibbetson (1845), 6 L. T. O. S. 194; Brown v. Chapman (1848), 11 L. T. O. S. 453.

**1497. ——— Visit to officer—On request.]**—Where a sheriff's officer, to whom a warrant upon a writ against A. was delivered, sent a message to A., & asked him to fix a time to call & give bail, & A. accordingly fixed a time, attended, & gave bail:—*Held*: this was not an arrest, & an action for a malicious arrest would not lie against the party suing out the writ, although he had no cause of action.—*BERRY v. ADAMSON* (1827), 6 B. & C. 528; 2 C. & P. 503; 9 Dow. & Ry. K. B. 558; 108 E. R. 546.

*Annotations:—***Consd.** George v. Radford (1828), Mood. & M. 244. **Refd.** Reece v. Griffiths (1829), 5 Man. & Ry. K. B. 120; Amor v. Blofield (1832), 9 Bing. 91; Bates v. Pilling (1834), 2 Cr. & M. 374; Brown v. Chapman (1848), 6 C. B. 365.

**1498. Unnecessary to inform prisoner of reason for arrest.]**—(1) A man may be arrested without warrant under 3 Geo. 4, c. 40, s. 5, as a person found in a dwelling-house, etc., with intent to commit a felony, if he is seen in the dwelling-house, but gets out of it, & is taken on fresh pursuit. It makes no difference that he was not seen getting out of the house, & was found concealing himself to avoid being apprehended upon other premises near.

(2) Where the circumstances are such that a man must know why a person is about to apprehend him, he need not be told, & the arrest will be legal, & the resistance illegal, as much as if he had been told.—*R. v. HOWARTH* (1828), 1 Mood. C. C. 207, C. C. R.

*Annotations:—**As to* (1) **Consd.** Downing v. Capel (1867), 36 L. J. M. C. 97. **Refd.** Greenfield v. Sykes (1853), 17 J. P. Jo. 728. *As to* (2) **Refd.** Baynes v. Brewster (1841), 2 Q. B. 375; Moran v. Jones (1911), 104 L. T. 921.

**1499. ———.]**—*R. v. BENTLEY*, No. 311, *ante*.

**1500. No privilege from arrest under criminal process.]**—Privilege of Parliament is no protection against an attachment for any contempt which is of a criminal & not a civil kind.—*WELLESLEY v. BEAUFORT (DUKE)* (1831), 2 Russ. & M. 639; 39 E. R. 538; *sub nom.* *Re LONG* State Tr. N. S. 911, L. C.

*Annotations:—***Consd.** *Re* Ludlow Charities, Lechmere Charlton's Case (1837), 2 My. & Cr. 316; *Re* Gent, Gent-Davis v. Harris (1888), 40 Ch. D. 190; *Re* Armstrong, *Ex p.* Lindsay, [1892] 1 Q. B. 327. **Refd.** Stockdale v. Hansard (1839), 9 Ad. & El. 1; *Re* Martin, *Ex p.* Van Sandan (1844), De G. 55; *Re* Martin, *Ex p.* Van Sandan (1846), De G. 303; Gosset v. Howard (1847), 11 Jur. 750; *Re* Charity Comrs. (England), *Ex p.* Tamworth School (1868), 18 L. T. 233; Onslow's & Whalley's Case (1873), L. R. 9

c.

**1501. ———.]**—A warrant, issued upon an information *ex officio* under East India Co. Act, 1792 (c. 52), s. 62, & expressed to be to answer for certain misdemeanours whereof the party was impeached, & also for certain penalties & forfeitures sued for by the A.-G., is criminal process, under

## PART V. SECT. 1, SUB-SECT. 2.—A.

*amounts to arrest—Whether physical contact necessary.]*—There may be an arrest without imposition of there be a constraint on a person's will.—*GREENWOOD v. RYAN* (1) (1846), 1 Legge, 275.—*AUS*



which the party may be taken on his return home after a discharge from illegal custody by *habeas corpus*.

A party discharged from illegal civil process is privileged during his return home, but the house itself is no protection against criminal process (LORD DENMAN, C.J.).—*Re DOUGLAS* (1842), 3 Q. B. 825; 3 Gal. & Dav. 509; 12 L. J. Q. B. 49; 114 E. R. 724; *sub nom.* R. v. DOUGLAS, 7 Jur. 39.

**1502.** —.]—A solr. who disobeys an order of the ct. made against him as an officer of the ct., commits a contempt of a criminal nature, & no privilege from arrest exists or can be claimed against the execution of an attachment issued to enforce such an order of the ct.—*Re FRESTON* (1883), 11 Q. B. D. 545; 52 L. J. Q. B. 545; 49 L. T. 290; 31 W. R. 804, C. A.

*Annotations:—Foll.* *Re Dudley* (1883), 12 Q. B. D. 44. **Consd.** *Re Dudley, Ex p. Monet* (1883), 53 L. J. Q. B. 16; *Harvey v. Harvey* (1884), 26 Ch. D. 644; *Re Wray* (1887), 36 Ch. D. 138; *Re Gent, Gent-Davis v. Harris* (1888), 40 Ch. D. 190; *Seldon v. Wilde*, [1911] 1 K. B. 701. **Refd.** *Re Wickham, Marony v. Taylor* (1887), 35 Ch. D. 272; *Re Grey*, [1892] 2 Q. B. 440; *Re Evans, Evans v. Noton*, [1893] 1 Ch. 252; *Seaward v. Paterson* (1897), 66 L. J. Ch. 267. **Mentd.** *Haydon v. Haydon* (1911), 104 L. T. 477; *Scott v. Scott*, [1913] A. C. 417.

**1503.** —.]—A solr. received on behalf of a client a sum of £339, which he paid into his account with his own bankers, & dealt with as his own money. He afterwards forwarded to his client a sum of £100, & refused to pay the balance on the ground that he had a claim against an agent whom the client had employed to communicate with him. Application having been made to the K. B. Div. to compel the solr. to pay the money, the matter was referred to a master, who reported that the balance was due from the solr. to his client. An order was made by the K. B. Div., & also a subsequent order was made at chambers, that the solr. should pay the balance claimed to his client. These orders not having been complied with, an order for the attachment of the solr. was made by a judge at chambers:—**Held:** the orders for the payment of the balance claimed were not merely in the nature of civil process, but were orders made against the solr. as an officer of the ct., & the attachment was properly granted.—*Re DUDLEY* (1883), 12 Q. B. D. 44; 49 L. T. 737; *sub nom.* *Re DUDLEY, Ex p. MONET*, 53 L. J. Q. B. 16; 32 W. R. 264, C. A.

*Annotations:—Consd.* *Re Strong* (1886), 32 Ch. D. 342; *Re Wray* (1887), 36 Ch. D. 138; *Re Gent, Gent-Davis v. Harris* (1888), 40 Ch. D. 190. **Refd.** *Re Grey*, [1892] 2 Q. B. 440; *Seldon v. Wilde*, [1911] 1 K. B. 701. **Mentd.** *Godfrey v. G.* (1895), 73 L. T. 599.

**1504. Child under seven cannot be arrested.]—**An infant under the age of seven is incapable of committing a felony, & if given into custody on the charge of committing one, an action for false imprisonment will lie.—*MARSH v. LOADER* (1863), 14 C. B. N. S. 535; 2 New Rep. 280; 11 W. R. 784; 143 E. R. 555.

### B. Effecting Arrest.

**1505. Use of force.]—**If a constable is preventing a breach of the peace, & any person stands in his way with intent to hinder him from doing so, the constable is justified in taking such person into custody, but not in giving him a blow.

As to the handcuffing of the boy who had fought

& taking him to the watch-house, the constable was justified (BURROUGH, J.).—*LEVY v. EDWARDS* (1823), 1 C. & P. 40.

**1506.** —.]—A., a constable employed to guard a copse from which wood had been stolen, saw B., come from it, who, on being called to stop, ran away, & A., having no other means of apprehending B., fired at & wounded him. B., had just before committed a felony in the copse, but A. did not know it. A. was convicted of having feloniously wounded B.:—**Held:** the conviction was right.—*R. v. DADSON* (1850), 3 Car. & Kir. 148; 2 Den. 35; T. & M. 385; 4 New Sess. Cas. 431; 20 L. J. M. C. 57; 10 L. T. O. S. 514; 14 J. P. 754; 14 Jur. 1051; 4 Cox, C. C. 358, C. C. R.

**1507. Use of handcuffs.]—LEVY v. EDWARDS**, No. 1505, *ante*.

**1508.** —.]—A constable, arresting a man on suspicion of felony, is bound to take him before a magistrate as soon as he reasonably can. A constable has no right to detain a prisoner three days without taking him before a magistrate in order that evidence may be collected in support of a felony with which he is charged.

A constable has no right to handcuff a prisoner except he has attempted to escape, or except it is necessary in order to prevent his escaping.—*WRIGHT v. COURT* (1825), 4 B. & C. 596; 6 Dow. & Ry. K. B. 623; 3 Dow. & Ry. M. C. 299; 4 L. J. O. S. K. B. 17; 107 E. R. 1182.

**1509.** —.]—The right of searching persons in custody must depend on the circumstances of each particular case, & the mere fact of a person being drunk & disorderly will not justify a police officer searching his person, although the officer may have received general orders to search all persons in custody; but any person, whatever may be the nature of the charge, may so conduct himself, by reason of violence of language or conduct, that it may be prudent & right to search him, as well for his own protection as for those entrusted with the duty.

The same rule applies to handcuffing persons in custody, & the right must depend on the circumstances of each particular case, as, for instance, the nature of the charge, & the conduct & temper of the person in custody. There cannot be any general rule that will justify a constable in resorting to the extreme measure of handcuffing a person in custody for a misdemeanour to a felon, & marching them through the public streets from the police station to the magistrate's office.—*LEIGH v. COLE* (1853), 21 L. T. O. S. 144; 6 Cox, C. C. 329.

**1510.** —.]—Pltfs. were owners of a field in which defts. were walking with loaded guns at half-cock in their hands. Pltfs. desired them to withdraw & give their names, & on their refusal advanced towards them apparently as if to apprehend them. Defts. half raised their guns, which they pointed towards them, & threatened to shoot them. Pltfs., one of whom was a constable, then gave them in charge to a policeman for shooting with intent, & he, with their assistance, seized & handcuffed them:—**Held:** the handcuffing was unlawful.—*OSBORN v. VEITCH* (1858), 1 F. & F. 317, N. P.

**1507 ii.** —.]—A police officer who makes an arrest is justified in handcuffing the person arrested if he has reason to believe that the prisoner may otherwise escape.—*FRASER v. SOY* (1918), 52 N. S. R. 476; 44 D. L. R. 437; 30 Can. Crim. Cus. 367. —**CAN.**

### PART V. SECT. 1, SUB-SECT. 2.—B.

**1507 i. Use of handcuffs.]—Pltf.,** a workman in the central prison, in the employment of a contractor therein, was detected conveying tobacco to a convict, contrary to the rules in force & to the provisions of the Central Prison Act, whereupon the warden

directed a constable to arrest him, which he did, & though under no apprehension of pltf. making an attempt to escape, handcuffed him:—**Held:** in the circumstances the handcuffing was not justifiable, & the constable was liable in trespass therefor.—*HAMILTON v. MASSIE* (1889), 18 O. R. 585.—**CAN.**

**Sect. 1.—Securing attendance of accused person :—**  
*Act. 2, B., C., D. & E. (a).]*

**1511.** ———.]—Handcuffing is only justifiable where reasonable necessity exists for it, & if it is resorted to in the absence of such necessity the party so treated may bring an action to recover damages for such a grievous indignity (LORD RUSSELL OF KILLOWEN, C.J.).—*R. v. TAYLOR* (1895), 59 J. P. 393.

**C. Searching Prisoner after Arrest—Disposal of Property.**

**1512. Right to search.**—It is often the duty of an officer to search a prisoner. If, for instance, a man is taken in the commission of a felony, he may be searched to see whether the stolen articles are in his possession, or whether he has any instruments of violence about him; &, in like manner, if he be taken on a charge of arson, he may be searched to see whether he has any fire-boxes or matches about his person. It may be highly satisfactory & indeed necessary, that the prisoner should be searched. If a tradesman should be charged with an offence such as non-payment of penalties, & he appeared before the magistrate by counsel & not in person, & a warrant issued against him not charging him with any crime, but merely to make him appear in person, the act of searching him would be contrary to law. It is said that the search might be justified, because the person in custody might have some instrument about him with which he might make away with or injure himself, or the alderman before whom he is brought. This does not appear a satisfactory reason; it assumes that when a man is apprehended, because he has in the first instance appeared by counsel, & not in person, he will take with him the means of committing suicide or murder. This is a most absurd supposition (LORD CAMPBELL, C.J.).—*BESSELL v. WILSON* (1853), 1 E. & B. 492, n.; 22 L. J. M. C. 94, 95, n.; 20 L. T. O. S. 233, n.; 17 J. P. Jo. 52; 118 E. R. 518.

*Annotation:—Mentd. R. v. Thompson, [1909] 2 K. B. 614.*

**1513.** ———.]—*LEIGH v. COLE*, No. 1509, ante.

**1514. Disposal of property found on prisoner—Whether right to retain—If unconnected with the charge.**—If a person, taken on a charge of stealing a horse, have the horse in his possession when he is apprehended, any money found upon him ought not to be taken away from him.—*R. v. JONES* (1834), 6 C. & P. 313; 2 Nev. & M. M. C. 177.

**1515.** ———.]—A constable who apprehends a prisoner has no right to take away from him any money which he has about him, unless it is in some way connected with the offence with which he is charged, as he thereby deprives him of the means of making his defence.—*R. v. O'DONNELL* (1835), 7 C. & P. 138; 3 Nev. & M. M. C. 397.

**1516.** ———.]—A police officer who

apprehended a person on a charge of rape, took from him a watch & other articles. The judges of the ct. at which he was indicted, on motion supported by affidavit, directed the property to be given up to prisoner saying that it ought not to have been taken from him.—*R. v. KINSEY* (1836), 7 C. & P. 447; 3 Nev. & M. M. C. 450.

**1517.** ———.]—Property found on a prisoner which is in no way connected with the charge ought not to be taken from him.—*Ex p. GRIFFITHS* (1845), 1 New Pract. Cas. 119.

**1518.** ———.]—Deft., committed to take his trial at the assizes for assaulting a constable, had a sum of £2 3s. 8d. taken from him by the constable who conveyed him to prison, to pay for, as was alleged, the expenses of conveying him to the prison, & his maintenance in prison, till the trial, this being the ordinary practice in the county of S.:—*Held*: the practice was quite wrong, & the judge at the assizes directed the money to be restored to deft.—*R. v. BASS* (1849), 2 Car. & Kir. 822.

**1519.** ———.]—The ct. will direct money found upon a prisoner to be restored to him before trial, if it appear by the depositions that it is in no way material to the charge on which he is to be tried.—*R. v. BARNETT* (1829), 3 C. & P. 600. *Annotation:—Refd. Dillon v. O'Brien & Davis* (1887), 16 Cox, C. C. 245.

**1520.** ———.]—**Partial restoration for purpose of defence.**—Where a prisoner, a week after the commission of the offence, was apprehended on a charge of robbing A. of £25 in notes, & £9 in gold, & on prisoner was found a sum of £12 in gold, but none of it identified, the judge ordered £5 to be restored to prisoner, in order to enable him to make his defence.—*R. v. ROONEY* (1836), 7 C. & P. 515.

**1521.** ———.]—**Whether authority to order restoration.**—*Semble*: neither a judge nor a justice of the peace has power to make an order for the delivery to a prisoner of money found on his person, such money being unconnected with the charge.—*R. v. PIERCE* (1852), 20 L. T. O. S. 182; 6 Cox, C. C. 117.

**1522.** ———.]—**Disposal after conviction.**—After the trial & conviction of a felon, the judges who presided at the trial made an order, directing that property found in his possession when he was apprehended should be disposed of in a particular manner. This property was not part of that which had been stolen, nor was it connected therewith:—*Held*: the order was bad, as the judges had no jurisdiction to make it.—*R. v. LONDON CORPN.* (1858), E. B. & E. 509; 27 L. J. M. C. 231; 4 Jur. N. S. 1078; 120 E. R. 599; *sub nom.* *R. v. PIERCE*, Bell, C. C. 235; 8 Cox, C. C. 344; 22 J. P. Jo. 368; *previous proceedings, sub nom.* *R. v. PIERCE* (1857), 7 Cox, C. C. 206, Ex. Ch.

**1523.** ———.]—**If connected with charge.**—The ct. will not order that money taken from a

*charge—Disposal after acquittal.*—The constable who apprehended prisoner took from his person 17s. 6d. Prisoner was acquitted on an indictment for stealing 17s. 6d.:—*Held*: the judge who tried prisoner could not make any order for the disposition of the money so taken from prisoner.—*R. v. KEOGH* (1842), 2 Craw. & "

**1523 i.** ———.]—When a person is arrested for committing a felony or misdemeanour, any property in his possession believed to have been used by him for the purpose of committing the offence may be seized & detained as evidence in support of the charge; &, if necessary, such property may be taken from him by force, pro-

**PART V. SECT. 1, SUB-SECT. 2.—C.**

**1520 i. Disposal of property found on prisoner—Whether right to retain—If unconnected with the charge—Partial restoration for purpose of defence.**—An application to hand over money found on a prisoner at the time of his arrest for the purpose of his defence should be made to the judge at the trial & not to a Judge in Chambers.—*R. v. CANE & JAMES* (1890), 16 V. L. R. 164.—*AUS.*

**1521 i.** ———.]—**Whether authority to order restoration.**—It appearing that money taken by the police from a prisoner would not be required as evidence by the Crown, the ct. ordered it to be restored.—*R. v. HARRIS* (1883),

1 B. C. R., pt. I. 255.—*CAN.*

**1521 ii.** ———.]—Where articles, unconnected with the offence charged & not required for the purpose of evidence, were taken from accused by the police:—*Held*: ordered to be restored.—*Ex p. MACMICHAEL* (1904), 7 Can. Crim. Cas. 549.—*CAN.*

**1521 iii.** ———.]—Money taken by the police from a party charged with murder was ordered to be returned to him on his acquittal. Unless a party be charged with taking money or money's worth, he ought not, on apprehension, to be deprived of his money.—*R. v. M'KAY* (1844), 3 Craw. & D. 205.—*IR.*

*m.* ———.]—**If connected with**

prisoner charged with high treason be restored to him, unless it be made appear to the ct. that the money forms no part of the proof against him.

The ct. before whom a prisoner is charged with high treason will not order that papers taken from his house should be restored to him, neither will they order that he shall be furnished with copies of them.—*R. v. Frost* (1839), 9 C. & P. 129; 4 State Tr. N. S. 85.

*Annotations.*—*Reid*. *Dillon v. O'Brien & Davis* (1887), 16 Cox, C. C. 245. *Mentid*. *R. v. O'Connell* (1844), 5 State Tr. N. S. 1; *R. v. Cuffey* (1848), 7 State Tr. N. S. 407; *R. v. Smith O'Brien* (1848), 7 State Tr. N. S. 1; *R. v. Duffy* (1849), 7 State Tr. N. S. 795; *Mansell v. R.* (1857), 8 E. & B. 54; *R. v. Crippen*, [1911] 1 K. B. 149; *Broadhurst, Meanley v. Hill* (1918), 13 Cr. App. Rep. 125; *R. v. Bliss Hill* (1918), 82 J. P. 194.

**1524.** ————*]*—The police have power under a warrant for the arrest of a person charged with stealing goods, to take possession of the goods for the purposes of a prosecution.—*TYLER & WITT v. LONDON & SOUTH WESTERN RY. CO.* (1884), Cab. & El. 285.

**1525.** ————*Money belonging to receiver in possession of thief.*—Upon an indictment against a party as a receiver, the ct. will not order money to be given up which is found in the possession of the principal, although it appears to belong to appt., & to be necessary for his defence, & although there is no evidence to show that it is any part of the proceeds of the robbery.—*R. v. HEORDLEY* (1843), 2 L. T. O. S. 247; 1 Cox, C. C. 42.

**1526.** ————*Order for partial restoration.*—A prisoner indicted for uttering two forged promissory notes, one for £29, & another for £26, when called on to plead, applied to the judge to order 28 sovereigns found on him when he was apprehended to be restored to him. There was ground for supposing that £26 of the sum found was the proceeds of the alleged forged note for that amount, & the judge therefore ordered that £2 only should be given back to prisoner.—*R. v. BURGESS* (1836), 7 C. & P. 488.

**1527.** ————*Retention after conviction.*—Money in the possession of prisoner, which is taken possession of by the police upon his apprehension, & retained by them after his conviction, does not render the police debtors to prisoner, & is not a debt due from them to prisoner which can be attached by a judgment creditor of prisoner by garnishee proceedings under R. S. C. Ord. 45, r. 1.—*BICE v. JARVIS, GARLAND & KENT* (1885), 49 J. P. 264.

**1528.** ————*Disposal after conviction.*—

vided no unnecessary violence is used.—*DILLON v. O'BRIEN & DAVIS* (1887), 16 Cox, C. C. 245.—*IR.*

**1523 ii.** ————*]*—Where a person is arrested for committing a felony or misdemeanour, any property in his possession or control, *bona fide* believed to be necessary & material evidence for the prosecution, may be seized & detained as evidence in support of the charge.—*CARMICHAEL v. MCGOWEN* (1903), 8 Nfld. L. R. 597.—*NFLD.*

**1523 iii.** ————*]*—A constable who is legally authorised to arrest an accused person may, at the time of such arrest, & as incidental to it, seize & take possession of articles in the possession or under the control of the accused person, as evidence tending to show the guilt of such person.—*BARNETT & GRANT v. CAMPBELL* (1902), 21 N. Z. L. R. 484.—*N.Z.*

**PART V. SECT. 1, SUB-SECT. 2.—E. (a).**

**1534 i.** *No authority to arrest at common law.*—Prisoner was convicted of

assaulting serjt. S. while in the execution of his duty. It was proved that prisoner made use of obscene language in a public place within hearing of constable B., who arrested him. Prisoner thereupon assaulted B., took his baton from him, knocked him down, & threw his baton away, leaving B. disabled. B. went immediately to the police-station & informed S., his superior officer, & S. promptly went to the place where the assault had been made on B. & there found prisoner. G. O., who was present, charged deft. with assaulting him, whereupon S., who had no warrant for the apprehension of the prisoner, said, touching him on the shoulder, "I arrest you for disarming constable B. of his baton while in the execution of his duty & for assaulting G. O." Prisoner then committed the assault on S. of which he was convicted.—*Held*: the conviction was bad & should be quashed. The arrest of prisoner by S. without a warrant was on a charge of an assault which S. had not witnessed, & it was therefore illegal.—*R. v. SMITH*

—A judge has no jurisdiction to make an order that certain pawn-tickets found, when arrested, on a person who has been convicted & sentenced for uttering a forged bill of exchange, should be delivered over to prosecutor, although there is reason to believe that the goods represented by the pawn-tickets were purchased by the proceeds of the forged bill.—*R. v. ROLFE* (1889), 53 J. P. 823.

#### *D. Procedure after Arrest.*

**1529. Accused must be taken before a magistrate.—Unreasonable delay.**—*WRIGHT v. COURT*, No. 1508, *ante*.

**1530.** ————*]*—If the servant of the owner of property find a party actually committing an offence against Larceny Act, 1827 (c. 29), & apprehend him under sect. 63 of that Act, & while taking the party to a magistrate, such party kill him, this will be murder; but if the servant either did not see him in the actual commission of the offence, or be taking him to any other place than before a magistrate, it will not be murder.—*R. v. CURRAN* (1828), 3 C. & P. 397.

**1531.** ————*]*—A private person cannot apprehend another, upon a suspicion of felony, for the purpose of taking him to the place where the theft was committed, in order to ascertain whether he was the thief.—*HALL v. BOOTH* (1834), 3 Nev. & M. K. B. 316.

**1532.** ————*Magistrate delaying to deal with accused.*—Two constables were taking pltf. before a magistrate on the Monday, when they met the magistrate in the street, who desired them to bring him up for examination on the Tuesday. They did so, when the magistrate fined him £1:—*Held*: it was the duty of the magistrate either to have gone into the case on the Monday, or to have desired that pltf. should be taken before another magistrate.—*EDWARDS v. FERRIS, LEWIS & WELLS* (1836), 7 C. & P. 542, N. P.

**1533. Accused must be taken to prison by direct route.**—A person justified under 7 & 8 Geo. 4, c. 30, in causing the arrest of another must do it "immediately," & he must send him by the direct road to the lock-up; for if he send him *extra viam* he would be a trespasser against the person so arrested.—*MORRIS v. WISE* (1860), 2 F. & F. 51.

#### *E. Arrest without Warrant.*

##### *(a) In General.*

**1534. No authority to arrest at common law.**—Suspicion that a party has, on a former occasion, committed a misdemeanour, is no justification for giving him in charge to a constable without a

(1876), 14 N. S. W. L. R. 419.—*AUS.*

**1534 ii.** ————*]*—A constable is not authorised to apprehend without warrant a person whom he with reasonable cause suspects of having committed an offence which is not an indictable offence.—*NOLAN v. CLIFFORD* (1904), 1 C. L. R. 429.—*AUS.*

**1534 iii.** ————*]*—Criminal Code, ss. 22 & 23, are a codification of the common law, & merely justify the personal arrest by a peace officer, whether justice or constable, on his own view, or on suspicion, or calling on some one present to assist him. They do not authorise a justice to direct a constable to make an arrest elsewhere without warrant.—*MCGUINNESS v. DAFOE* (1896), 23 A. R. 704; 27 O. R. 117.—*CAN.*

**1534 iv.** ————*]*—A constable is not justified in taking a person into custody & depriving him of his liberty on a criminal charge without a warrant issued by competent authority.—*MOUSSEAU v. MONTREAL CITY* (1897), Q. R. 12 S. C. 61.—*CAN.*

**1534 v.** ————*]*—Deft., a police officer,

**Sect. 1.—Securing attendance of accused person:**  
**Sub-sect. 2, E. (a) & (b).]**

justice's warrant.—*FOX v. GAUNT* (1832), 3 B. & Ad. 798; 1 L. J. K. B. 198; 110 E. R. 293.

**1535.** —.]—In an action of trespass for assaulting pltf., & causing him to be taken to a police station, & afterwards before a magistrate upon an unfounded charge:—*Held*: the plea was bad, inasmuch as it neither alleged that a felony had been committed, so as to make it a good justification at common law, nor that pltf. had been "found committing" any offence against the provisions of 7 & 8 Geo. 4, c. 29, so as to justify his apprehension without warrant, under sect. 63 of that statute.—*MATHEWS v. BIDDULPH* (1841), 3 Man. & G. 390; 4 Scott, N. R. 54; 133 E. R. 1195; *sub nom.* *MATTHEWS v. BIDDULPH*, 11 L. J. M. C. 13.

*Annotations:—Refd.* *Davis v. Swift* (1843), 7 J. P. 672; *Walters v. Smith* (1913), 83 L. J. K. B. 335.

**1536.** —.]—A constable, at common law, is not justified in imprisoning a person in the belief that he has committed a misdemeanour.—*GRIFFIN v. COLEMAN* (1859), 4 H. & N. 265; 28 L. J. Ex. 134; 157 E. R. 840; *sub nom.* *COLEMAN v.*

*GRIFFIN*, 32 L. T. O. S. 333; *sub nom.* *COLMAN v. GRIFFIN*, 23 J. P. 327.

*Annotation:—Mentd.* *Walters v. Coghlan* (1872), L. R. 8 Q. B. 61.

**1537.** —.]—*I.*, a constable, having been informed by his wife that P. had indecently exposed himself to her & another woman, went in search of P., & then without any warrant arrested P., who resisted, but without unnecessary violence. P. having been charged with & convicted of assaulting L. when acting in the discharge of his duty:—*Held*: the conviction was wrong, for the arrest by the constable being illegal, prisoner was justified in freeing himself.—*PUNSHON v. LESTLIE* (1879), 43 J. P. 605, D. C.

**1538.** —.]—A constable who sees a person riding a bicycle without a proper light contrary to Local Government Act, 1888 (c. 41), s. 85, has no power at common law . . . to stop him for the purpose of ascertaining his name & address.—*HATTON v. TREEBY*, [1897] 2 Q. B. 452; 66 L. J. Q. B. 729; 77 L. T. 309; 61 J. P. 586; 46 W. R. 6; 13 T. L. R. 556; 18 Cox, C. C. 633, D. C.

**1539.** — **Exception in case of cheating with false dice.**—A private person may justify arresting

arrested pltf. on the charge of having unlawfully assaulted, beaten, wounded, & ill-treated P., a police officer, while in the discharge of his duty, occasioning actual bodily harm. Deft., at the time, held a warrant for pltf.'s arrest, but it had not been indorsed for service out of the jurisdiction. Apart from the warrant deft. had actual knowledge of the commission of the offence for which the arrest was made. In an action by pltf. claiming damages for unlawful arrest & imprisonment:—*Held*: It was competent for deft. to contend that the arrest was made under Code, s. 25, independent of the warrant, & to justify such arrest by showing that, at the time the arrest was made, he was aware that pltf. had committed the offence of unlawfully wounding.—*JORDAN v. McDONALD* (1898), 31 N. S. R. 129.—**CAN.**

**1534 vi.** —.]—A peace officer who arrests a person, charged with obtaining goods by false pretences with intent to defraud, on a request by telegram from another Province of Canada, where the offence is alleged to have been committed, may justify the arrest & detention of his prisoner under Criminal Code, s. 22 or s. 552, sub-s. 2, by alleging, (a) that prisoner has actually committed such offence, or (b) that he, the peace officer, on reasonable & probable grounds, believes that prisoner committed the offence charged.—*R. v. CLOUTIER* (1898), 12 Man. L. R. 183.—**CAN.**

**1534 vii.** —.]—Prisoner was indicted & tried for having assaulted a peace officer in the execution of his duty contrary to Criminal Code, s. 263:—*Held*: had a crime been committed by prisoner under Criminal Code, s. 552 (3), the peace officer would have been justified in making the arrest without any warrant.—*R. v. COOK* (1906), 3 W. L. R. 553.—**CAN.**

**1534 viii.** —.]—Arrest without a warrant & not on view, on a charge of keeping a common bawdy-house, is illegal, & if objection is taken to the jurisdiction of the magistrate the conviction will be quashed.—*R. v. WALLACE* (1915), 32 W. L. R. 204; 24 D. L. R. 825; 8 Alta. L. R. 472.—**CAN.**

**1534 ix.** —.]—No person can be arrested without a warrant on a charge of keeping a disorderly house.—*R. v. YOUNG KEE*, [1917] 2 W. W. R. 442, 654; 37 D. L. R. 121; 28 Can. Crim. Cas. 161.—**CAN.**

**1534 x.** —.]—A conviction for escaping from custody, while under arrest for common assault, cannot be

sustained where it appears that the policeman who made the arrest did not see the assault committed, & made the arrest without warrant.—*R. v. STACKHOUSE* (1917), 52 N. S. R. 242.—**CAN.**

**1534 xi.** —.]—In the absence of any statutory provision in Liquor Licence Act, enabling a peace officer to arrest without a warrant, a person whom he finds committing an offence under it, such an arrest is illegal, & the magistrate before whom the accused is brought in custody without a warrant or summons after such illegal arrest has no jurisdiction to proceed with the trial in the face of deft.'s objection then taken that he was not properly before the magistrate.—*R. v. POLLARD* (1917), 29 Can. Crim. Cas. 35; 39 D. L. R. 111; 3 W. W. R. 754; 13 Alta. L. R. 157.—**CAN.**

**1534 xii.** —.]—A. entered a church during the celebration of Divine service, & though offered a seat by the churchwarden, went into another seat allocated to a parishioner, & refused to leave it, notwithstanding the remonstrances of the churchwarden; & deft., who was a J.P., & present at the time, thereupon took him into custody, & kept him in custody until the clergyman & churchwarden should swear informations against him, which they did; & on pltf.'s not getting two sureties, as provided by 6 Geo. 1, c. 5, deft. committed him to gaol. Pltf. brought an action against deft. for assault & false imprisonment, & deft. pleaded the above facts:—*Held*: on demurrer to the defences, that they must be set aside as not justifying the assault or even the false imprisonment, as deft. had not brought the offence charged against pltf. within the provisions of the Act.—*R. v. POE* (1866), 15 L. T. 37.—**IR.**

**1534 xiii.** —.]—Knowledge by a police constable that a warrant has been issued by a duly authorised magistrate for the arrest of a particular person for felony constitutes a sufficient ground for reasonable suspicion that a felony has been committed by such person, so as to authorise such constable to arrest him, & if the warrant has been granted at a distance from the place where he is to be found the constable is entitled to bring him in custody before a justice having jurisdiction in the place at which the arrest is made & to obtain a reasonable remand until the warrant shall arrive & be backed pursuant to 14 & 15 Vict. c. 93.—*CREAGH v. GAMBLE* (1888), 24

L. R. Ir. 458.—**IR.**

**1534 xiv.** —.]—At common law a police officer is entitled in special circumstances to apprehend without a warrant, it being always a question whether the circumstances justified the apprehension.—*PEAGUE v. LAKE* (1868), 7 Macph. (Ct. of Sess.) 89; 41 Sc. Jur. 52.—**SCOT.**

**1534 xv.** —.]—Glasgow Police Act, 1866, s. 88, empowers constables within the city to take into custody without any other authority than the Act any person "who is either accused or reasonably suspected of having committed" a penal offence.—*SHEARER v. SHIELDS*, [1914] A. C. 808.—**SCOT.**

**n.** — **Objection to magistrate's jurisdiction.—Must be made promptly.**—

—Accused was arrested without a warrant, was brought before the magistrate, & the evidence in chief & cross-examination of one witness was taken, & the case was adjourned, accused being released on recognisance:—*Held*: on the resumption of the hearing it was too late to object, for the first time, that accused was arrested without a warrant & so was not properly before the magistrate.—*R. v. WOODWARD*, [1923] 3 W. W. R. 697; 39 Can. Crim. Cas. 311.—**CAN.**

**o.** — — — —.]—If one is arrested & brought before a magistrate without a warrant in a case in which arrest without a warrant is not authorised & he objects to the jurisdiction of the magistrate over his person on that ground, the magistrate has no jurisdiction to proceed provided the objection is taken promptly. But the objection, in order to be effective, must be made before or at the time of pleading.—*R. v. PINDER*, [1923] 2 W. W. R. 997; [1923] 3 D. L. R. 707; 40 Can. Crim. Cas. 272.—**CAN.**

**p.** — — — —.]—While arrests without a warrant may be made under certain sections of Criminal Code, the offences charged must be within the legislative competence of the Parliament of Canada. Where the offence is one under a provincial penal statute with no provision for arrest without a warrant, an arrest without a warrant goes to the jurisdiction, & if accused, being before the magistrate on arrest by a constable without a warrant, objects to the magistrate's jurisdiction & to the whole proceedings on the ground stated, a conviction made in face of the objection will be quashed.—*R. v. SUDACKI*, [1923] 3 W. W. R. 1202.—**CAN.**

a common gambler, whom he detects cheating with false dice.—*HOLYDAY v. OXENBRIDGE* (1631), Cro. Car. 234; W. Jo. 249; 79 E. R. 805.  
*Annotation* :—*Mentd.* R. v. Gripe (1696), 1 Ld. Raym. 256.

(b) For Felony.

**1540. By private person.—On reasonable suspicion of felony—Felony must have been committed.]—**  
**CASE** (1611), 12 Co. Rep. 90; 77 E. R. 1366.

**1541. ———.]—**When a felony has actually been committed a constable or even a private person acting *bona fide* & in pursuit of the offender, upon such information as amounts to reasonable & probable ground of suspicion, may justify an arrest.—*LEDWITH v. CATCHPOLE* (1783), Cald. Mag. Cas. 291.

*Annotation* :—*Refd.* *Davies v. Russell* (1829), 7 L. J. O. S. M. C. 52.

**1542. ———.]—**If a reasonable charge of felony be made against a person, who is given in charge to a constable, the constable is bound to take him, & will be justified in so doing, although the charge may turn out to be unfounded. If a person be taken by a private individual without warrant, on suspicion of felony, & will not tell his name, & otherwise conducts himself, so as to excite suspicion, this only goes in mitigation of damages, if it turn out that no felony was committed.—*COWLES v. DUNBAR & CALLOW* (1827), 2 C. & P. 565; *Mood.* & M. 37, N. P.

*Annotation* :—*Refd.* *Hartley v. Ellnor* (1917), 86 L. J. K. B. 938.

**1543. ———.]—**R. v. CURRAN, No. 1530, ante.

**1544. ———.]—**In order to justify a private individual in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable having reasonable ground to suspect that a felony has been committed, is authorised to detain the party suspected until inquiry can be made by the proper authorities (*LORD TENTERTON, C.J.*).—*BECKWITH v. PHILBY* (1827), 6 B. & C. 635; 9 Dow. & Ry. K. B. 487; 4 Dow. & Ry. M. C. 394; 5 L. J. O. S. M. C. 132; 108 E. R. 585.

*Annotations* :—*Consd.* *Davis v. Russell* (1829), 5 Bing. 354; *Nicholson v. Hardwick* (1833), 5 C. & P. 495; *King & King v. Met. Dist. Ry.* (1908), 99 L. T. 278; *Walters v. Smith*, [1914] 1 K. B. 595. *Refd.* *West v. Baxendale* (1850), 9 C. B. 141; *Re Chivers v. Savage* (1855), 26 L. T. O. S. 148. *Mentd.* *Coleman v. Griffin* (1859), 32 L. T. O. S. 333.

**1545. ———.]—***ADAMS v. MOORE* (1811), cited in 2 Selwyn's N. P. 10th ed. at p. 925, N. P.

**1546. ———.]—**In an action for false imprisonment, as deft. had taken the law into his own hands, it was incumbent on him to make out not only that a felony had been committed, but that the circumstances of the case were such that the jury or any reasonable person, would have suspected pltf. of being the person who committed it.—*ALLEN v. WRIGHT* (1838), 8 C. & P. 522, N. P.  
*Annotation* :—*Consd.* *King & King v. Met. Dist. Ry.* (1908), 99 L. T. 278.

**1547. ———.]—**A. asked permission

at the house of B. to go & take some ashes, which he was allowed to do, but as he was coming out B.'s apprentice saw a copper tea-kettle among the ashes in A.'s basket, & told B. B. laid hold of A. to secure him, on the charge of stealing the tea-kettle, & in a scuffle A. & B. fell, & A. cut B. with a knife :—*Held* : this was wounding within 1 Vict. c. 85, provided the jury were satisfied that A. had stolen the kettle, as B. had then a right to apprehend him.—*R. v. PRICE* (1838), 8 C. & P. 282.

**1548. ———.]—**Any person has by law the power to act on a well-grounded suspicion that a felony has been committed, by giving the suspected party into custody. But the grounds must, if they be relied on as a defence to an action of this kind, be stated in the plea & proved as stated (*POLLOCK, C.B.*).—*FEGGETT v. BARKER* (1860), 2 F. & F. 248, N. P.

**1549. ———.]—**A private person is justified in arresting another on suspicion of having committed a felony if, & only if, he can show that the particular felony for which he arrested the other was in fact committed, & that he had reasonable & probable cause for suspecting the other of having committed it.—*WALTERS v. SMITH (W. H.) & SON, LTD.*, [1914] 1 K. B. 595; 83 L. J. K. B. 335; 110 L. T. 345; 78 J. P. 118; 30 T. L. R. 158; 58 Sol. Jo. 186.

**1550. ———.]—***MEERING v. GRAHAME-WHITE AVIATION CO., LTD.*, No. 1739, post.

**1551. ——— In ignorance of pardon.]—***CUDDINGTON v. WILKINS* (1615), Hob. 81; *Moore, K. B.* 863; *Owen*, 154; 80 E. R. 231; *sub nom. CODDINGTON v. WILKIN*, 1 Brownl. 10.

*Annotations* :—*Consd.* *Leyman v. Latimer* (1878), 3 Ex. D. 352; *Hay v. Tower Division of London J.J.* (1890), 24 Q. B. D. 561. *Refd.* *Searle v. Williams* (1618), Hob. 288; *R. v. Reilly* (1787), 1 Leach, 451; *Re Barber* (1850), 15 L. T. O. S. 500; *Alexander v. N. E. Ry.* (1865), 34 L. J. Q. B. 152. *Mentd.* *Monson v. Tussauds*, *Monson v. Tussaud*, [1894] 1 Q. B. 671.

**1552. — To prevent attempted felony.]—**A private person may justify breaking & entering pltf.'s house, & imprisoning his person, to prevent him from committing murder on his wife.—*HAND-CKOCK v. BAKER* (1800), 2 Bos. & P. 260; 126 E. R. 1270.

**1553. ——— In the night.]—**If a man be found attempting to commit a felony in the night, any one may apprehend & detain him until he can be carried before a magistrate.—*R. v. HUNT* (1825), 1 Mood. C. C. 93, C. C. R.

*Annotations* :—*Mentd.* *R. v. Holt* (1836), 7 C. & P. 518; *R. v. Stopford* (1870), 11 Cox, C. C. 643; *R. v. Latimer* (1886), 17 Q. B. D. 359.

**1554. — Felony committed abroad.]—**A plea justifying an arrest by a private person, on suspicion of felony, must show the circumstances from which the ct. may judge, whether the suspicion were reasonable.

A person who commits a felony in a foreign country & comes into England, may be arrested here & conveyed & given up to the magistrates of the country against the laws of which the offence was committed.—*MURE v. KAYE* (1811), 4 Taunt. 34; 128 E. R. 239.

*Annotations* :—*Mentd.* *Panton v. Williams* (1841), 2 Q. B. 169; *Burgess v. Beaumont* (1844), 9 Jur. 14; *M'Leod v. Schultze* (1844), 13 L. J. Ex. 321.

make out a reasonable ground of suspicion against such person, but must also prove that a felony has been committed.—*MURPHY v. ELLIS* (1871), (1825-1897), N. B. Dig. 60.—**CAN.**

**1540 iv. ———.]—**A private individual must aver that a felony has actually been committed.—*BELL v. ALLEN* (1837), 2 Jo. Ex. Ir. 448, 450.—**IR.**

PART V. SECT. 1, SUB-SECT. 2.—  
 E. (b).

**1540 i. By private person.—On reasonable suspicion of felony—Felony must have been committed.]—**A private individual cannot arrest on suspicion of felony; he must show a felony committed.—*ASHLEY v. DUNDAS* (1837), O. S. 749.—**CAN.**

**1540 ii. ———.]—**When a

private person takes upon himself to arrest without a warrant for a supposed offence he must be prepared to prove, & affirm it unequivocally, that a felony has been committed; strong suspicions of it will not do.—*MCKENZIE v. GIBSON* (1833), 8 U. C. R. 100.—**CAN.**

**1540 iii. ———.]—**To justify a private individual in arresting a person on a charge of felony, he must not only

*Sect. 1.—Securing attendance of accused person: Sub-sect. 2, E. (b) & (c) i.]*

**1555. By police officer—On reasonable suspicion—Felony need not have been committed.]**—A peace officer may justify an arrest on a reasonable charge of felony, without a warrant, although it should afterwards appear that no felony had been committed; but a private individual cannot.—*SAMUEL v. PAYNE* (1780), 1 Doug. K. B. 359; 99 E. R. 230.

*Annotations:—Refd. Stinchhouse v. Elliott* (1795), 6 Term Rep. 315; *Lawrence v. Hedger* (1810), 3 Taunt. 14; *Beckwith v. Philby* (1827), 9 Dow. & Ry. K. B. 487; *Davis v. Russell* (1829), 5 Bing. 354.

**1556. ————.]**—Watchmen & beadles have authority at common law to arrest & detain in prison for examination persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed.—*LAWRENCE v. HEDGER* (1810), 3 Taunt. 14; 128 E. R. 6.

*Annotations:—Consd. Buckley v. Gross* (1863), 3 B. & S. 566. *Refd. Beckwith v. Philby* (1827), 9 Dow. & Ry. K. B. 487.

**1557. ————.]**—A peace officer may justify taking a person into custody charged with a felony, although no felony was committed.—*HOBBS v. BRANSCOMB* (1813), 3 Camp. 420, N. P.

*Annotations:—Refd. Beckwith v. Philby* (1827), 9 Dow. & Ry. K. B. 487; *Timothy v. Simpson* (1835), 1 Cr. M. & R. 757; *Baynes v. Brewster* (1841), 2 Q. B. 375.

**1558. ————.]**—*BECKWITH v. PHILBY*, No. 1544, *ante*.

**1559. ————.]**—A woman died & it was rumoured that her husband had poisoned her, & a great crowd was collected in front of his house. The constable of the parish, without any warrant, took him into custody & conveyed him before a magistrate, who detained him till medical men had reported the cause of death, & then discharged him. In an action for false imprisonment:—*Held: if the jury were of opinion that the constable had reasonable ground of suspicion to justify the apprehension, the action could not be maintained.*—*NICHOLSON v. HARDWICK* (1833), 5 C. & P. 495; 1 Nev. & M. M. C. 351.

**1560. ————.]**—A policeman has no right to apprehend a person on suspicion of having stolen growing potatoes out of a garden, as the law does not regard such an offence as a felony, unless the person has been previously fined before a magistrate for a similar offence. It is different if potatoes are stolen from a place of deposit, such

as a storehouse or warehouse.—*R. v. PHELPS* (1841), Car. & M. 180; 2 Mood. C. C. 240, C. C. R. *Annotations:—Mentd. R. v. Boden* (1844), 1 Car. & Kir. 395; *R. v. Bird* (1851), 5 Cox, C. C. 20.

**1561. ————.]**—Under the common law if a felony were actually committed a person might be arrested without a warrant by any one, if he were reasonably suspected of having committed the felony, & a constable could go farther. If he had reasonable ground for supposing that a felony had been committed, & reasonable ground for supposing that a certain person had committed the supposed felony, he might arrest him, though no felony had actually been committed (*BLACKBURN, J.*).—*HADLEY v. PERKS* (1866), L. R. 1 Q. B. 444; 7 B. & S. 375; 35 L. J. M. C. 177; 14 L. T. 325; 30 J. P. 485; 12 Jur. N. S. 662; 14 W. R. 730.

*Annotation:—Refd. R. v. Whitley* (1867), 31 J. P. 565.

**1562. ———— Felony committed abroad.]**—*Seemle: a constable would be justified in arresting without a warrant a fugitive from a foreign country on reasonable grounds of suspicion that he has committed a crime which would be a felony if committed in the United Kingdom.*—*R.*

(1882), 9 Q. B. D. 701; 53 L. J. M. C. 74; 47 L. T. 630; 31 W. R. 60; 15 Cox, C. C. 180, C. A.

*Annotations:—Refd. Ex p. Piot* (1883), 48 L. T. 120; *Ex p. Woodhall* (1888), 20 Q. B. D. 832. *Mentd. R. v. Rudge* (1886), 53 L. T. 851.

**1563. ———— On charge made by thief—Arrest of receiver.]**—*Seemle: a constable is not justified in apprehending & imprisoning a person, on suspicion of having received stolen goods, on the mere assertion of one of the principal felons.*—*ISAACS v. BRAND* (1817), 2 Stark. 167, N. P.

*Annotation:—Consd. Hogg v. Ward* (1858), 3 H. & N. 417.

**1564. ———— On a charge made by private person.]**—If a constable, who makes a search in a house for stolen goods under a justice's warrant, pulls the clothes off the bed of a woman then in her bed, to search under her smock for the goods, this makes all the proceedings in the house illegal from the beginning.

If a search warrant for stolen goods is executed in pltf.'s house & no stolen goods are found there, but the owner of the stolen goods charges pltf. with having taken them & requests the constable to arrest him, the arrest is good, so far as the constable is concerned, although he might in his discretion have refused to arrest pltf.—*WARD'S CASE* (1636), Clay. 44.

*Annotation:—Refd. Samuel v. Payne* (1780), 1 Doug. K. B. 359.

**1555 i. By police officer—On reasonable suspicion.]**—A constable is justified in proceeding to arrest a man when he sees him under circumstances which naturally lead him to entertain the belief that he is either about to commit or has committed a felony.—*R. v. MORRISON* (1889), 10 N. S. W. L. R. 197.—*AUS.*

**1555 ii. ————.]**—Prisoner, a convicted felon, escaped from gaol & eluded pursuit for two months, when he was arrested without a warrant, on a charge of escaping from gaol:—*Held: at common law any private person or constable may arrest without warrant a convicted felon who is legally at large.*—*R. v. RYAN* (1890), 11 N. S. W. L. R. 171.—*AUS.*

**1555 iii. ————.]**—A constable may arrest, if he has reasonable & probable cause to suspect, even from the information of another, that a felony has been committed.—*BELL v. ALLEN* (1837), 2 Jo. Ex. Ir. 448, 450.—*IR.*

**1555 iv. ————.]**—Knowledge by a police constable that a warrant has been granted by a duly authorised magistrate for the arrest of a par-

ticular person for felony, constitutes sufficient ground of reasonable suspicion that a felony has been committed by that person so as to authorise, or it may be to render it the duty of, such constable to arrest him although the particular felony be not described or be misdirected by telegram, & if the warrant has been granted at a distance the constable is justified in bringing the person in custody before a justice having jurisdiction in the place at which the arrest was made & in obtaining a reasonable remand until the warrant shall arrive & be backed in the manner directed by 14 & 15 Vict. c. 93.—*CHEAGH v. GAMBLE* (1888), 24 L. R. Ir. 458.—*IR.*

**1562 i. ———— Felony committed abroad.]**—A reasonable suspicion that a person has in a foreign country or in another part of a British Dominion, committed an offence which if committed in Victoria would be a felony does not justify a constable in arresting such person in Victoria without a warrant, & is therefore not a defence to an action by such person against constable for false imprisonment.—*BROWN v. LIZARS*, [1905] 2 C. L. R.

837.—*AUS.*

**1562 ii. ————.]**—To a declaration for imprisoning pltf., deft. pleaded that when he made the arrest he was a peace officer for the county, & as such was informed that pltf. had committed a felony, & was then a fugitive from justice therefore; that, as he lawfully might, he arrested pltf., & immediately caused him to be brought before the nearest justice to answer the said felony, & that pltf. was detained in the police station by said magistrate, which is the trespass complained of:—*Held: plea good.*—*ROGERS v. VAN VALKENBURGH* (1860), 20 U. C. R. 218, 220.—*CAN.*

**1562 iii. ————.]**—A person who had been convicted in Dundee on an indictment charging him with falsehood, fraud, & wilful imposition, brought a suspension on the ground, *inter alia*, that he had been arrested in England & brought to Scotland without a warrant. He did not state this objection before the case went to trial:—*Held: the objection came too late.*—*LOYD v. H.M. ADVOCATE* (1899), 1 F. (Ct. of Sess.) 31.—*SCOT.*



**1565.** ———.]—**WILLIAMS v. DAWSON** (1788), cited in 3 Camp. at p. 421, N. P.

**1566.** ———.]—In an action of trespass for false imprisonment, a constable may justify under the general issue, though he acted without a warrant, provided there were a reasonable charge of felony made, although he afterwards discharges prisoner without taking him before a magistrate, & although it should turn out in fact that no felony was committed. But a private individual, who makes the charge, & puts the constable in motion, cannot justify under the general issue. He must plead the special circumstances, by way of justification, in order that it may be seen whether his suspicions were reasonable.—**M'CLOUGHAN v. CLAYTON** (1816), Holt, N. P. 478, N. P.

**1567.** ———.]—Killing an officer will be murder, though he has no warrant & was not present when the felony was committed, but takes the party on a charge only, & though that charge does not, in terms, specify all the particulars necessary to constitute the felony.—**R. v. FORD** (1817), Russ. & Ry. 329, C. C. R.

**1568.** ———.]—A horse of A.'s having been taken out of A.'s close without his consent, & having been found in pltf.'s stable, & A. having grounds to believe, & believing that the horse had been stolen by pltf., gave charge of pltf. to a constable, & requested him to take pltf. into custody, to be examined by a justice touching the offence; whereupon the constable & A., in his aid & by his command, laid their hands on pltf., who resisted, & assaulted the constable & A., whereupon they defended themselves, & took pltf. & conducted him to a police office:—**Held**: no action of trespass for false imprisonment would lie.—**HEDGES v. CHAPMAN** (1825), 2 Bing. 523; 10 Moore, C. P. 143; 3 L. J. O. S. C. P. 91; 130 E. R. 408.

**1569.** ———.]—**COWLES v. DUNBAR & CALLOW**, No. 1542, ante.

**1570.** ———.]—Deft., a constable, being told by A. that pltf. had robbed her, & the information being countenanced by a supposed intercepted letter which was shown to him, apprehended pltf., a respectable inhabitant of C., at her lodgings, & took her from her bed at night to prison. The charge proving unfounded, pltf. sued him for the false imprisonment, & the judge having directed the jury to consider whether the foregoing circumstances afforded deft. reasonable ground to suppose pltf. had committed a felony, & whether, in his situation, they would have acted as he had done:—**Held**: this direction was substantially correct.—**DAVIS v. RUSSELL** (1829), 5 Bing. 354; 2 Moo. & P. 590; 7 L. J. O. S. M. C. 52; 130 E. R. 1098.

**Annotations**:—**Refd.** West v. Baxendale (1850), 9 C. B. 141; Griffin v. Coleman (1859), 4 H. & N. 265; Hales v. Marks (1861), 7 H. & N. 56. **Mentd.** Wilans v. Taylor (1829), 6 Bing. 183.

**1571.** ———.]—A constable is not justified in arresting a supposed offender for felony, without warrant, at the instigation of a third party, unless there exists a reasonable charge & suspicion.—**HOGG v. WARD** (1858), 3 H. & N. 417; 27 L. J. Ex. 443; 31 L. T. O. S. 184; 22 J. P. 626; 4 Jur. N. S. 885; 6 W. R. 595; 157 E. R. 533.

**Annotations**:—**Consd.** Neville v. Kelly (1862), 12 C. B. N. S. 740. **Mentd.** Coleman v. Griffin (1859), 32 L. T. O. S. 333.

**1572.** ——— **On information of private person.**]—**MEERING v. GRAHAME-WHITE AVIATION CO., LTD.**, No. 1739, post.

**1573. By magistrate—Felony committed in his presence.**]—If an affray be made in the presence of a justice of peace, or if a felon be in his presence, he may arrest him, & detain him *ex officio* till he can make a warrant to send him to gaol, but then the warrant must be in writing to the gaoler.—**R. v. SANDFORD** (1647), 1 Hale, P. C. 587; 2 Hale, P. C. 122.

**Annotations**:—**Refd.** Derecourt v. Corbishley (1855), 24 L. J. Q. B. 313. **Mentd.** Mayhew v. Locke (1816), 2 Marsh. 377; R. v. Bartlett (1843), 12 L. J. M. C. 127; Watson v. Bodell (1845), 14 L. J. Ex. 281; R. v. Allen (1867), 17 L. T. 222.

(c) *For Breach of the Peace.*

i. *In General.*

**1574. By private person—Arrest of nightwalkers.**—**WILLOW'S CASE** (1626), Lat. 173; 82 E. R. 331; *sub nom.* **WHEELHOUSE'S CASE**, Benl. 199.

**1575.** ——— **Breach of the peace must be in progress—Or about to be renewed.**]—A private person is not justified in arresting, or giving in charge of a policeman, without a warrant, a party who has been engaged in an affray, unless the affray is still continuing, or there is reasonable ground for apprehending that he intends to renew it.—**PRICE v. SEELEY** (1843), 10 Cl. & Fin. 28; 8 E. R. 651, H. L.

**1576.** ———.]—In an action for false imprisonment the plea stated that pltf. committed a breach of the peace by violently knocking for a long time at the door of deft.'s dwelling-house, & that pltf. threatened to continue such knocking until a certain book was delivered up to him; that deft. then sent for a constable, & pltf., having ascertained this, ceased knocking & ran off, when deft., with the assistance of the constable, immediately pursued pltf. & overtook him near the dwelling-house, whereupon deft., in order to preserve the peace & prevent pltf. from continuing the disturbance, gave him in charge to the constable:—**Held**: plea was bad, *non obstante veredicto*, as it did not show either that the breach of the peace was continuing, or show any certain facts from which a renewal of the breach was to be apprehended.—**BAYNES v. BREWSTER** (1841), 2 Q. B. 375; 1 Gal. & Dav. 669; 11 L. J. M. C. 5; 5 J. P. 799; 6 Jur. 392; 114 E. R. 149.

**Annotation**:—**Refd.** Derecourt v. Corbishley (1855), 5 E. & B. 188.

**1577.** ———.]—A party who has witnessed an affray is justified in giving one of the affrayers in charge to a constable on the very spot where it was committed, & whilst there is a reasonable apprehension of its continuance.—**TIMOTHY v. SIMPSON** (1835), 1 Cr. M. & R. 757; 3 Nev. & M. M. C. 127; 5 Tyr. 244; 4 L. J. M. C. 73; 4 L. J. Ex. 81; 149 E. R. 1285.

**Annotations**:—**Consd.** Baynes v. Brewster (1841), 2 Q. B. 375. **Apprvd.** Price v. Seeley (1843), 10 Cl. & Fin. 28. **Distd.** R. v. Walker (1854), 5 Cox, C. C. 371. **Refd.** Cohen v. Huskisson (1837), Murp. & H. 150; R. v. Light (1857), 27 L. J. M. C. 1; Trebeck v. Croudace, [1918] 1 K. B. 158. **Mentd.** Baillie v. Kell (1838), 4 Bing. N. C. 638.

**1578.** ——— **Act done must amount to a breach of the peace.**]—Proof of annoyance & disturbance by a person present at a meeting, such as crying "hear, hear," & putting questions to a speaker, & making observations on his statements, will not justify the chairman of the meeting in giving such person in charge to the police; but, to justify such a course of proceeding, it must be shown that what was done amounted to a breach of the peace.—**WOODING v. OXLEY** (1839), 9 C. & P. 1, N. P.

**By police officer—Breach of the peace must**

offender & take him to a peace officer. **v. CLARK** (1846), 3 U. C. R. 151.—**CAN.**

**PART V. SECT. 1. SUB-SECT. 2.—**  
E. (a) 1.

**1577 l. By private person—Breach of**

*the peace must be in progress.*]—A man assaulted by a person disturbing the peace in a public street may arrest the

*Sect. 1.—Securing attendance of accused person:*  
*Sect. 2, E. (c) i. & ii.]*

**be in view.]**—ANON. (1593), Poph. 12; 79 E. R. 1135.

*Annotation:—Mentd. R. v. Huggins (1731), 2 Ld. Raym. 1574.*

**1580. ——— Unless felony is likely to ensue.]**

—A constable cannot arrest for an affray out of his view without warrant, except felony is likely to ensue.—SHARROCK *v.* HANNEMER (1595), Cro. Eliz. 375; 78 E. R. 622.

*Annotations:—Refd. R. v. Wyatt (1705), 2 Ld. Raym. 1189; R. v. Tooley (1709), 2 Ld. Raym. 1296; Timothy v. Simpson (1835), 1 Cr. M. & R. 757.*

**1581. ———.]**—A constable is not justified in taking a person into custody for a mere assault, unless he is present at the time, & interposes with a view to prevent a breach of the peace. But if an affray has happened & a wound has been given, which there is reasonable ground to suppose may end in a felony, the constable may take the party who has given such wound into custody without a warrant.—COUPEY *v.* HENLEY (1797), 2 Esp. 539, N. P.

*Annotations:—Refd. Butler v. Ford (1833), 2 L. J. M. C. 109; Timothy v. Simpson (1835), 1 Cr. M. & R. 757; Cohen v. Huskisson (1837), Murp. & H. 150.*

**1582. ——— Affray continuing until arrest.]**  
 —To justify a constable in apprehending a party without warrant for an affray, it is essential that the party should have been engaged in the affray, & that the constable should have had view of the affray, while the party was so engaged in it, & that the affray was still continuing at the time of the apprehension.—COOK *v.* NETHERCOTE (1835), 6 C. & P. 741, N. P.

(1852). 1 E. & B. 11.

**1583. ———.]**—If a breach of the peace is in the act of being committed in the presence of a constable, that constable is not only justified but bound to prevent it or to put a stop to it if it has begun & he is bound to do so without a warrant (ALDERSON, B.).—R. v. BROWN (1841), Car. & M. 314; 4 State Tr. N. S. App. A. 1369.

*Annotation:—Mentd. R. v. Coney (1882), 8 Q. B. D. 534.*

**1584. ———.]**—Where a plea stated that pltf., with force & arms, entered into a message in the possession of W., & expelled W., in view of a constable, & within the constable's district, & "thereupon" deft. gave pltf. in charge of the constable for the offence, & directed him to take pltf. into custody & convey him before a magistrate to answer for the offence, & the constable took him into custody, & imprisoned him for a reasonable time at the police station:—*Held*: this was a good plea. The word "thereupon" was to be taken as equivalent to "then & there," so that the constable appeared to have arrested at the time of a breach of the peace committed in his sight, which he had authority to do. Deft. was justified in directing the constable to perform his duty.—DERECOURT *v.* CORBISHLEY (1855), 5 E. & B. 188; 24 L. J. Q. B. 313; 25 L. T. O. S. 157; 19 J. P. 693; 1 Jur. N. S. 870; 3 W. R. 513; 3 C. L. R. 1359; 119 E. R. 451.

**1585. ——— To avoid occurrence of breach of peace.]**—KEALE *v.* CARTER (1590), Moore, K. B. 284; 72 E. R. 582.

**q. ——— To avoid occurrence of breach of the peace.]**—A private citizen has the right to arrest, under the common law, any person as to whom there is reasonable apprehension that he would commit a breach of the peace.—*Re RAMASWAMI AYYAR* (1921), 1 L. R. 41 Mad. 913.—IND.

**1585 i. By police officer.—To avoid occurrence of breach of peace.]**—AL-

though it is the duty of a police officer to take all reasonable steps to prevent a breach of the peace, including, where the circumstances demand it, the arrest & detention of an innocent person, such arrest & detention is undertaken at the peril of the officer responsible, & it is no defence to an action for false imprisonment, at the instance of an innocent person so arrested & detained, that the officer bona

**1586. ——— To avoid renewal of breach of peace.]**  
 Deft. was convicted upon an indictment charging him with assaulting a constable in the execution of his duty. It appeared that the constable whilst standing outside deft.'s house saw him take up a shovel & hold it in a threatening attitude over his wife's head, & heard him at the same time say, "If it was not for the policeman outside I would split your head open"; that in about twenty minutes afterwards deft. left his house, after saying that he would leave his wife altogether, & was taken into custody by the constable, who had no warrant, when he had proceeded a short distance in the direction of his father's residence; & that upon being so taken into custody deft. resisted & assaulted the constable:—*Held*: the constable was justified in apprehending deft., & the conviction was right.

The policeman himself witnessed what in point of law amounted to an assault, for he saw prisoner hold a shovel over his wife's head, & that act was accompanied by violent language & threats. No long period elapsed between this & the taking of the prisoner by the policeman, prisoner continuing in all probability in the same state of mind (COCKBURN, C.J.).—R. v. LIGHT (1857), Dears. & B. 332; 27 L. J. M. C. 1; 30 L. T. O. S. 137; 21 J. P. 758; 3 Jur. N. S. 1130; 6 W. R. 42; 7 Cox, C. C. 389, C. C. R.

**1587. ——— Arrest of person opposing peace officer in the execution of his duty.]**—SHEFFELD'S CASE (1634), Clay. 10.

**1588. ———.]**—Prisoner assaulted a police constable in the execution of his duty. The constable went for assistance, & after an interval of an hour returned with three other constables, when he found that prisoner had retired into his house, the door of which was closed & fastened. After another interval of fifteen minutes the constables forced open the door, entered, & arrested prisoner, who wounded one of them in resisting his apprehension:—*Held*: as there was no danger of any renewal of the original assault, & as the facts of the case did not constitute a fresh pursuit, the arrest was illegal.—R. v. MARSDEN (1868), L. R. 1 C. C. R. 131; 37 L. J. M. C. 80; 18 L. T. 298; 32 J. P. 436; 16 W. R. 711; 11 Cox, C. C. 90, C. C. R.

*Annotation:—Refd. Codd v. Cabe (1876), 1 Ex. D. 352.*

**1589. ———.]**—If when a man is apprehended, & in the custody of officers of justice, a third person espouses his cause & encourages prisoner to resist, the officers may imprison such third person.—WHITE *v.* EDMUNDS (1791), Peake, 123, N. P.

**1590. ———.]**—LEVY *v.* EDWARDS, No. 1505, ante.

**1591. By justice of the peace.—For breach of the peace in his presence.]**—ANON. (1501), Keil. 41; 72 E. R. 198.

**1592. ———.]**—R. v. SANDFORD, No. 1573, ante.

## ii. What Amounts to Breach of the Peace.

**1593. Acts amounting to breach of the peace.—Obstruction to sheriff at election.]**—If, at a county ct. held for the election of knights of the shire, a

felon believed him to be in danger at the hands of wrongdoers, & accordingly detained him for his own protection. CONNORS *v.* PEARSON, M'LAUGHLIN *v.* SCOTT, [1921] 2 I. R. 51, 61, 75.—IR.

**PART V. SECT. 1. SUB-SECT. 2.—E. (c) ii.**

**r. Acts amounting to a breach of the peace.—Keeping common gaming house.]**  
 —Keeping a common gaming house



freeholder interrupt the proceedings, by making a great noise & disturbance, the sheriff may order him to be taken into custody, & carried before a justice of the peace.—*SPILSBURY v. MICKLETHWAITE* (1808), 1 Taunt. 146; 127 E. R. 788.

*Annotations*:—*Refd.* *Recco v. Taylor* (1835), 4 Nev. & M. K. B. 469. *Mentd.* *Baillie v. Kell* (1838), 4 Bing. N. C. 638; *Lush v. Russell* (1850), 5 Exch. 203.

**1594. — Making a disturbance—Disturbance by several in theatre—Assault committed by one.**—If three persons be told on entering a theatre that there is room, when in fact there is not, their proper course is to leave the theatre, & demand the return of their money. Such persons are not justified in getting into a private box in the theatre, & if they do, the proprietor may remove them, using no more force than is necessary. If, in going out of the theatre, one of them strike a servant of the proprietor's in the presence of a constable, such constable will be justified in taking all the three persons into custody, if the jury shall be satisfied that they were acting with a common purpose.—*LEWIS v. ARNOLD* (1830), 4 C. & P. 354, N. P.

*Annotation*:—*Mentd.* *Said v. Butt*, [1920] 3 K. B. 497.

**1595. — & obstructing public way.**—It is not every noise, nor every circumstance alarming to a very timid person which will justify giving charge of the party who misconducts himself. But when a man is standing in the highway opposite to another's house, making a disturbance, exciting others to disturbance & riot, & obstructing the public way, these are facts which may well amount to such a breach of the peace as justifies an arrest (*ERLE, J.*).—*WEBSTER v. WATTS* (1847), 11 Q. B. 311; 17 L. J. Q. B. 73; 10 L. T. O. S. 226; 12 J. P. 279; 12 Jur. 243; 116 E. R. 492.

**1596. — Refusal to leave house—Resisting expulsion—Disturbance causing alarm.**—If a person conducts himself in a disorderly manner in a public-house, & the landlord requests him to depart, & he refuse to do so, the landlord is justified in laying hands on him to put him out, & if, while the landlord has hold of him to put him out, the person lays hands on the landlord, this is an assault, & if it is seen by a peace-officer, he is justified in taking the person into custody. So, if a person, without committing any assault, make such noise or disturbance in a public-house as would create alarm, this would be such a breach of the peace as would not only justify the landlord in turning the person out of the house, but would justify the landlord in immediately giving the person into the custody of a peace-officer, provided that this had occurred in the presence of the officer.—*HOWELL v. JACKSON* (1834), 6 C. & P. 723; 2 Nev. & M. M. C. 627, N. P.

*Annotation*:—*Refd.* *Sealey v. Tandy* (1901), 85 L. T. 459.

**1597. — Attempt to enter house—Disturbance in street.**—To a declaration in trespass for an assault & false imprisonment, deft. pleaded that pltf. attempted forcibly to enter his public-house without the leave of deft., whereupon he, deft., resisted such entrance; & because pltf. created

a disturbance in the street, by which means a mob was assembled & deft.'s business interrupted, & his customers annoyed, & because pltf. threatened to continue such violent conduct, & to renew his attempts to get into the house, & because no request of deft. to pltf. to abstain from his attempts was complied with, deft., in order to preserve the peace, & to secure himself from a renewal of such attempts, gave him in charge to a constable:—*Held*: the plea was good after verdict.—*INGLE v. BELL* (1836), 1 M. & W. 516; Tyr. & Gr. 801; 5 L. J. M. C. 85; 150 E. R. 539.

*Annotation*:—*Consd.* *Cohen v. Huskisson* (1837), 2 M. & W. 477.

**1598. — Disturbance in shop—Inflammatory speech in street.**—In trespass for assault & false imprisonment, the evidence was, that pltf., after abusing deft. in his shop, went into the street outside, & there continued to abuse him, that a crowd of a hundred persons was collected, & the street much obstructed, that deft. sent for the police, who, on pltf.'s refusing to go away, took him to the station-house:—*Held*: these facts amounted to a breach of the peace, & justified deft. in directing the imprisonment.—*COHEN v. HUSKISSON* (1837), 2 M. & W. 477; Murp. & H. 150; 6 L. J. M. C. 133; 1 Jur. 559; 150 E. R. 845.

*Annotation*:—*Folld.* *Webster v. Watts* (1847), 11 Q. B. 311.

**1599. Acts not amounting to breach of the peace—Disorderly conduct in street—Limited to words.**—Using loud words in the street, though it is disorderly, is not an offence for which a party should be taken into custody, & if a person is so taken, an action of false imprisonment will lie.—*HARDY v. MURPHY* (1795), 1 Esp. 294, N. P.

**1600. — Committing nuisance.**—If a party be turning towards the wall in a street at night, for a particular occasion, a watchman is not justified in collaring him, to prevent his so doing.—*BOOTH v. HANLEY* (1826), 2 C. & P. 288, N. P.

**1601. — Making a disturbance in house—Unjustified charge of felony.**—Pltf. having entered a public-house after all the doors had been closed for the night, & having conducted himself with insolence, deft. sent for a constable, & charging pltf. with a felony, he was detained in custody two days. Pltf. having recovered in an action of trespass for this imprisonment, the ct. refused to set aside the verdict & grant a new trial, holding deft. was not justified in charging pltf. with a felony.—*ROSE v. WILSON* (1823), 1 Bing. 353; 8 Moore, C. P. 363; 2 L. J. O. S. C. P. 14; 130 E. R. 142.

**1602. — Refusal to leave house.**—A. went to the house of B. to demand a debt, which B. said he could not pay. Angry words passed, & B. told A. to leave his house. This A. refused to do unless he was paid. Upon this B. sent for a police officer, & had A. locked up in the watch-house:—*Held*: if A. was making a disturbance, B. would have been justified in turning him out of his house, but he was not justified in imprisoning

is a breach of the peace.—*Ex p. MOY SHING* (1904), 4 S. R. N. S. W. 480; 21 N. S. W. W. N. 189.—*AUS.*

**s. — Obstruction of peace officer.**—By Criminal Code, s. 30, "Every peace officer who, on reasonable & probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, & who on reasonable &

probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not."—*Held*: as an officer arresting without warrant might be called upon to decide whether or not there were reasonable & probable grounds for the arrest, the section did not apply to an officer arresting for an offence when he is himself the victim & the offence had been already com-

mitted & the offender is not being freshly pursued.—*R. v. BELYEA* (1915), 43 N. B. R. 375.—*CAN.*

**t. Acts not amounting to a breach of the peace—Drunkenness in own house.**—A person cannot legally be arrested for drunkenness in his own house, even at the request of his own family, unless he is creating a disturbance of the peace.—*R. v. BLAKELEY* (1875), 6 P. R. 244.—*CAN.*

*Secd 1.—Securing attendance of accused person:*

him.—*GREEN v. BARTRAM* (1830), 4 C. & P. 308, N. P.

**1603.** ———.]—To trespass for an assault & false imprisonment, deft. pleaded that he was in lawful possession of a house, & that pltf. was unlawfully therein, & had been requested to depart, but had refused, whereupon deft. gently laid his hands on him to remove him, whereupon pltf. assaulted him in the presence of a policeman, wherefore he caused him to be taken to a police office. Deft. proved all the matters of the plea, except the assault by pltf.:—*Held*: pltf. was entitled to recover damages for the imprisonment.—*LEECE v. TAYLOR* (1835), 1 Har. & W. 15; 4 Nev. & M. K. B. 469; 3 Nev. & M. M. C. 35; 4 L. J. K. B. 74.

*Annotation*:—*Mentd.* *Penn v. Ward* (1835), 2 Cr. M. & R. 338.

**1604.** ———.]—*Semble*: in an action for false imprisonment, a plea that deft. was possessed of a house, & that pltf. was there making a great disturbance, & refused to depart when requested, & was in great heat & fury, ready & desirous to make an affray, & cause a breach of the peace, whereupon deft. gave pltf. into custody, is bad.—*WHEELER v. WHITING* (1840), 9 C. & P. 262.

**1605.** ———.]—Pltf. having seen his wife & a man go into a certain house, obtained access thereto, & not finding the man, declared he would remain there until he saw him. Deft., who was lodging there, being much annoyed by pltf., who continued to remain outside the door of his apartments, after urging him in vain to leave, sent for a policeman to remove him, & on his declining to interfere unless he was given in charge, deft. gave him in charge, & he was conveyed to the police-station, at which place deft. attended & declined to make any charge. Upon an action brought for an assault & false imprisonment:—*Held*: although pltf. was committing a civil trespass, & so might have been removed from the house, yet as he was not actually committing a breach of the peace, his arrest & detention were unlawful.—*JORDAN v. GIBBON* (1863), 8 L. T. 391.

**1606.** ———.]—*Attempt to enter house.*—In an action for false imprisonment, the plea stated, that pltf., with force & arms, etc., came to the door of deft.'s dwelling-house, & with great force & violence, attempted to enter it, & with great force & violence, wilfully rang the bell, etc., & then made a great noise & disturbance, etc., against the peace of our Lady the Queen, etc., whereupon deft. in order to preserve the peace & restore good order in his dwelling-house gave him in charge to a constable. On special demurrer:—*Held*: the plea was bad, as not showing that any breach of the peace had been committed, or was apprehended.—*GRANT v. MOSER* (1843), 5 Man. & G. 123; 6 Scott, N. R. 46; 12 L. J. C. P. 146; 7 Jur. 854; 134 E. R. 507.

*Threat to break windows.*

—A. went to a house at night, demanding to see the servant. He was told to depart, & would not. A constable was sent for, & A. went from the house to the garden. When the constable arrived, A. said that if a light appeared at the windows he would break them, upon which the constable took him into custody:—*Held*: the constable was not justified in so doing.—*R. v. BRIGHT* (1830), 4 C. & P. 387.

**1608.** ———.]—*Assault not sufficient to justify*

*criminal charge.*—In order to justify a metropolitan policeman in taking a party into custody for an assault or battery committed in his view, the assault or battery must be such as would justify a criminal charge.—*COWARD v. BADDELEY* (1859), 4 H. & N. 478; 28 L. J. Ex. 260; 33 L. T. O. S. 125; 23 J. P. 296; 5 Jur. N. S. 414; 7 W. R. 466; 157 E. R. 927.

*(d) By Servant in Protection of Master's Property.*

**1609.** *Offence committed in view of servant.*—*R. v. CURRAN*, No. 1530, *ante*.

**1610.** *Scope of servant's authority.*—A clerk in the service of a railway co., whose duty it is to issue tickets to passengers, & receive the money, & keep it in a till under his charge, has no implied authority from the co. to give into custody a person who, he suspects, has attempted to rob the till, after the attempt has ceased, as such arrest could not be necessary for the protection of the co.'s property.—*ALLEN v. LONDON & SOUTH WESTERN RY. CO.* (1870), L. R. 6 Q. B. 65; 40 L. J. Q. B. 55; 23 L. T. 612; 35 J. P. 308; 19 W. R. 127; 11 Cox, C. C. 621.

*Annotations*:—*Consd.* *Bank of New South Wales v. Owston* (1879), 4 App. Cas. 270; *Abrahams v. Deakin*, [1891] 1 Q. B. 516; *Stevens v. Hinshelwood* (1891), 55 J. P. 341; *Knight v. North Metropolitan Tram. Co.* (1898), 78 L. T. 227. *Refd.* *Mulkern v. Met. Ry.* (1892), 8 T. L. R. 232; *Radley v. L. C. C.* (1913), 109 L. T. 162.

**1611.** ———.]—The arrest, & still less the prosecution, of offenders is not within the ordinary routine of banking business & therefore not within the ordinary scope of a bank manager's authority. Evidence, accordingly, is required to show that such arrest or prosecution is within the scope of the duties & class of acts such manager is authorised to perform. That authority may be general, or it may be special & derived from the exigency of the particular occasion on which it is exercised.—*BANK OF NEW SOUTH WALES v. OWSTON* (1879), 4 App. Cas. 270; 48 L. J. P. C. 25; 40 L. T. 500; 43 J. P. 476; 14 Cox, C. C. 267, P. C.

*Annotations*:—*Apld.* *Abrahams v. Deakin*, [1891] 1 Q. B. 516. *Consd.* *Hanson v. Waller*, [1901] 1 K. B. 390. *Refd.* *Ashton v. Spiers & Pond* (1893), 9 T. L. R. 606. *Mentd.* *Edwards v. Mid. Ry.* (1881), 45 J. P. 374; *Dyer v. Munday* (1895), 61 L. J. Q. B. 448; *Cornford v. Carlton Bank*, [1899] 1 Q. B. 392; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244.

**1612.** *Not when property is no longer in danger.*—Pltf. & a friend went into deft.'s public-house, & pltf.'s friend tendered in payment for some refreshment which they had a German gold ten-mark piece by mistake for a half-sovereign, & asked the barman for change. The barman went to fetch the change; but before giving it he observed that the coin was a foreign one, & took it back to pltf.'s friend, who gave him a half-sovereign instead of it, & the barman thereupon gave him the change. Pltf. & his friend then left the house. A person who was acting as manager at the bar in the absence of deft. followed them into the street, & gave them into the custody of a policeman on a charge of attempting to pass bad money:—*Held*: the manager had no implied authority by reason of his position to arrest pltf., inasmuch as his master's property was no longer in any danger, & the arrest was made only for the purpose of vindicating the law by punishing pltf. for a criminal offence which he was supposed to have already committed.—*ABRAHAM v. DEAKIN*, [1891] 1 Q. B. 516; 60 L. J. Q. B. 238; 63 L. T. 690; 55 J. P. 212; 39 W. R. 183; 7 T. L. R. 117, C. A.

*Annotations*:—*Follid.* *Stedman v. Baker* (1896), 12 T. L. R. 451. *Consd.* *Radley v. L. C. C.* (1913), 109 L. T. 162. *Refd.* *Hanson v. Waller*, [1901] 1 K. B. 390.

**1613.** —.]—A servant has only an implied authority to give a person into custody when it is necessary to take such a step to protect his master's property.—**STEVENS v. HINSHELWOOD** (1891), 55 J. P. 341, C. A.

**1614.** —.]—A person in the position of manager [of a restaurant] has no right to give a customer into custody because he thought that the customer had defrauded his master. He has no implied authority to give any one into custody on behalf of his master merely for having committed an offence (LORD Esher, M.R.).—**STEDMAN v. BAKER & Co.** (1896), 12 T. L. R. 451, C. A.  
*Annotation:—***Refd.** **Hanson v. Waller**, [1901] 1 K. B. 390.

**1615.** —.]—**JONES v. DUCK** (1900), *Times*, Mar. 16.

*Annotation:—***Consd.** **Hanson v. Waller**, [1901] 1 K. B. 390.

**1616.** —.]—Pltf. was head barman & cellarman in a public-house of which deft. was owner; deft. took no part in the management of the house, though he visited it nearly every day, the manager on behalf of deft. being one M., who had the general management of the house. While pltf. was superintending the operation of bringing mineral waters into the cellar, the manager, acting under the mistaken impression that whisky was being removed from the cellar, sent for a policeman & gave pltf. into custody on a charge of stealing whisky. Before reaching the police station the manager admitted that he had made a mistake, & on arrival at the police station pltf. was released by the inspector:—**Held**: there was no evidence that the manager had an implied authority from deft. to give pltf. into custody, the act not being reasonably necessary for the protection of his master's property.—**HANSON v. WALLER**, [1901] 1 K. B. 390; 70 L. J. Q. B. 231; 84 L. T. 91; 49 W. R. 445; 17 T. L. R. 162; 45 Sol. Jo. 166, D. C.

(c) *Statutory Provisions.*

i. *In General.*

**1617. Arrest by police officer—Metropolitan Police Act, 1829 (c. 44), s. 7.**—A police constable is not justified under sect. 7 of the above Act in laying hold of, pushing along the highway, & ordering to be off, a person found by him conversing in a crowd with another, merely because the person with whom he happens to be conversing is known to be a reputed thief.—**STOCKEN v. CARTER** (1831), 4 C. & P. 477; 2 Man. & Ry. M. C. 498, N. P.

**1618.** — **Metropolitan Police Act, 1839 (c. 47), ss. 54, 63.**—In trespass by A. against B. for false imprisonment, B. justified, on the ground of A. having wilfully & without excuse, within view of the constable who apprehended her, annoyed & disturbed deft. & his family by knocking & ringing at his door:—**Held**: to support this plea under sects. 54 & 63 of the above Act, it was necessary to prove the offence to have been committed within view of the constable.—**SIMMONS v. MILLINGEN** (1846), 2

C. B. 524; 15 L. J. C. P. 102; 6 L. T. O. S. 320; 10 Jur. 224; 135 E. R. 1051.

**1619.** — **City of London Police Act, 1839 (c. xciv.).**—A police constable of the City of London has no power, under the above Act, to take a person into custody without warrant, merely on suspicion that he has committed a misdemeanour.—**BOWDITCH v. BALCHIN** (1850), 5 Exch. 378; 4 New Mag. Cas. 118; 19 L. J. Ex. 337; 15 L. T. O. S. 232; 14 J. P. 449; 155 E. R. 165.

**1620.** — **Army Act, 1881 (c. 58), s. 156 (2).**—Deft., a sergeant of police, found pltf. in possession of a soldier's regimental overcoat & apprehended him without a warrant. Pltf. was in custody for fifteen hours before being released on bail. He was subsequently convicted before a ct. of summary jurisdiction under sect. 156 (1) (a) of the above Act of buying the coat from a soldier, & fined:—**Held**: (1) sect. 156 (2) conferred direct authority upon the police in their discretion, to take or summon any person found in possession of regimental equipments before a ct. of summary jurisdiction; (2) taking such person into custody instead of summoning him was no ground for an action for false imprisonment.—**LAWS v. READ** (1894), 63 L. J. Q. B. 683; 10 R. 545, D. C.

**1621.** — **Prevention of Crime Act, 1872 (c. 112), s. 7.**—The provisions of sect. 7 of the above Act being very stringent, are not to be invoked on mere suspicion. There must be positive testimony to enable the police to bring a proper prosecution. Where the circumstances are consistent with prisoner being in the public place for a purpose other than that suggested by the police, he should not be charged (LORD COLERIDGE, J.).—**R. v. PAVITT** (1911), 75 J. P. 432; 6 Cr. App. Rep. 182, C. C. A.

**1622.** — **Licensing Act, 1872 (c. 94), s. 12.**—The power to apprehend conferred by sect. 12 of the above Act, extends to authorise apprehension of persons honestly & upon reasonable grounds believed to be committing an offence at the time when they are arrested.—**TREBECK v. CROUDACE**, [1918] 1 K. B. 158; 87 L. J. K. B. 272; 118 L. T. 141; 82 J. P. 69; 34 T. L. R. 57; 62 Sol. Jo. 85; 16 L. G. R. 82, C. A.

**1623. Arrest by gamekeeper—Night Poaching Act, 1828 (c. 69), s. 2.**—A gamekeeper or other person lawfully authorised under sect. 2 of the above Act may apprehend persons found offending under that Act, without giving notice of his purpose.—**PAYNE'S CASE** (1833), 1 Mood. C. C. 378, C. C. R.

**1624.** —.]—A person who is employed by a lord of a manor as a watcher of his game preserves, is a person having authority to apprehend night poachers, under sect. 2 of the above Act, & he need not have any written authority from the lord of the manor.—**R. v. PRICE** (1835), 7 C. & P. 178; 3 Nev. & M. M. C. 401.

**1625.** — **9 Geo. 4, c. 31, ss. 11 & 12.**—Gamekeepers being in a preserve between twelve & one at night, heard the firing of two guns, & proceeding in the direction of the sound, met with

**PART V. SECT. 1, SUB-SECT. 2.—**  
**E. (a) 1.**

**a. Arrest by police officer—Police Offences Act, 1890, No. 1126, s. 82.**—Under Police Offences Act, 1890 (No. 1126), s. 82, a constable has the right & duty to take into custody a person tendered to him by a layman who has arrested such person & alleges that he has found him offending against the Act.—**MCLINEY v. MINSTER**, [1911] V. L. R. 347.—**AUS.**

**b.** — **4th R. S., Appendix, p.**

109, s. 12.]—"Any person being on any street, etc., who shall use abusive or provoking language, may be forthwith arrested by any constable."—**Held**: if a superior officer had authority to arrest, under this section, it was the duty of an inferior officer to obey, & if resistance were offered, bystanders might be called in aid.—**PEPPY v. GROSSO** (1875), 10 N. S. R. (1 R. & C.) 31.—**CAN.**

**a.** — **Criminal Code, ss. 30, 33, 649.**—The police of one province can

arrest without warrant a person charged with having committed a crime in another province only where the crime is one for which the accused could have been arrested without warrant in the province where the crime was committed, or where the accused is escaping fresh pursuit.—**It. v. SHYFFER** (1910), 15 W. L. R. 323.—**CAN.**

**d.** — **Criminal Code, ss. 643, 647.**—A peace officer may arrest without a warrant a person if he has

*Sect. 1.—Securing attendance of accused person:**Sub-sect. 2, E. (e) i. & ii.]*

two persons, who neither had guns nor game upon them, nor were either found near them. The gamekeepers immediately seized them, without calling on them to surrender, or in any way notifying to them who they were. The keepers were wounded, one of them seriously:—*Held*: prisoner who wounded them might, under the circumstances, & taking into consideration the situation & the time of the night, etc., be properly convicted under sects. 11 & 12 of the above Act.—*R. v. TAYLOR* (1836), 7 C. & P. 266, N. P.

**1626.** —.].—If the servant of A., who is not lord of the manor, find a night poacher on the land of B., & pursue him with intent to take him, this is such an attempt at an illegal arrest, that, if the poacher shoot the servant with the gun he has in his hand, & kill him, this will be manslaughter only.—*R. v. DAVIS* (1837), 7 C. & P. 785, N. P.

**1627.** —.].—On an indictment for wounding with intent to prevent lawful apprehension, it was proved that prisoners were found poaching in the night, armed, in a preserve which had belonged to the Earl of L., & then was in the possession of the Earl's trustees. The person trying to apprehend was a watcher employed by the head keeper, the latter having been appointed by the Earl twenty years before, & paid by his agent down to the time of the trial, but the head keeper had never had any direct communication with the trustees:—*Held*: there was sufficient proof of an authority to apprehend.—*R. v. FIELDING & CORBETT* (1848), 2 Car. & Kir. 621.

**1628.** —.].—Gamekeepers, who were out watching in the night, heard firing of guns in the preserves of their employer, & they waited in a turnpike road, expecting the poachers to come there, which they did, & an affray ensued between the gamekeepers & the poachers:—*Held*: if the gamekeepers were then endeavouring to apprehend the poachers, they were not justified in so doing.—*R. v. MEADHAM & HAINES* (1848), 2 Car. & Kir. 633.

**1629.** —.].—The gamekeeper of a person who has merely the right of shooting over land is not justified in apprehending a person unlawfully being upon such land by night, for the purpose of taking game.—*R. v. PRICE* (1851), 15 J. P. 149; 5 Cox, C. C. 277.

**1630. Arrest by owner or occupier of property—7 & 8 Geo. 4, c. 30.]**—A party who trespasses upon land, under a fair & reasonable supposition that he has a right to do the act complained of, is not liable to be apprehended under sect. 28 of the above Act, by the owner of the property, although the latter have reason to suppose the party to be within the Act.—*PARRINGTON v. MOORE* (1848), 2 Exch. 223; 17 L. J. M. C. 117; 11 L. T. O. S. 88; 154 E. R. 473.

*Annotation:—Consd.* *Horn v. Thornborough* (1849), 6 Dow. & L. 651.

**1631.** —.].—A female who occupied a house belonging to deft. saw a man on a Sunday

throw a stone at the windows of the house. She immediately pointed out to deft. two men running away, saying it was one of them, "the one with the stick," & telling him to arrest them. He did so, & one of them, *pltf.*, was proved to be the one who had thrown the stone:—*Held*: there was reasonable ground for giving him into custody under the above Act.—*JONES v. HOWELL* (1859), 29 L. J. Ex. 19; 1 L. T. 330; 24 J. P. 55; 8 W. R. 151.

*Annotation:—Mentd.* *Hermann v. Seneschal* (1862), 11 W. R. 184.

**1632. Arrest by any person for indictable offence at night—Prevention of Offences Act, 1851 (c. 19)—Applies to night poaching.]**—Sect. 11 of the above Act, giving any person the right to apprehend persons committing indictable offences in the night applies to persons night poaching within the meaning of Night Poaching Act, 1828 (c. 69), s. 9, although the night is defined to begin & end at different times in the two statutes.—*R. v. SANDERSON* (1859), 1 F. & F. 598.

**1633. Arrest by any person under Highway Act, 1835 (c. 50), s. 79—Not applicable to offences under Local Government Act, 1888 (c. 41), s. 85.]**—*HATTON v. TREEBY*, No. 1538, *ante*.

**1634. Arrest by pawnbroker—Pawnbrokers Act, 1872 (c. 93), s. 34.]**—*Pltf.* offered in pawn to deft., a pawnbroker, a gold horse-shoe pin, set with seven diamonds, and a ring. Deft., having previously received from the police a notice of articles recently stolen, amongst which was "a gold horse-shoe pin, set with seven diamonds," & a ring, gave *pltf.* into custody of a constable under sect. 34 of the above Act, on suspicion that the articles were stolen. It was afterwards proved that the articles in the possession of *pltf.* had not been stolen, & that his statements were true. In an action by him for false imprisonment the judge left the question whether deft. had a reasonable suspicion to the jury, who found their verdict for *pltf.*:—*Held*: (1) the question arising under the Act whether deft. reasonably suspected that the pin had been stolen or otherwise illegally or clandestinely obtained was for the judge; (2) there was no evidence of absence of reasonable suspicion in the mind of deft., & therefore judgment should be entered for him.—*HOWARD v. CLARKE* (1888), 20 Q. B. D. 558; 58 L. T. 401; 52 J. P. 310; 4 T. L. R. 261, D. C.

*Annotation:—As to* (1) *Refd.* *Carter v. Kimbell* (1894), 10 T. L. R. 554.

**1635. Arrest by official of railway company—Special Act.]**—5 Will. 4 (c. x.) incorporated the London & Croydon Railway Company & by sect. 106 empowered the co. to make bye-laws for the good government of the affairs of the co., & for regulating the proceedings & remunerating & reimbursing the expenses of the directors & for the management of the undertaking, & of the officers & servants of the co. in all respects whatever, & to impose & inflict reasonable fines & forfeitures upon persons offending against the same, not exceeding £5 for any one offence, to be levied & recovered as any penalty might by that act be levied & recovered; such

reasonable grounds for believing that an offence within said sections has been committed.—*R. v. PANASES* (1920), 36 Can. Crim. Cus. 309; 29 B. C. R. 80.—**CAN.**

**e.** — *Criminal Code*, ss. 30, 648.]—A ground claimed for quashing a conviction for keeping a common bawdy-house "that the search order under which deft. was arrested was bad," was rejected, because no warrant was required to justify the arrest, the arrest being authorised under

either s. 648 or s. 30 of the Code.—*R. v. GRAHAM*, [1921] 3 W. W. R. 607.—**CAN.**

**f.** — *Crime committed in officer's presence.]*—Under Cape law police officers are justified in arresting without a warrant in view of the fact that a crime was committed in his presence.—*R. v. LEVIN* (1917), C. P. D. 563.—**S. Af.**

**g.** *Arrest by private person—Criminal Procedure Code*, s. 59.]—

Accused was arrested in the act of stealing & was handed over to the village magistrate, who forwarded him in custody to a police station. He was convicted:—*Held*: the conviction was right. S. 59 of the Code of Criminal Procedure requires a private person who arrests a thief in the act to take the thief to the nearest police station, is sufficiently complied with by sending the offender in custody of a servant.—*R. v. POTADU* (1888), 1 L. R. 11 Mad. 480.—**IND.**

bye-laws to be binding upon & be observed by all parties; provided that they were not repugnant to the laws of England, or the directions of that act.

The 148th sect. enacted that it should be lawful for the company to make orders & regulations for regulating the travelling upon & use of the railway, & for or relating to travellers upon the line: such orders & regulations to be binding upon travellers & passengers passing upon the railway, upon pain of forfeiting & paying a sum not exceeding £5. Sect. 165 enacted that it should be lawful for any officer or agent of the co. to seize & detain any person whose name & residence should be unknown to such officer or agent, who should commit any offence against the act, & to convey him, etc., before a judge without any warrant or other authority than that act. The co. made a bye-law whereby a passenger not producing or delivering up his ticket was to be required to pay the fare from the place where the train originally started:—*Held*: this was not a bye-law imposing a penalty or forfeiture; & the arrest of a passenger not producing his ticket & refusing to pay the fare from the place where the train originally started was illegal.

*Qu.*: whether the 165th section gives power to apprehend a person except for an offence against the act of Parliament itself.

*Qu.*: also, whether the bye-law was a reasonable & void bye-law.—*CHILTON v. LONDON & CROYDON RY. CO.* (1847), 16 M. & W. 212; 5 Ry. & Can. Cas. 4; 16 L. J. Ex. 89; 8 L. T. O. S. 366; 11 Jur. 149; 11 J. P. Jo. 87; 153 E. R. 1164.

*Annotations*:—*Refd.* *Eggington v. Lichfield Corpn.* (1855), 19 J. P. 819; *Barry v. Mid. G. W. Ry.* (1867), 15 W. R. 384; *L. & B. Ry. v. Watson* (1878), 3 C. P. D. 429. *Mentd.* *Stevens v. Midland Counties Ry.* (1854), 18 Jur. 932; *Whitfield v. S. E. Ry.* (1858), 27 L. J. Q. B. 229; *Green v. London General Omnibus Co.* (1859), 7 C. B. N. S. 290; *Brown v. G. E. Ry.* (1877), 2 Q. B. D. 406.

**1636. Arrest by special constable of railway company—Special Act.**—*Pltfs.* were arrested outside the premises of deft. co. by a special constable appointed under Metropolitan District Railway Act, 1900 (c. clxxiii.), on a charge of having stolen copper & lead belonging to the co., & were prosecuted by the co. & acquitted. In the course of the trial of an action for false imprisonment & malicious prosecution in county ct., *pltfs.* put in evidence the deposition taken before the magistrate upon which they were committed for trial, & upon the deposition there was evidence that certain copper & lead which was found in *pltfs.*' possession at the time of their arrest was similar to that used by the railway co. There was, however, no admission on the part of the *pltfs.* that a felony had been committed, & there was no finding to that effect as the case had never gone to the jury. As the result of the trial in the county ct. the judge non-suited *pltfs.*, holding that there was reasonable & probable cause for the arrest & prosecution of *pltfs.*:—*Held*: (*DARLING, J.*), there being no finding or admission that a felony had been committed, the special constable was not protected by sect. 55 (2) of the above Act.—*KING & KING v. METROPOLITAN DISTRICT RY. CO.* (1908), 99 L. T. 278; 72 J. P. 294, D. C.

## ii. When Arrest must take place.

**1637. Must be on some charge.**—Magistrates have no authority to detain a person known to them till some other person makes a charge against him. Before they detain a known person, they should have a charge actually made.—*R. v. BIRNIE* (1832), 5 C. & P. 206; 1 Mood. & R. 160; 1 Nev. & M. M. C. 304.

**1638. "Immediate apprehension."**—A party using unreasonable violence to beat off a dog which runs at him is guilty of a wilful trespass under 7 & 8 Geo. 4, c. 30, s. 24. If he is seen committing the act, & a constable is immediately sent for, who follows him, he having quitted the place, & apprehends him at the distance of a mile, this is an immediate apprehension of a person "found committing" an offence under sect. 28 of the above Act.—*HANWAY v. BOULTBEE* (1830), 4 C. & P. 350; 2 Man. & Ry. M. C. 481; 1 Mood. & R. 15, N. P.

*Annotation*:—*Distd.* *Downing v. Capel* (1867), 36 L. J. M. C. 97.

**1639.** —.—.]—*MORRIS v. WISE*, No. 1533, *ante*.

**1640.** —.—.]—A. purchased an article of B., & directed him to take it to his house & ask for payment. B. left the article at A.'s house at 1 p.m., & was paid for it by A.'s butler. A. returned home at 3 p.m., & was informed that the butler had paid for the article, & believing, although erroneously, that he himself had paid B. for it at the time of the purchase, immediately sent for a policeman, & ordered him to arrest B. on a charge of obtaining money under false pretences. The policeman & A.'s butler at once went in pursuit of B., & apprehended him at 10 p.m. In an action by B. against A. for wrongful arrest:—*Held*: B. was "found committing the offence," if at all, at 1 p.m., & the pursuit not having been commenced till A.'s return at 3 p.m., A. could not have believed he was immediately apprehending B. in pursuance of Larceny Act, 1861 (c. 96), s. 103.—*DOWNING v. CAPEL* (1867), L. R. 2 C. P. 461; 36 L. J. M. C. 97; 16 L. T. 323; 15 W. R. 745.

*Annotations*:—*Refd.* *Leete v. Hart* (1868), L. R. 3 C. P. 322. *Mentd.* *Judge v. Selmes* (1871), 40 L. J. Q. B. 287; *Trebeck v. Croudace*, [1918] 1 K. B. 158.

**1641.** —.—.]—*Pltf.* had not been apprehended on the spot where deft. believed he had found her committing a felony, & the question, whether or not she had been "immediately apprehended" in pursuance of Larceny Act, 1861 (c. 96), s. 103, had not been left to the jury:—*Held*: this was a question of fact for the jury which should have been left to them.—*GRIFFITH v. TAYLOR* (1876), 2 C. P. D. 194; 46 L. J. Q. B. 152; 36 L. T. 5; 41 J. P. 340; 25 W. R. 196, C. A.

**1642. "Found committing."**—*HANWAY v. BOULTBEE*, No. 1638, *ante*.

**1643.** —.—.]—*MATHEWS v. BIDDULPH*, No. 1535, *ante*.

—.]—*DOWNING v. CAPEL*, No. 1640, *ante*.

**1645.** —.—.]—In an action for false imprisonment, the charge being, "that he had embezzled various sums within the last fortnight," deft. pleaded not guilty, urging that *pltf.* had been found committing the offence, in accordance with Larceny Act, 1861 (c. 96), s. 103:—*Held*: the statute did not apply at all to such a case, & the plea could not be sustained.

*Semble*: though, as a general rule, the statute would not apply to a case of embezzlement, it being an act more of the mind than anything else, still it would apply where the person was found doing the act itself.—*FIELD v. MUSGROVE* (1867), 16 L. T. 536.

**1646.** —.—.]—*GRIFFITH v. TAYLOR*, No. 1641, *ante*.

**1647. "Found offending."**—A constable is not bound to take into his custody without a warrant, a man who does not support his wife, as he cannot be said to be "found offending" under Vagrancy Act, 1824 (c. 83), ss. 3, 6, the offence depending on a variety of circumstances not visible to the eye.—

*Sect. 1.—Securing attendance of accused person: Sub-sect. 2, E. (e) ii. & (f) & F. (a), (b) & (c).]*

**HORLEY v. ROGERS** (1860), 2 E. & E. 674; 29 L. J. M. C. 140; 2 L. T. 171; 24 J. P. 582; 6 Jur. N. S. 605; 8 W. R. 392; 121 E. R. 253.

**1648. On fresh pursuit.**—*R. v. HOWARTH*, No. 1498, *ante*.

**1649.** —.]—A constable attempted to apprehend prisoner & his companions playing at thimblery in a public fair. The constable, with assistance, took one of the party, but prisoner & the rest rescued him, & got off. In the evening of the same day the constable found prisoner in a public house, not having been able to find him before, & endeavoured to apprehend him, stating it was for what he had been doing in the fair. Prisoner escaped. The constable called prosecutor to his assistance, & together they endeavoured to take prisoner, who thereupon stabbed prosecutor:—*Held*: A conviction for feloniously cutting & maiming was wrong, on the ground that the arrest was not on fresh pursuit.—*R. v. GARDENER* (1834), 1 Mood. C. C. 390, C. C. R.

**1650.** —.]—Under 7 & 8 Geo. 4, c. 29, s. 63, justifying arrest in certain cases without warrant, the pursuit of the offender must be commenced at the time of the committing of the offence, & pursuit after the offence has been consummated is insufficient.—*GREENFIELD v. SYKES* (1854), 2 W. R. 372.

**1651.** —.]—Prisoner assaulted a police constable, who went away, & after two hours' time returned with assistance:—*Held*: the constable was not justified in apprehending prisoner for the assault after that interval.—*R. v. WALKER* (1854), Dears. C. C. 358; 23 L. J. M. C. 123; 23 L. T. O. S. 99; 18 J. P. 281; 18 Jur. 409; 2 W. R. 416; 2 C. L. R. 485; 6 Cox, C. C. 371, C. C. R.

*Annotations*:—*Fold*, *R. v. Marsden* (1868), L. R. 1 C. C. R. 131. *Refd.* *R. v. Light* (1857), 7 Cox, C. C. 389.

**1652.** —.]—*DOWNING v. CAPEL*, No. 1640, *ante*.

**1653.** —.]—*R. v. MARSDEN*, No. 1588, *ante*.

(f) *Entering Premises to effect Arrest.*

**1654. Entry by constable—In treason or felony.**—*MONREY v. JOHNSON* (1607), 1 Brownl. 211; 123 E. R. 760.

**1655.** —.]—Deft. was seen in a metropolitan street stealthily to produce an empty bag from under his jacket, place it under the legs of the coachman of a brougham, & with his assistance take instead a bag full of oats, which he carried off on his shoulder. The coachman immediately drove rapidly off. A police constable was told of what had occurred, & his attention was called to

deft. & his burden. He followed, but came up only after deft. had entered his own house, when the constable arrested him:—*Held*: the conviction of deft. by a magistrate under Metropolitan Police Cts. Act, 1830 (c. 71), s. 24, for having in his possession these oats which were then & there suspected of being unlawfully obtained, was under the circumstances right.—*R. v. FISHER* (1875), 32 L. T. 22; 39 J. P. 612, D. C.

**1656. Breaking open doors—In treason or felony.**—If the sheriff pursue a felon to a house, & in order to take him break open the doors of the house, this is justifiable, because it is for the public good that such felons should be taken. But it is otherwise in particular cases; as if the sheriff break open an house to arrest one within the house by virtue of a *capias* in debt or trespass, he shall be punished, for this was a particular case, & is not for the public good (*per cur.*).—*MALFVERER v. SPINKE* (1537), 1 Dyer, 35 b; 73 E. R. 79.

*Annotations*:—*Mentd.* *Lasington's Case* (1600), Cro. Eliz. 750; *Mouse's Case* (1608), 12 Co. Rep. 63; *Liford's Case* (1615), 11 Co. Rep. 46 b; *Secheverel v. Dale* (1627), Poph. 193; *Simmons v. Norton* (1831), 9 L. J. O. S. C. P. 185; *Cope v. Sharpe*, [1910] 1 K. B. 168; *Cope v. Sharpe* (No. 2), [1912] 1 K. B. 496.

**1657.** —.]—Doors cannot be broken open in the night for any cause except treason or felony.—*SMITH v. SMITH* (1600), Cro. Eliz. 741; 78 E. R. 974.

**1658.** — **Assault on constable.**—*R. v. MARSDEN*, No. 1588, *ante*.

**1659.** — **To prevent murder.**—*HANDCOCK v. BAKER*, No. 1552, *ante*.

**1660.** — **On suspicion of felony.**—A plea justifying the breaking & entering a house, without warrant, on suspicion of felony, ought distinctly to show, not only that there was reason to believe that the suspected person was there, but also that deft. entered for the purpose of apprehending him.—*SMITH v. SHIRLEY* (1846), 3 C. B. 142; 15 L. J. C. P. 230; 7 L. T. O. S. 185; 136 E. R. 58.

*F. Arrest under Warrant.*

(a) *In General.*

**1661. Duration of warrant.**—A justices' warrant continues in force until fully executed.—*DICKENSON v. BROWN* (1794), 1 Esp. 218; Peake, 307, N. P.

**1662. Withdrawal of warrant.**—*R. v. CROSSMAN*, *Ex p. CHETWYND*, No. 839, *ante*.

(b) *Form and Contents of Warrant.*

**1663. General warrants void.**—*ANON.* (1648), cited 1 Hale, P. C. at p. 580.

*Annotation*:—*Refd.* *Howard v. Gossett* (1845), 5 L. T. O. S. 144.

show the person arrested the authority under which he is acting, but to hold that he is bound to do so before he can properly arrest & detain in custody such a person, so as to make the arrest & the detention lawful, would be to extend the law beyond what the legislature has thought proper to declare it.—*R. v. BASANT LALL* (1900), 1 L. R. 27 Calc. 320; 4 C. W. N. 311.—*IND.*

**PART V. SECT. 1, SUB-SECT. 2.—**  
**F. (b).**

**o. Bench warrant—Seal.**—A bench warrant issued at quarter sessions, tested in open sessions, & signed by the clerk of the peace:—*Held*: not invalid for want of a seal.—*FRASER v. DICKSON* (1849), 5 U. C. R. 231.—*CAN.*

**p. Indorsement of warrant.**—A warrant was issued in the united

**PART V. SECT. 1, SUB-SECT. 2.—**  
**F. (a).**

**h. Persons other than constables making arrest.**—Where an offence was committed in the county of G., & warrants were issued for the arrest of the guilty parties, persons from another county, who came to assist the constables of the county of G., in making arrests, were held entitled to the same protection as the constables.—*R. v. CHASSON* (1876), 3 Pug. 546.—*CAN.*

**k. Release on bail—Re-arrest.**—D., being at large, could not be arrested on the order without a process of the ct. to enforce it.—*Ex p. DOHERTY* (1900), 20 C. L. T. 20.—*CAN.*

**l. Escape—Right to re-arrest under same warrant.**—*R. v. O'HEARON*, 21 C. L. T. 355; 5 Can. Crim. Cas. 531.—*CAN.*

**m. Provincial offence — Backing**

*warrant therefor in another province—Ultra vires.*—A warrant for a provincial offence cannot be given effect to outside the limits of that province. Provincial legislation attempting to authorise it would be *ultra vires*. The introduction by provincial Act of Part XV. of the Criminal Code for the purpose of procedure in relation to provincial offences was not intended to have extra-provincial effect, & the provisions therein for backing warrants, if intended by the legislature to have effect at all, would be applicable only as between territorial divisions of the province (as such exist in other provinces) if & when such divisions are made.—*Exp. ELI*, [1920] 1 W. W. R. 661.—*CAN.*

**n. Constable not bound to show warrant.**—It may be desirable or even obligatory that, if called upon, the police officer making an arrest should



**1664.** —[.]—**MONEY v. LEACH** (1765), 3 Burr. 1742; 1 Wm. Bl. 555; 97 E. R. 1075; *sub nom.* **LEACH v. MONEY**, 19 State Tr. 1001.

*Annotations* :—**Refd.** Entick v. Carrington, Case of Seizure of Papers (1765), 19 Howell's State Tr. 1029; Gosset v. Howard (1845), 10 Q. B. 411. **Mentd.** Brookshaw v. Hopkins (1773), Loft, 243; Bell v. Oakley (1814), 2 M. & S. 259; Parton v. Williams (1820), 3 B. & Ald. 330; Prestidge v. Woodman (1822), 1 B. & C. 12; Bell v. Robinson (1824), 2 L. J. O. S. K. B. 192; Kay v. Grace (1831), 5 Moo. & P. 140; Hoyer v. Bush (1840), 1 Man. & G. 775; Harrison v. Bush (1855), 25 L. J. Q. B. 25; Tobin v. R. (1864), 16 C. B. N. S. 310; Feather v. R. (1865), 6 B. & S. 257; Raleigh v. Goschen, [1898] 1 Ch. 100.

**1665.** —[.]—Where a warrant recited no information, but directed the constable to "apprehend & bring before me the body of A., to answer to all such matters & things as, on Her Majesty's behalf, shall be objected against him on oath, by B., for an assault committed upon her on the 24th inst." :—**Held**: the warrant was altogether void as being too general in its form.—**CAUDLE v. SEYMOUR** (1841), 1 Q. B. 889; 1 Gal. & Dav. 454; 10 L. J. M. C. 130; 113 E. R. 1372; *sub nom.* **CANDLE v. SEYMOUR**, 5 Jur. 1196.

*Annotation* :—**Refd.** R. v. Hughes (1879), 4 Q. B. D. 614.

**1666. Description of offence—Treasonable practices.**—[.]—**R. v. DESPARD**, No. 1455, *ante*.

**1667.** —[.]—**"Commission of crimes against bankruptcy law."**—Upon a rule for a *habeas corpus* to discharge a prisoner arrested under Extradition Acts, 1870 (c. 52), & 1873 (c. 60), on the ground that the warrant whereon he was arrested did not sufficiently describe the offence, it appeared that the warrant, which was a warrant issued by a metropolitan police magistrate without the order of a Secretary of State, described the offence as "the commission of crimes against bkpcy. law" :—**Held**: the warrant sufficiently described the offence.—**Ex p. TERRAZ** (1878), 4 Ex. D. 63; 48 L. J. Q. B. 214; 39 L. T. 502; 27 W. R. 170; 14 Cox, C. C. 153, D. C.

*Annotation* :—**Distd.** **Ex p. Plot** (1883), 48 L. T. 120.

**1668. Purpose of arrest.**—[.]—A warrant to arrest the party "to the end that he may become bound, etc., to appear at the next sessions," etc., means the next sessions after the arrest, & not after the date of the warrant. Therefore the officer executing it may justify an arrest after the sessions next ensuing the date of the warrant.—**MAYHEW v. PARKER** (1799), 8 Term Rep. 110; 2 Esp. 683; 101 E. R. 1294, N. P.

counties of Northumberland & Durham, & was indorsed by a magistrate in the county of Peterborough, "This is to certify that I have indorsed this warrant, to be executed in the county of Peterborough," but there was no proof of handwriting of the justice who issued the warrant or recital of

warrant.—**R. v. SABLEANS** (1904), 37 N. S. R. 223.—**CAN.**

**r. Description of offence—Perjury.**—[.]—**R. v. LEE CHU** (1909), 14 Can. Crim. Cas. 322.—**CAN.**

**s. — Felony.**—[.]—A warrant of a Scottish judge to apprehend persons, & bring them before the nearest

issued upon the petition of the advocate, which stated an injury to a ship, committed with a felonious intent, within 43 Geo. 3, c. 113, is bailable, the warrant not stating a crime, & it not appearing that any crime was charged on oath.—**Ex p. GIBBONS** (1829), 2 Hud. & B. 425; 2 Ir. L. Rec. 1st ser. 454, 469.—**IR.**

#### PART V. SECT. 1, SUB-SECT. 2.— F. (c).

**1673 i. Person arrested—Must be person named in warrant.**—[.]—Arrest of pltf. by deft. under a warrant "to arrest a man who calls himself Clark." Pltf. was never identified as such, & after several remands was discharged :—**Held**: the warrant was good.—**GREENWOOD v. RYAN** (1) (1846), 1 Legge, 275.—**AUS.**

**1669.** —[.]—**Warrant directing police officers to keep defendant in custody.**—[.]—A warrant which directs police officers to arrest deft. & keep him in custody, so as to produce him at the next quarter sessions, is bad, such a custody being illegal.—**Ex p. NISBETT** (1844), 4 L. T. O. S. 120; 8 J. P. 823; 8 Jur. 1071.

#### (c) Circumstances of Arrest.

**1670. By whom made—Person to whom warrant is directed.**—[.]—**AMSON v. WALCOT** (1616), 3 Bulst. 209; 18 E. R. 176.

**1671.** —[.]—Where a warrant was directed "To A. to the constables of W., & to all other His Majesty's officers" :—**Held**: the constables of W., their names not being inserted in the warrant, could not execute it out of that district.—**R. v. WEIR** (1823), 1 B. & C. 288; 2 Dow. & Ry. K. B. 444; 1 Dow. & Ry. M. C. 319; 107 E. R. 108.

*Annotations* :—**Consd.** A. G. v. Jefferys (1824), M'Cle. 270. **Refd.** Gladwell v. Blake (1834), 1 Cr. M. & It. 636; Hoyer v. Bush (1840), 1 Man. & G. 775; Baynes v. Brewster (1841), 6 Jur. 392; Leverick v. Mercer (1853), 14 Q. B. 759. **Mentd.** Gimbert v. Coyney (1825), 3 Dow. & Ry. M. C. 323.

**1672.** —[.]—When a warrant is directed to a parish constable only, it should be executed by him, & not by a police constable of the county.—**FREGGARD v. BARNES & BARTON** (1852), 7 Exch. 827; 21 L. J. Ex. 320; 16 J. P. 777; 155 E. R. 1185; *sub nom.* **FREGGARD v. BARNES & BARTON**, 19 L. T. O. S. 188.

*Annotation* :—**Refd.** R. v. Sanders (1867), L. R. 1 C. C. R. 75.

**1673. Person arrested—Must be person named in warrant.**—[.]—In an action for trespass against a constable for taking pltf. into custody on a charge of felony, a warrant of a justice of the peace describing pltf. by a wrong Christian name, affords no protection to deft., although pltf. is the real person to be taken, & pltf., therefore, is entitled to recover in such action, without a demand of perusal & copy of the warrant, pursuant to Constables Protection Act, 1750 (c. 44), s. 6.—**HOYE v. BUSH** (1840), 1 Man. & G. 775; 2 Scott, N. R. 86; 10 L. J. M. C. 168; 133 E. R. 545; *sub nom.* **HOYLE v. BUSH**, Drinkwater, 15; 5 J. P. 30.

**1674. Officer arresting must have warrant in his possession.**—[.]—A constable must be in actual possession of a warrant to arrest for a misdemeanour at the time of the arrest, so as to be able to produce it for the information of the person arrested.—

**1673 ii.** —[.]—Where the police in one city notify the police in another city that a warrant has been issued for the arrest of a certain man & forwards a description & photograph of accused, & the police so notified, relying on such description & photograph, arrest a man in the honest belief that he is the man wanted, they are protected from liability in civil or criminal proceedings, even though the man arrested is not in fact the one for whom the warrant has been issued.—**ANDERSON v. JOHNSON**, [1917] 3 W. W. R. 353; 10 Sask. L. R. 352; 43 D. L. R. 183; 11 Sask. L. R. 478; (1918) 3 W. W. R. 626.—**CAN.**

**1674 i. Officer arresting must have warrant in his possession.**—[.]—A constable making an arrest under a warrant is bound to exhibit same when making the arrest, & where he fails to do so the municipality employing him is liable for nominal damages.—**HIGGINS v. MONTREAL CITY**, [1894] Q. R. 6 S. C. 414.—**CAN.**

**1674 ii.** —[.]—A warrant should be in the actual possession of the person executing it.—**HAY v. THOMSON** (1889), 7 N. Z. L. R. 579.—**N.Z.**

C. P. 384.—**CAN.**

**q. Absence of name of prisoner.**—[.]—Where deft., arrested by a provincial constable, who believed that a robbery had been committed, & that deft. was one of the persons who committed it, & who, being asked to show his authority, produced & read a warrant against F. E. & others, for breaking & entering a shop & stealing a quantity of goods therefrom, seeing that his name was not mentioned in the warrant, deft. resisted arrest, & in so doing assaulted a constable, & was tried & convicted for assaulting a police officer in the discharge of his duty, with intent to resist lawful arrest :—**Held**: the arrest could be justified under the statute, notwithstanding the insufficiency of the war-

**Sect. 1.—Securing attendance of accused person:**  
*Sub-sect. 2, F. (c); sub-sect. 3.]*

GALLIARD v. LAXTON (1862), 2 B. & S. 363; 31 L. J. M. C. 123; 5 L. T. 835; 26 J. P. 230; 8 Jur. N. S. 642; 10 W. R. 353; 9 Cox, C. C. 127; 121 E. R. 1109.

*Annotations:—***Foid.** R. v. Chapman (1871), 12 Cox, C. C. 4; Codd v. Cabe (1876), 1 Ex. D. 352. **Reid.** Ex p. Smith (1897), 61 J. P. Jo. 410.

**1675.** —.]—In order to justify an arrest, even by an officer, under a warrant, for a mere misdemeanour, it is necessary that he should have the warrant with him at the time. Therefore in a case where the officer, although he had seen the warrant, had it not with him at the time, & it did not appear that the party knew of it:—**Held:** the arrest was not lawful.—R. v. CHAPMAN (1871), 12 Cox, C. C. 4.

*Annotation:—***Consd.** Codd v. Cabe (1876), 1 Ex. D. 352.

**1676.** — **When offence is less than felony.** — When a warrant has been issued to apprehend a person for an offence less than felony, the police officer who executes it must have the warrant in his possession at the time of arrest.—Codd v. CABE (1876), 1 Ex. D. 352; 34 L. T. 453; 40 J. P. 566; 13 Cox, C. C. 202; *sub nom.* COD v. CABE, 45 L. J. M. C. 101, D. C.

*Annotations:—***Reid.** Ex p. Smith (1897), 61 J. P. Jo. 410.

**Mentd.** Betts v. Stevens (1909), 79 L. J. K. B. 17.

**1677. Where made—Not out of district—Custom in London.** —A constable is an officer but for his own particular vill, & though he may execute warrants in any other parts of the county, as any other person may, yet he is not compellable to do it, though the contrary is practised in London by custom (HOLT, C.J.).—ANON. (1697), Comb. 446; 90 E. R. 582.

*Annotation:—***Mentd.** Gimbirt v. Coyney (1825), 3 Dow. & Ry. M. C. 323.

**1678.** —.]—A constable cannot execute out of his own district a warrant directed generally to all constables. But he may execute anywhere within the limits of the justice's jurisdiction a warrant directed particularly to him.—R. v. CHANDLER (1700), 1 Ld. Raym. 545; 91 E. R. 1264.

*Annotations:—***Consd.** R. v. Weir (1823), 1 B. & C. 288. **Mentd.** Gimbirt v. Coyney (1825), 3 Dow. & Ry. M. C. 323.

**1679.** — **Except when issued by a judge of King's Bench.** —5 Geo. 4, c. 18, s. 6, which authorises constables to arrest persons out of their own district, though the warrant be not directed to them by name, does not apply to cases where

warrants are issued by the judges of the Ct. of K. B., but is confined to warrants issued by justices of the peace of limited jurisdiction.—GLADWELL v. BLAKE (1834), 1 Cr. M. & R. 636; 2 Nev. & M. M. C. 588; 5 Tyr. 186; 4 L. J. M. C. 13; 149 E. R. 1235.

**1680.** — **Unless backed.** —C. was convicted of an assault on two police constables of the county police of W. in the execution of their duty, who were apprehending him in the city of W. under a warrant issued by two justices of & for the county of W. for his commitment to prison for default in payment of a fine, but not backed by any justice of & for the city of W. W. is a borough having a separate commission of the peace with exclusive jurisdiction, & a separate police force. C. was not pursued from the county, but found in the city:—**Held:** the conviction was wrong, & the constables were not acting in the execution of their duty in so executing such warrant.—R. v. CUMPTON (1880), 5 Q. B. D. 341; 49 L. J. M. C. 41; 42 L. T. 543; 44 J. P. 489; 28 W. R. 539, C. C. R.

*Annotation:—***Mentd.** Betts v. Stevens (1909), 79 L. J. K. B. 17.

**1681.** — **In court.** —R. v. KELLEY (1722), 1 Stra. 530; 93 E. R. 680.

**1682.** — **Within King's palace.** —FITZPATRICK v. KELLY (1781), cited 3 Term Rep. 740; 100 E. R. 833.

*Annotations:—***Consd.** Bell v. Jacobs (1828), 4 Bing. 523. **Reid.** Carrett v. Smallpage (1808), 9 East, 330.

**1683.** —.]—An indictment will not lie against the officer of the Palace Ct. for assisting a person not of the King's household, within the King's palace, against whom a writ has issued out of that ct., though no leave to make the arrest has been obtained from the Board of Green Cloth.—R. v. STOBBS (1790), 3 Term Rep. 735; 100 E. R. 830.

*Annotations:—***Consd.** Bell v. Jacobs (1828), 4 Bing. 523. **Mentd.** Combe v. De La Bere (1882), 22 Ch. D. 316.

**1684.** — **Abroad.** —A British subject, arrested abroad, under a warrant upon an indictment for a misdemeanour, brought in custody to England, & there committed to prison, is not entitled to be discharged.—Ex p. SCOTT (1829), 9 B. & C. 446; 4 Man. & Ry. K. B. 361; 2 Man. & Ry. M. C. 308; 109 E. R. 116.

*Annotation:—***Consd.** R. v. Garrett, Ex p. Sharf (1917), 116 L. T. 82.

**1685. Arrest on Sunday — For murder.** — Matters of necessity may be done on the Sunday. Thus, arrest for murder on a Sunday is lawful

**1676 i.** — **When offence is less than felony.** —The officer executing a warrant for an offence less than felony must have it in his possession at the time of the arrest.—Ex p. McMANUS (1894), 32 N. B. R. 481.—**CAN.**

**1680 i. Where made—Not out of district—Unless backed.** —Prisoner was arrested in Toronto, upon information contained in a telegram from England, charging him with having committed a felony in that country, & stating that a warrant had been issued there for his arrest:—**Held:** a person cannot, under Imperial Act, 6 & 7 Vict. c. 34, legally be arrested or detained here for an offence committed out of Canada, unless upon a warrant issued where the offence was committed & indorsed by a judge of a superior ct. in this country.—R. v. McHOLME (1881), 8 P. R. 452.—**CAN.**

**1680 ii.** —.]—A warrant for the arrest of pltf. who had made default in paying a fine on conviction, was sent from an outlying county to a city. Before the warrant was indorsed by a magistrate in the city pltf. was arrested there by two of defts., the

chief constable & a detective, & confined. Some hours after the arrest the warrant was properly indorsed & the detention of pltf. was continued until payment of the fine:—**Held:** the only damages recoverable by pltf. were for the trespass up to the time of backing the warrant.—SOUTHWICK v. HARR (1893), 24 O. R. 528.—**CAN.**

**1680 iii.** —.]—A constable in an action against him for wrongfully arresting pltf. without a proper indorsement of the warrant by a magistrate of the county in which the arrest is made is entitled to plead "not guilty by statute."—ALDERICH v. HUMPHREY (1898), 29 O. R. 427.—**CAN.**

**1680 iv.** —.]—If a warrant has been granted at a distance a constable is justified in bringing the person in custody before a justice having jurisdiction in the place at which the arrest was made & in obtaining a reasonable remand until the warrant shall arrive & be backed in the manner directed by 14 & 15 Vict. c. 93.—CREAGH v. GAMBLE (1888), 24 L. R. Ir. 458.—**IR.**

**1685 i. Arrest on Sunday.** —A special warrant for keeping a common gaming house may be issued & executed on a Sunday.—Ex p. MOY SHING (1904), 4 S. R. N. S. W. 480; 21 N. S. W. W. N. 189.—**AUS.**

**1685 ii.** —.]—M. was arrested on Sunday on a warrant issued for an offence against Canada Temperance Act:—**Held:** the warrant could be executed on Sunday.—R. v. McGILLIVRAY (1907), 41 N. S. R. 321.—**CAN.**

**1685 iii.** —.]—A. B. having been arrested on Sunday, under a criminal charge, had a detainer out of the Ct. of Exchequer lodged against him on the same day, without the previous leave of that ct., or of the Ct. of K. B.; but after the lodgment, permission was granted by the K. B. to lodge the detainer in question:—**Held:** that this subsequent permission cured the previous irregularity, so as to prevent a discharge after acquittal on trial for the offence.—LYNCH v. TORRENS (1833), Hayes, & Jo. 433.—**IR.**

**1685 iv.** —.]—Deft. was arrested under a warrant, brought before a



(CROKE, J.).—*PIT v. WEBLY* (1613), 2 Bulst. 72; 80 E. R. 968.

*Annotation* :—*Reid*. *Cameron v. Lightfoot* (1778), 2 Wm. Bl. 1190.

**1686.** ——— *For any indictable offence.*—*ANON.* (1611), Jenk. 291; 145 E. R. 211.

**1687.** ——— *—A person may be arrested on a Sunday for any indictable offence.*—*RAWLINS v. ELLIS* (1846), 16 M. & W. 172; 16 L. J. Ex. 5; 8 L. T. O. S. 215; 10 Jur. 1039; 2 Cox, C. C. 96; 10 J. P. Jo. 789.

**1688. Use of force—Breaking doors, etc.—In case of felony—After admission refused.**—*A constable having a warrant from a justice to arrest a prisoner immediately is not justified in breaking open his door, on admission being refused, except in case of felony or treason.*—*FOSTER v. HILL* (1611), 1 Bulst. 146; 80 E. R. 839.

**1689.** ——— *In case of breach of the peace—After admission demanded & notice given.*—*CURTIS'S CASE* (1757), Post. 135, C. C. R.

*Annotation* :—*Mentd.* *R. v. Platt* (1777), 1 Leach, 157.

**1690.** ——— *In case of contempt—After admission refused.*—*The mode of executing that warrant . . . by breaking the house after due notification & demand of admittance without effect, is justifiable, upon the ground of its being an execution of a process for contempt, to which the personal privilege of the individual in respect of his door must give way for the public good* (LORD ELLENBOROUGH, C.J.).—*BURDETT v. ABBOTT* (1811), 14 East, 1; 104 E. R. 501; *affd.* (1812), 4 Taunt. 401, Ex. Ch.; (1817), 5 Dow, 165, H. L.

*Annotations* :—*Reid*. *Launock v. Brown* (1819), 2 B. & Ald. 592; *Harvey v. Harvey* (1884), 26 Ch. D. 644. *Mentd.* *R. v. Hobhouse* (1820), 2 Chit. 207; *Redford v. Birley* (1822), 1 State Tr. N. S. 1071; *Bedrechund v. Elphinstone* (1830), 2 State Tr. N. S. 379; *Wellesley v. Beaufort, Wellesley's Case* (1831), 2 Russ. & M. 639; *Beaumont v. Barrett* (1836), 1 Moo. P. C. C. 59; *Stockdale v. Hansard* (1839), 9 Ad. & El. 1; *Middlesex Sheriff's Case* (1840), 11 Ad. & El. 273; *Re Clarke* (1842), 2 Q. B. 619; *Kielley v. Carson* (1842), 4 Moo. P. C. C. 63; *Re Martin, Ex p. Van Sandau* (1844), 4 L. T. O. S. 369; *Howard v. Gossett* (1845), 10 Q. B. 359; *Fenton v. Hampton* (1858), 11 Moo. P. C. C. 347; *Re Fernandes* (1861), 6 H. & N. 717; *Ex p. Fernandez* (1861), 10 C. B. N. S. 3; *Dill v. Murphy* (1864), 1 Moo. P. C. C. N. S. 487; *A.-G. of New South Wales v. Macpherson* (1870), L. R. 3 P. C. 268; *Bradlaugh v. Gossett* (1884), 12 Q. B. D. 271; *Barton v. Taylor* (1886), 2 T. L. R. 382; *Filding v. Thomas*, [1896] A. C. 600; *Heddon v. Evans* (1919), 35 T. L. R. 642; *Pitchers v. Surrey County Council*, [1923] 2 K. B. 57.

**1691.** ——— *—Where a writ of attachment has issued against a party to an action for contempt of ct. in non-compliance with an order for the delivery over of deeds & documents, the officer charged with the execution of the writ may break open the outer door of the house in order to execute it.*—*HARVEY v. HARVEY* (1884), 26 Ch. D. 644; 51 L. T. 508; 48 J. P. 468; 33 W. R. 76.

*Annotations* :—*Reid*. *Re Evans, Evans v. Noton*, [1893] 1 Ch. 522. *Mentd.* *Selous v. Croydon R. S. A.* (1885), 53

magistrate & required to give sureties for good behaviour, or in default, be imprisoned. Deft. refused, & a warrant was made out, under which he was committed to prison till he should find the sureties. All these proceedings took place on Sunday, & the warrants & entry in the sessions book bore date of that day:—*Held*: although the arrest might be good, the taking sureties & committal in default was a judicial act, & therefore void, as being done on Sunday.—*R. v. RAMSAY*

in aid of a constable who searched the premises under a search warrant issued by a justice under Crimes Act, 1900, No. 40, s. 354. The warrant alleged that deft. made information & complaint on oath that he had reasonable cause to suspect that F. had unlawfully on his premises certain property, etc., in respect of which an offence punishable by indictment was reasonably believed by deponent to have been committed:—*Held*: (1) the warrant was void & afforded deft. no protection at common law against the present action; (2) deft. was protected by the above Act.—*FRATHER v. ROGERS* (1909), 9 S. R. N. S. W. 192.—*AUS.*

**1695 i.** ——— *—In order to obtain a search warrant under 32 & 33 Vict. c. 30, it is not necessary that the information should allege that the*

L. T. 209; *R. v. Lambeth County Court Judge & Jones* (1887), 36 W. R. 475; *Mander v. Falcke*, [1891] 3 Ch. 488; *Seldon v. Wilde*, [1910] 2 K. B. 9; *Taylor, Plinston v. Plinston*, [1911] 2 Ch. 368.

**1692.** ——— *In misdemeanours—Admittance must first be demanded.*—*In the execution of criminal process against any man in the case of a misdemeanour, it is necessary to demand admittance, before the breaking of the outer door can be legally justified.*—*LAUNOCK v. BROWN* (1819), 2 B. & Ald. 592; 106 E. R. 482.

**1693.** ——— *To arrest absconding debtor.*—*Where a warrant is issued for the arrest of an absconding debtor, who has failed to surrender to bkpcy. proceedings taken against him, such debtor cannot avoid the execution of the warrant by sheltering himself behind a locked door. Such warrant of arrest is an authority to the officer charged with its execution to break the door & to go in & arrest the debtor inside the house where he is known to be.*—*Re VON WEISSENFELD, Ex p. HENDRY* (1892), 9 Morr. 30; 36 Sol. Jo. 276.

*Annotation* :—*Mentd.* *Re Hirth, Ex p. Official Receiver* (1899), 68 L. J. Q. B. 287.

### SUB-SECT. 3.—SEARCH WARRANTS.

**1694. No power to issue at common law—Except in case of stolen goods.**—*ENTICK v. CARRINGTON* (1765), 19 State Tr. 1029; 2 Wils. 275; 95 E. R. 807.

*Annotations* :—*Consd.* *Howard v. Gossett, Gossett v. Howard* (1847), 6 State Tr. N. S. 319; *Dillon v. O'Brien & Davis* (1887), 16 Cox, C. C. 245. *Reid*. *Harrison v. Bush* (1855), 5 E. & B. 344. *Mentd.* *Jones v. German*, [1896] 2 Q. B. 418.

**1695. To search for stolen goods—Issued on oath of reasonable suspicion that felony has been committed.**—*Upon a representation to a magistrate that a person has reason to suspect that his property has been stolen, or is concealed in a certain place, the magistrate may lawfully issue his warrant to search the place & bring the occupier or owner before him* (ABBOTT, C.J.).—*ELSEE v. SMITH* (1822), 2 Chit. 304; 1 Dow. & Ry. K. B. 97; 1 Dow. & Ry. M. C. 28.

*Annotations* :—*Consd.* *Jones v. German*, [1897] 1 Q. B. 374. *Reid*. *Wyatt v. White* (1860), 5 H. & N. 371.

**1696.** ——— *—JACKSON v. BULL & ALISON* (1838), 2 Mood. & R. 176; 2 J. P. 695.

**1697.** ——— *Involves an application for warrant for arrest.*—*Deft., a miller, saw a number of sacks partly covered with a tarpaulin lying on a quay alongside a vessel. Seeing his mark on one of the sacks, he cut it open & found it contained pieces of sacks. He removed the tarpaulin, & saw some sacks on which was his mark, & on others it was cut away. Being informed that the sacks*

goods have been stolen by the party whose premises are sought to be searched, & it is sufficient if it allege that they have been feloniously stolen.—*HAMILTON v. CALDER* (1883), 23 N. B. R. 373.—*CAN.*

**a.** ——— *Warrant for arrest provided for.*—*A justice's search warrant by which a party is arrested must be founded on an information which discloses a charge of felony, or contains a statement of facts from which it may fairly be inferred that a felony has been committed. A search warrant by which the property when found is directed to be brought together with the person in whose possession it is found, becomes, so soon as the property is so found, a warrant to secure the personal attendance of such party, & therefore falls within 12 Vict.*

### PART V. SECT. 1, SUB-SECT. 3.

**i.** *To search for stolen goods—Issued on oath of reasonable suspicion that felony has been committed—Protection afforded by 24 Geo. 2, c. 44.*—*To a declaration for trespass to plaintiff's dwelling, deft. pleaded that he acted*

*Sect. 1.—Securing attendance of accused person:*  
*Sub-sect. 3. Sect. 2: Sub-sect. 1.]*

were about to be shipped by pltf. for the manufacture of paper, he laid an information before a magistrate that he had reason to suspect, & did suspect, that some sacks, his property, had been stolen, & were then in the possession of pltf. Thereupon the magistrate issued a warrant to search for the goods, & if they should be found, to bring them & pltf. before him, to be dealt with according to law. Pltf. was accordingly apprehended & taken before the magistrate who dismissed the charge:—*Held*: the magistrate was justified in issuing a warrant in that form, since the application for a search warrant involved an application to arrest.—*WYATT v. WHITE* (1860), 5 H. & N. 371; 29 L. J. Ex. 193; 1 L. T. 517; 24 J. P. 197; 8 W. R. 307; 157 E. R. 1226.

*Annotation:—Reid. Jones v. German* (1897), 66 L. J. Q. B. 281.

**1698. — Goods need not be specified.]—**

On an application to a justice of the peace for a search warrant the sworn information upon which the application was made stated that the informant "hath just & reasonable cause to suspect & doth suspect that J. has in his possession certain property belonging to" the informant, "& that he has requested J. to allow him to search several boxes which J. has had packed ready to be taken away, & which he refuses to be looked through." The justice issued his warrant, which was executed:—*Held*: it was not necessary in such an information to allege that a larceny had in fact been committed, but it was enough to allege a suspicion that a larceny had been committed. It was not necessary to specify in the information the particu-

lar goods for which a search is desired. The information in question substantially averred that the informant suspected certain property of his to have been stolen, & it was sufficient to give the justice jurisdiction.—*JONES v. GERMAN*, [1897] 1 Q. B. 374; 66 L. J. Q. B. 281; 76 L. T. 136; 61 J. P. 180; 45 W. R. 278; 13 T. L. R. 173; 41 Sol. Jo. 240; 18 Cox, C. C. 497, C. A.

**1699. Execution of warrant.]—WARD'S CASE**, No. 1564, *ante*.

**1700. — Seizure of goods not mentioned in warrant—Goods seized not of use to substantiate charge.]—**When a constable, having a warrant to search for certain specific goods alleged to have been stolen, found & took away those goods, & certain others also supposed to have been stolen, but which were not mentioned in the warrant, & were not likely to be of use in substantiating the charge of stealing the goods mentioned in the warrant:—*Held*: the constable was liable to an action of trespass.—*CROZIER v. CUNDEY* (1827), 6 B. & C. 232; 9 Dow. & Ry. K. B. 224; 4 Dow. & Ry. M. C. 303; 5 L. J. O. S. M. C. 50; 108 E. R. 439.

*Annotations:—Consol. Kay v. Grover* (1831), 7 Bing. 312; *Dillon v. O'Brien & Davis* (1887), 16 Cox, C. C. 245.

**1701. Under Betting Act, 1853 (c. 119), s. 11—Seizure of money & betting slips.]—**Pltf., a book-maker, placed £107 6s. 8d., the proceeds of street betting, in a house occupied by a person who assisted him in his transactions. The house was raided by the police under a warrant granted under sect. 11 of the above Act, & the money & a number of betting slips were seized & detained by the police for the purposes of certain proceedings taken against pltf. & others. In those proceedings pltf. was acquitted. The police having refused

c. 16, s. 2.—*McDONALD v. BULWER* (1862), 11 L. T. 27.—**IR.**

**b. — General warrant delegating judicial duties—Bad.]—**A warrant to search for stolen goods, addressed to "all or any of the constables or other peace officers in the county of B." authorised such constables or peace officers to enter, in the day time, into the dwelling-houses of five persons mentioned by name, "or any other house at B., if there is any suspicion that goods & wares may be in such house":—*Held*: (1) the warrant was a general warrant, & void, & afforded no justification to the officer acting under it; (2) the warrant was bad as delegating to the officer the duties of the justice, by enabling him to act on suspicions arising in his mind after the adjudication & the issue of the warrant.—*McLEOD v. CAMPBELL* (1894), 26 N. S. R. 458.—**CAN.**

**c. — No warrant of arrest provided for—Necessity for further oath.]—**A complaint in writing under oath for a search warrant under which a warrant was issued & goods named therein were found in the possession of the accused, will not justify arrest without any further or other complaint.—*MELANSON v. LAVIGNE* (1906), 1 E. L. R. 520; 37 N. B. R. 539.—**CAN.**

**d. Execution of warrant—Party executing not named.]—**The direction of a search warrant to the constable of T., not naming him, to execute the warrant in the township of L., is good.—*JONES v. ROSS* (1847), 3 U. C. R. 328.—**CAN.**

**e. — Includes search of individuals found on premises.]—**A warrant to search premises authorises the search of the person of any individual found on the premises.—"L. S. D." *LTD. v. VACHELL* (1918), W. L. D. 127.—**S. AF.**

**f. — Term "documents" in-**

**cludes books.]—**A warrant to search for & seize "documents" authorises the seizure of books.—"L. S. D." *LTD. v. VACHELL* (1918), W. L. D. 127.—**S. AF.**

**g. Under Gaming & Lotteries Act, 1881, s. 3—Seizure of goods under warrant of arrest—Whether legal if no arrest made.]—**A constable who is legally authorised to arrest an accused person under a warrant issued under the above sect. may, at the time of such arrest, & as incidental to it, seize & take possession of articles in the possession or under the control of accused, as evidence tending to show the guilt of such person. But the authority to seize & take possession of such things, & the legal justification for so doing, arises from the actual arrest of accused, & not from the mere right to arrest. It does not exist, therefore, in a case in which no arrest has actually been made.—*BARNETT & GRANT v. CAMPBELL* (1902), 21 N. Z. L. R. 484.—**N.Z.**

**h. Under Canada Temperance Act, 1878—Issue of illegal warrant—Evidence obtained admissible.]—**Before any complaint a charge was made against deft., a search was issued & executed, & evidence obtained upon his premises, under which he was convicted:—*Held*: although the search warrant under the above Act was illegally issued, the evidence obtained under it was admissible against deft.—*R. v. DOYLE* (1886), 12 O. R. 347.—**CAN.**

**k. — ]—**An information charging deft. with having sold intoxicating liquor was laid before two justices of the peace, & immediately afterwards a further information to obtain a search warrant under the above Act was sworn by the same complainant before the same two justices. Thereupon a warrant to search the premises of deft. was issued under the hand & seal of one

only of the two justices:—*Held*: the warrant in this case was illegal because issued by one justice of the peace only.—*R. v. WALKER* (1887), 13 O. R. 83.—**CAN.**

**l. — Execution of warrant by informant.]—**A search warrant under the above Act was executed by the informant who was also chief constable:—*Held*: not a ground for quashing the conviction.—*R. v. HEFFERNAN* (1887), 13 O. R. 616.—**CAN.**

**m. Offence not alleged in information or warrant.]—***Certiorari* will lie to quash a search warrant, which alleges no offence, & which is issued upon an information defective in that it alleges no offence against deft. or any other person; that no facts or circumstances are disclosed showing the causes of suspicion, which tended to the belief of the commission of an alleged or any offence with regard to which the warrant is deemed essential, & that no cause of suspicion or reasonable or other grounds for believing that the goods were concealed on the premises of deft. are given.—*R. v. FRAIN* (1915), 32 W. L. R. 387.—**CAN.**

**n. Grounds for belief of location of goods not set forth—Effect of.]—**Where the information on which a search warrant is issued does not set forth the reasons or causes of deponent's belief that the goods in question are on the premises mentioned, the search warrant is void, & the arrest of accused or seizure of goods thereunder is illegal.—*R. v. NELSON*, [1922] 2 W. W. R. 381; 69 D. L. R. 180; 37 Can. Crim. Cas. 270.—**CAN.**

**o. To search for Asiatics—General warrant—Bad.]—**A general search warrant purporting to authorise a police officer to enter any premises by day or night & to search for & arrest Asiatics illegally in the colony, or wanted on warrant, or not in possession of registration certificates:—

to hand him back the money, *pltf.* brought an action claiming the return of his property :—*Held* : the action was maintainable.—*GORDON v. METROPOLITAN POLICE CHIEF COMM.*, [1910] 2 K. B. 1080 ; 79 L. J. K. B. 957 ; 103 L. T. 338 ; 74 J. P. 437 ; 26 T. L. R. 645 ; 54 Sol. Jo. 719, C. A.

**1702. — Arrest of persons found on premises for the purpose of betting.**—A person may be "found" on premises within the meaning of Betting Act, 1853 (c. 119), s. 11, although he only comes thereon after the police have entered the premises. But the power of arrest given to the police by that sect. is limited to the arrest of persons found on the premises for the purpose of betting.—*DAVIS v. SLY* (1910), 26 T. L. R. 460.

## SECT. 2.—PRELIMINARY EXAMINATION BEFORE JUSTICES.

### SUB-SECT. 1.—THE HEARING.

**1703. Jurisdiction of justices—Where warrant illegal.**—*R. v. HUGHES*, No. 1459, *ante*.

**1704. — Where complainant dies before hearing—Proceedings unaffected.**—Complaint having been duly made under 20 & 21 Vict. c. 83, that obscene books were kept by *deft.* in his shop for sale, a warrant for the seizure of such books was issued, & after they had been seized *deft.* was summoned to show cause why they should not be destroyed. Upon the hearing of the summons an order was made for the destruction of the books. After the issuing of the summons, but before the hearing, complainant died, & no application to substitute another complainant was made :—*Held* : the proceedings against *deft.* did not lapse upon the death of complainant, & the order was valid.—*R. v. TRUELOVE* (1880), 5 Q. B. D. 336 ; 49 L. J. M. C. 57 ; 42 L. T. 250 ; 44 J. P. 346 ; 28 W. R. 413 ; 14 Cox, C. C. 408, D. C.  
*Annotation* :—*Mentd.* *R. v. Spokes, Ex p. Buckley* (1912), 107 L. T. 290.

**1705. Attendance of witnesses—Power to compel—Refusal of witness to be bound over.**—A justice of the peace may commit a *feme covert* who is a material witness upon a charge of felony brought before him, & who refuses to appear at sessions to give evidence or to find sureties for her appearance.—*BENNET v. WATSON* (1814), 3 M. & S. 1 ; 105 E. R. 512.

*Annotations* :—*Distd.* *Cropper v. Horton* (1826), 8 Dow. & Ry. K. B. 166 ; *Evans v. Rees* (1840), 12 Ad. & El. 55.  
*Refd.* *Gosset v. Howard* (1847), 11 Jur. 750.

**1706. — Witnesses must be apprised of charge under inquiry.**—Where *pltf.* was com-

mitted by a justice "for refusing to give evidence before him, touching a certain riot & disturbance," without showing that there had been a person charged before the justices, & that *pltf.* was apprised of the existence of such charge, with respect to which he was required to be examined as a witness :—*Held* : the warrant of commitment was no justification of the magistrate in an action of trespass.

Before a party can be brought into contempt for refusing to give evidence before a magistrate, he ought to be fully apprised that there is some information or charge for an offence then under inquiry before the justice (*HOLROYD, J.*).—*CROPPER v. HORTON* (1826), 8 Dow. & Ry. K. B. 166 ; 4 Dow. & Ry. M. C. 42.

**1707. —**—*J.*—A magistrate issued a warrant, reciting that, on complaint on oath before him of a misdemeanour, *pltf.* was stated to be a material witness ; that the magistrate had issued a summons requiring *pltf.* to appear to testify his knowledge ; that the summons was proved before the magistrate to have been duly served, but *pltf.* did not appear to testify & said that he would not ; & that it was necessary for the ends of justice that *pltf.* should appear at the next assizes to testify. The warrant then commanded the constable to bring *pltf.* before the magistrate, or some other justice, to find sufficient bail to appear & give evidence at the next assizes & testify :—*Held* : the warrant was bad for requiring *pltf.* to give bail at this stage of the proceedings, assuming that the magistrate had power to bring him up by warrant to give testimony.

I throw no doubt on the power of the magistrate to do all that is necessary to compel the attendance of those witnesses, whom he knows to be material. Here, if the warrant had merely recited the refusal of the witness to attend, & directed the constable to bring him, there might not be much doubt that it would have been justifiable (*LORD DENMAN, C.J.*).—*EVANS v. REES* (1840), 12 Ad. & El. 55 ; 4 Per. & Dav. 32 ; 9 L. J. M. C. 83 ; 4 J. P. 444 ; 4 Jur. 1032 ; 113 E. R. 732.

**1708. Representation of accused by solicitor—Right of solicitor to cross-examine.**—Certain justices at a preliminary inquiry into an alleged case of highway robbery declined to permit the solr. representing prisoners to cross-examine witnesses for the prosecution, believing that they possessed a discretionary power in the matter :—*Held* : justices had no discretion to prohibit the solr. to prisoners from cross-examining witnesses for the prosecution, & the right to cross-examine is absolute both under the Summary Jurisdiction

*Held* : to be invalid.—*HO ST. v. VERNAN* (1900), T. S. 1074.—*S. AF.*  
*p.* Under 17 Geo. 3, c. 56, s. 10—*Applies to materials for manufacture—Not manufactured goods.*—A warrant granted under the above sect. to search for manufactured goods suspected to have been purloined or embezzled & apprehend the person in whose possession they might be found, is not competent, the statute giving this power only in regard to materials for manufacture. By the above sect. it is lawful for two justices upon complaint made by oath by one credible person that purloined or embezzled materials were concealed in any dwelling-house, etc., to grant a warrant for its being searched.—*BARNET v. WHYTE* (1849), 11 Dunl. (Ct. of Sess.) 666 ; 21 Sc. Jur. 190.—*SCOT.*

*q.* Under Act 31, 1917, s. 49—*Whether confined to offences mentioned in Act.*—Warrants may be issued under Act 31, 1917, s. 49 (1) (b) & (c), directing search for & seizure of any-

thing as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any offence, the offences referred to being quite general & not confined to such as are mentioned in sect. 49 (1) (a), as being in respect to *corpora delicti*.—"L. S. D." LTD. *v.* VACHELL, [1918] W. L. D. 127.—*S. AF.*

### PART V. SECT. 2, SUB-SECT. 1.

*r.* *Jurisdiction of justices—Power of one justice to adjourn proceedings.*—One justice of the peace has power at the return day of the summons to adjourn the proceedings till a future day, under Summary Conviction Act, though jurisdiction to hear the case is given to two justices.—*Ex p. HOLDER* (1866), 6 All. 338.—*CAN.*

*s.* — *Objection after pleading too late.*—*Deft.* pleaded to a charge & raised no objection to the validity of the proceedings before a justice until the appln. for a *certiorari* :—

*Held* : the conviction could not be impugned.—*R. v. STONE* (1892), 23 O. R. 46.—*CAN.*

*t.* — — — *J.*—*Deft.* having been unlawfully arrested on a charge of vagrancy by reason of there being no warrant, appeared, without protest, before a magistrate who dismissed the charge. Prior to its dismissal, a further charge of having opium in his possession, contrary to Opium & Drug Act, s. 3, was preferred against *deft.*, upon which he was convicted. On the hearing of the latter charge, accused objected to the jurisdiction of the magistrate on the ground that his arrest without a warrant was illegal :—*Held* : *deft.*, not having objected to the illegality of the warrant upon which he was arrested upon the charge of vagrancy when tried upon that charge, could not raise it on the second charge.—*R. v. HURST* (1914), 30 W. L. R. 176 ; 7 W. W. R. 994 ; 20 D. L. R. 129 ; 23 Can. Crim. Cas. 339.—*CAN.*

**Sect. 2.—Preliminary examination before justices:**  
**Sub-sects. 1 & 2, A.]**

Acts, 1879 (c. 49), & 1884 (c. 43), & by the common law.—*R. v. GRIFFITHS & WILLIAMS* (1886), 54 L. T. 280; 16 Cox, C. C. 40.

**1709. Statement of accused—When taken.]**—If a prisoner is brought before a magistrate, his statement ought not to be taken till the evidence against him is gone through, & he should be then asked if he has anything to say in answer to the charge.—*R. v. FAGG* (1831), 4 C. & P. 566; 2 Man. & Ry. M. C. 517.

**Annotations:—***Consd. R. v. Bell* (1831), 5 C. & P. 162; *R. v. Watson* (1851), 3 Car. & Kir. 111. **Refd. Anon.** (1831), 5 C. & P. 164, n.

**1710. — On cross-examination of witness for prosecution—Absence of caution.]**—On an examination on a charge of felony before a magistrate, prisoner was asked if he wished to put any question to a witness against him. Instead of asking anything, he made a statement, which was written down on the depositions, but not signed by prisoner, who had received no caution:—**Held:** this statement was not evidence *per se*, but any one who heard prisoner make it might give evidence of it. But in such a case a prisoner ought to be told that that was not the proper time for him to make a statement.—*R. v. WATSON* (1851), 3 Car. & Kir. 111.

**1711. — Caution to be used by justices.]**—A prisoner ought to be told by the magistrate that, if he makes any statement, it may be used as evidence against him, & that he must not expect any favour if he confesses; but the magistrate ought not to dissuade him from confessing.—*R. v. GREEN* (1832), 5 C. & P. 312; 1 Nev. & M. M. C. 361.

**1712. — —.]**—When a prisoner is willing to make a statement, it is the duty of magistrates to receive it, but magistrates, before they do so, ought entirely to get rid of any impression that may have before been on prisoner's mind, that the statement may be used for his own benefit; & prisoner ought also to be told that what he thinks fit to say will be taken down, & may be used against him on his trial.

Nothing should be returned as a deposition, unless prisoner had an opportunity of knowing what was said, & an opportunity of cross-examining the person making the deposition.—*R. v. ARNOLD* (1838), 8 C. & P. 621.

**1713. — — Indictable Offences Act, 1847 (c. 42), s. 18, & Sched. (N).]**—*Semble:* for the purpose of proving a prisoner's statement on his examination before a magistrate, it is not sufficient that the form given in sched. (N) of the above

**a. — —.]**—An objection to the magistrate's jurisdiction because of the arrest of accused without warrant must be taken promptly. It is too late to do so after pleading in the regular way without protest.—*R. v. TEY SHING* (1920), 1 W. W. R. 546; 51 D. L. R. 173; 15 Alta. L. R. 185; 32 Can. Crim. Cas. 315.—**CAN.**

**b. — — Whether power to reduce charge.]**—Justices of the peace, before whom a charge of "shooting & wounding with intent to do grievous bodily harm" came on for preliminary hearing, changed it of their own motion to one of common assault & convicted & fined accused:—**Held:** the justices had no right to alter the charge to one of common assault.—*MILLER v. LEA* (1898), 25 A. R. 428.—**CAN.**

**c. — —.]**—A magistrate has no power to reduce a charge of intent to do serious bodily harm to one of assault, even with consent of Crown counsel.—*GOODWIN v. HOFFMAN* (1908),

10 W. L. R. 613; 15 Can. Crim. Cas. 270.—**CAN.**

**d. — — To try charge of obstruction of peace officer.]**—A stipendiary magistrate in Nova Scotia has jurisdiction in a summary conviction proceeding to try a charge of obstructing a peace officer.—*R. v. SOLOMON*, [1918] 58 D. L. R. 235; 34 Can. Crim. Cas. 171.—**CAN.**

**e. — — To hear further charge—Consent of accused.]**—Where a person already before the ct. consents to a charge being then & there made against him & proceeded with, the magistrate has jurisdiction to hear & determine the charge.—*ALVES v. CROSBY* (1895), 13 N. Z. L. R. 351.—**N.Z.**

**1715 i. Witnesses for defence—Should be called.]**—A person charged before a magistrate with an indictable offence has a right to call witnesses for his defence.—*Re PHIPPS* (1883), 8 A. R. 77.—**CAN.**

Act has been read over to prisoner, but there must be some proof that the caution mentioned in the proviso contained in the latter part of sect. 18 has been also given.—*R. v. KIMBER* (1849), 13 J. P. 122; 3 Cox, C. C. 223.

**Annotation:—***Refd. R. v. Sansome* (1850), 1 Den. 545.

**1714. — — —.]**—(1) A statement made by a prisoner before a committing magistrate, & signed by prisoner & the magistrate, if taken in the form prescribed by sched. (N) of the above Act, is admissible in evidence against him at his trial at common law.

(2) It will be prudent for justices always to give a prisoner the second caution as well as the first when taking his statement under sect. 18.—*R. v. SANSOME* (1850), 3 Car. & Kir. 332; 1 Den. 545; T. & M. 260; 4 New Mag. Cas. 80; 4 New Sess. Cas. 152; 19 L. J. M. C. 143; 15 L. T. O. S. 119; 14 J. P. 273; 14 Jur. 466; 4 Cox, C. C. 203, C. C. R.

**Annotation:—***As to (2) Refd. R. v. Hertfordshire JJ.* (1910), 80 L. J. K. B. 437.

**1715. Witnesses for defence—Should be called.]**—*ANON.* (1870), 48 L. T. Jo. 367.

**1716. — — —.]**—It is a great pity when justices discourage witnesses from giving evidence before them on the initial stage of criminal proceedings. They should be encouraged then to give evidence (*CHANNELL, J.*).—*R. v. NICHOLSON* (1909), 73 J. P. 347; 2 Cr. App. Rep. 195, C. C. A.

**1717. — — —.]**—Magistrates should do nothing to discourage a prisoner from calling his witnesses at the hearing before them.—*R. v. HENDRY* (1909), 25 T. L. R. 635, C. C. A.

**1718. — Evidence of accused.]**—When an accused person charged with an indictable offence is about to be committed for trial & intends to rely upon evidence by way of defence, it is advisable that he should give evidence before the committing justices. Justices should impress this upon all accused persons. If an accused person omits to give evidence before the justices, the value of his evidence at the trial will be much lessened.—*R. v. HUMPHRIES* (1903), 67 J. P. 396.

**1719. Non-appearance due to mistake—Issue of fresh summons.]**—*R. v. BENNETT & BOND, Ex p. BENNETT* (1908), 72 J. P. 362; 24 T. L. R. 681; 52 Sol. Jo. 583, D. C.

*See, further, MAGISTRATES.*

**SUB-SECT. 2.—DEPOSITIONS.**

**A. In General.**

**1720. Object of depositions.]**—Depositions are not taken for the purpose of affording information

**1718 i. — Evidence of accused.]**—Def. was charged by his wife, before a magistrate, with refusing to provide necessary clothing & lodging for herself & children. At the close of the case for the prosecution, deft. was tendered as a witness on his own behalf. The magistrate refused to hear his evidence, & without further evidence, committed him for trial:—**Held:** deft.'s evidence should have been taken for the defence.—*R. v. MEYER* (1886), 11 P. R. 477.—**CAN.**

**f. Duty of justices—Prior to commitment for trial.]**—The duty of a committing magistrate is to ascertain whether by the evidence for the prosecution a *prima facie* case is made out against an accused.—*R. v. MAHA SINGH* (1871), 3 N. W. 27; 14 W. L. R. 16.—**IND.**

**PART V. SECT. 2, SUB-SECT. 2.—A.**

**1720 i. Object of depositions.]**—The object of taking depositions is not to

to prisoner. The object of taking the depositions is, that if any of the witnesses, whose evidence is given before the magistrates, should be unable to attend at the trial, or die, there should not, by reason of this, be a failure of justice. That is the real ground on which the depositions are taken (CRESSWELL, J.).—*R. v. WARD* (1848), 2 Car. & Kir. 759.

*Annotation* :—*Mentd.* *Dawes v. Hawkins* (1860), 7 Jur. N. S. 262.

**1721. Witness must be on oath.]**—Where magistrates first took the examination of witnesses, not on oath, in support of a conviction, & afterwards swore them to the truth of their evidence, the ct. expressed its disapprobation of the practice.—*R. v. KIDDY* (1824), 4 Dow. & Ry. K. B. 734; 2 Dow. & Ry. M. C. 364.

**1722. —.]**—A deposition taken in an adjoining room to that in which the magistrates sit, by the magistrates' clerk, in the presence of prisoners, the witness not being sworn, & afterwards read over to the witness before the magistrates, in the presence of prisoners, the witness being then sworn to the truth of his deposition, is admissible.—*R. v. CALVERT* (1848), 2 Cox, C. C. 491.

**1723. Must be in presence of justices.]**—On a charge of felony, the witnesses who make the depositions on which prisoner is committed should be examined in prisoner's presence, & he should hear all the questions put & answered; & if the magistrates' clerk, before the arrival of the magistrates & of prisoner, examine the witnesses & take down what they state, & when the magistrates & prisoner arrive the depositions so taken are read over to the witnesses in the presence of the magistrates & prisoner, & the latter be asked whether he has any question to put to any of them, this is wrong.—*R. v. JOHNSON* (1846), 2 Car. & Kir. 394; 7 L. T. O. S. 370.

*Annotation* :—*Consd.* *R. v. Christopher* (1850), 4 Cox, C. C. 76.

**1724. —.]**—*R. v. CALVERT*, No. 1722, *ante*.

**1725. —.]**—Prisoners being charged with felony before a magistrate, minutes of the examination & cross-examination of the witnesses were taken in writing under the inspection of the magistrate. These minutes were taken to the magistrate's office to T., who proceeded to draw up the depositions. The witnesses attended at the office, & T., in order to make the depositions

complete, put questions to them, & inserted their answers in the depositions. Neither the magistrate nor prisoners were present at the office. The depositions having been so written out, the witnesses again appeared before the magistrate, & in the presence of prisoners were re-sworn, & the depositions were read over to them, & a full opportunity was given for cross-examination before the depositions were signed by the witnesses :—*Held* : counsel for prisoners was entitled, without putting in the depositions, to ask a witness whether he had not made a certain statement to T., in answer to a question put by the latter in the course of writing the depositions, although, according to the evidence, the answer would have appeared in the depositions.—*R. v. CHRISTOPHER, SMITH & THORNTON* (1850), 2 Car. & Kir. 994; 1 Den. 536; T. & M. 225; 4 New Mag. Cas. 61; 4 New Sess. Cas. 139; 19 L. J. M. C. 103; 14 J. P. 83; 14 Jur. 203; 4 Cox, C. C. 76, C. C. R.

**1726. — May be written by justice's clerk.]**—At the hearing of a charge of felony the witnesses were examined & cross-examined by an attorney for prisoner in the presence of the magistrate, & a note was made of the heads of what they could each prove. Witnesses & prisoner were then taken into another room, & the witnesses were there, in the absence of the magistrate, examined by a clerk, & their answers taken in writing by him, & their signatures obtained to the paper, after which the witnesses & prisoner were again brought before the magistrate, & the evidence so taken was read over. Prisoner was then cautioned by the magistrate, & having previously made a statement, signed it, & the magistrate then signed the paper :—*Held* : this course of taking the depositions was irregular, & a deposition so taken was inadmissible in evidence.—

I do not suppose it necessary for the magistrate himself to write down the answers (MARTIN, B.).—*R. v. WATTS* (1863), Le. & Ca. 339; 3 New Rep. 175; 33 L. J. M. C. 63; 9 L. T. 453; 27 J. P. 821; 12 W. R. 112; 9 Cox, C. C. 395, C. C. R.

*Annotation* :—*Mentd.* *Ex p. Huguet* (1873), 29 L. T. 41.

**1727. Necessity for presence of accused—Opportunity for cross-examination.]**—*R. v. ARNOLD*, No. 1712, *ante*.

**1728. —.]**—An examination of a witness was taken on one day in the absence of prisoner, & then

afford information to prisoner, but to secure the testimony.—*R. v. HAMILTON* (1866), 16 C. P. 340.—*CAN.*

**g. Witness must be on oath—Necessity for presence of accused.]**—Prisoner having been arrested on a charge of poisoning P., a magistrate, the prisoner being kept in custody outside, first took down in writing the deposition of P., & then swore him to the truth of it. Prisoner being then brought into the room, the magistrate slowly read over the deposition to P., & asked him if it was true, & having been answered in the affirmative, he then re-swore P. to his deposition in the presence of prisoner, & read over the information to P., to him. Dependent having died, the entire document was read in evidence on the part of the Crown at the trial of the prisoner :—*Held* : the evidence was inadmissible both because the information was originally taken down without an oath having been previously administered to the informant, & also because prisoner was not present from the commencement.—*R. v. WALSH* (1850), 5 Cox, C. C. 115.—*IR.*

**1723 i. Must be in presence of justices.]**—Depositions taken at a preliminary inquiry, in the absence of the magistrate before whom the case is pro-

ceeding, have no legal value whatever; & the commitment by the magistrate of a prisoner for trial, the bill of indictment founded on his illegal commitment or on the illegal depositions & the true bill & indictment reported by the grand jury are null & void.—*R. v. TRAYNOR* (1901), Q. R. 10 K. B. 63.—*CAN.*

**1723 ii. —.]**—The declaration of a party since deceased was taken by way of precognition by a person not a magistrate, without witnesses, & when the party was not in apprehension of death :—*Held* : an inadmissible article of evidence, although it had been subsequently read over to deponent & attested by her in the presence of a magistrate.—*Re M'INTOSH* (1838), 2 Swin. 103.—*SCOT.*

**h. Should be taken down in writing.]**—Although the depositions or a substantial summary of the depositions of witnesses examined in a summary trial must be taken down in writing, duly authenticated & placed in the record, this is not so essential a part of the proceedings that it cannot be waived by the accused, it being a matter of procedure only capable of being dispensed with.—*R. v. MALIS* (1922), Q. R. 34 K. B. 297; 40 Can. Crim. Cas. 199.—*CAN.*

**1727 i. Necessity for presence of accused—Opportunity for cross-examination.]**—At a preliminary inquiry before a magistrate on a charge of indecent assault on a female, the latter's depositions were taken, prisoner being represented by counsel, but before her cross-examination was concluded the proceedings were adjourned to a fixed date on account of her illness. On the day to which adjournment had been made, the magistrate went out to the residence of the witness, & obtained her signature to her depositions as already taken, neither prisoner nor his counsel being present, & afterwards resumed the inquiry at his own office, prisoner being present, but not the witness, & on the evidence already taken prisoner was committed for trial. At the trial the witness was proved to be too ill to attend, & her depositions taken as above were tendered by the Crown & admitted :—*Held* : in view of Criminal Code, s. 687, the depositions were improperly received in evidence, prisoner's counsel not ever having had a full opportunity of cross-examining the witness.—*R. v. TREVANNE* (1902), 22 C. L. T. 385; 4 O. L. R. 475; 1 O. W. R. 587; 6 Can. Crim. Cas. 124.—*CAN.*

**1728 i. —.]**—Prisoner was charged with manslaughter, & in a second count

*Sect. 2.—Preliminary examination before justices:  
Sub-sect. 2, A., B. & C.]*

signed by the magistrate. On the next day prisoner was brought up, & the deposition taken & signed on the previous day was read in his presence, & that of the other prisoners, & an opportunity given him for cross-examination. Subsequently the witness died:—*Held*: her deposition so taken was admissible in evidence as against prisoner absent at the time that it was taken.—*R. v. HAKE* (1845), 1 Cox, C. C. 226.

1729. —.]—*R. v. JOHNSON*, No. 1723, *ante*.

1780. —.]—Before a deposition of a person who is dead, or so ill as not to be able to travel, can be read on the trial under Indictable Offences Act, 1848 (c. 42), s. 17, it must be proved affirmatively on the part of the prosecution that the deposition was taken in the presence of accused, & that he or his counsel had a full opportunity of cross-examining the witness.—*R. v. DAY* (1852), 19 L. T. O. S. 35; 6 Cox, C. C. 55.

1781. —.]—Where a deposition of a deceased witness, partly taken from the examination of the witness in the presence of accused on a previous day, & not then read over, was read over on a subsequent examination of the witness in the presence of accused, the witness then being further examined, & cross-examined on behalf of accused, & the notes of the magistrate's clerk of the whole being subsequently fair copied in an adjoining room, & then read over to the witness in the presence of accused, & signed by the witness & the

magistrate:—*Held*: this was admissible.—*R. BATES* (1860), 2 F. & F. 317.

1782. —.]—*R. v. WATTS*, No. 1726, *ante*.

1783. —.]—*R. v. HARRIS*, No. 1766, *post*.

1784. *First hearing abortive—Procedure at rehearing.*—Several persons having been charged with conspiracy to defraud, a summons was issued, & the hearing commenced before a magistrate. When the inquiry had lasted a considerable time, & the evidence of a large number of witnesses had been taken, the magistrate fell ill & was unable to continue the hearing, which had to be recommenced before another magistrate. At the commencement of the rehearing counsel for the prosecution proposed to recall some of the witnesses called at the first hearing; to reswear them; to read to them their depositions taken at that hearing, directing them to correct the evidence if & where it was inaccurate; to ask them any additional questions that might be thought advisable; then to tender these witnesses for cross-examination, with liberty for the prosecution to re-examine where necessary; & then to proceed with the oral examination of those witnesses whom the prosecution intended to call but had not called on the first hearing:—*Held*: there was nothing illegal in the course proposed, & to accede to the proposal, if he thought it expedient in the interests of justice so to do, was within the discretion of the magistrate, with which the ct. would not interfere.—*Ex p. BOTTOMLEY*, [1909] 2 K. B. 14; 78 L. J. K. B. 547; 100 L. T. 782; 73 J. P. 246; 25 T. L. R. 371; 22 Cox, C. C. 106, D. C.

with wounding M. with intent to do grievous bodily harm. The day after the wounding took place, prisoner not being present, a constable took down M.'s statement in writing before a justice, & she signed & swore to it. On Oct. 18, prisoner then being present with others, the statement was read over to M., & accused was told he might ask questions. M. was then re-sworn & said the statement was true. Martin died on Nov. 4. At the trial the statement was put in & read as a verbal statement made in prisoner's presence & reduced to writing:—*Held*: inadmissible & conviction quashed.—*R. v. SOLARI* (1891), 12 N. S. W. L. R. 18.—*AUS.*

*k. Statement of deceased person.—Taken on oath by magistrate.—On proof of presence of accused.*—The statement of a deceased person, taken on oath by a magistrate, detailing the circumstances under which a felony was committed upon him, is admissible in evidence on the trial of the accused person under 1 Rev. Stat. c. 156, s. 7, though it is headed, "The complaint," etc., & does not appear on its face to have been in the presence of accused, it being proved that it was taken in his presence.—*R. v. MILLAR* (1861), 5 All. 87.—*CAN.*

*l. For prisoner's inspection.—Contained in bundle with depositions in another case.*—Where the depositions handed prisoner for his inspection are contained in a bundle with other depositions, but in such way that there is no difficulty in understanding those applicable to the particular offence charged, there is a sufficient compliance with Criminal Code, s. 653.—*R. v. JODREY* (1905), 38 N. S. R. 142.—*CAN.*

*m. Reading depositions.—Whether duty of magistrate.*—Criminal Code, s. 798, relieves the magistrate from the duty of reading the depositions to the witnesses before accused enters on his defence.—*R. v. KLEIN* (1909), 15 B. C. R. 165.—*CAN.*

*n. — Must be in accordance with law.—Reading before court clerk insufficient.*—A. was convicted of giving false evidence in a judicial proceeding. It was proved that after his evidence had been recorded, his deposition, upon which the assignments of perjury were based, was read over to him by the ct. clerk, in a place where neither the judge nor vakils were present:—*Held*: the conviction could not be sustained. The deposition upon which the prosecution was based not being properly taken in accordance with law, should not have been admitted in evidence.—*KAMATCHINATHAN CHETTY v. R.* (1904), 1 L. R. 28 Mad. 308.—*IND.*

*o. — Presence of accused or pleader necessary.*—The evidence given by a witness must be read over to him in the presence of accused or his pleader.—*JYOTISH CHANDRA MUKERJEE v. R.* (1909), 1 L. R. 36 Calc. 955.—*IND.*

*p. Evidence taken down in shorthand.—No ground for quashing conviction.*—A conviction entered by the magistrate will not be quashed on *certiorari* because the evidence was taken down by a shorthand reporter.—*R. v. BOND* (1911), 21 Man. L. R. 366.—*CAN.*

*q. — Stenographer must be duly sworn.*—A conviction for an offence on evidence taken in shorthand by a stenographer who was not sworn to truly & faithfully report the evidence, & was not a duly sworn official ct. stenographer as required by Criminal Code Amendment Act, 1913 (c. 13), s. 25, was quashed on *certiorari* as having been made without jurisdiction.—*R. v. LIMERICK, Ex p. DEWAR* (1910), 44 N. B. R. 233; 27 Can. Crim. Cas. 309.—*CAN.*

*r. Slight defect in deposition.—Insufficient to quash charge preferred by agent of Attorney-General.*—Where there were some slight defects in the form in which a magistrate had returned depositions to the proper ct.:—*Held*: the defects could not be

set up as a ground for quashing a charge preferred by an agent of the A.-G. under Criminal Code, s. 873A.—*R. v. MCCLAIN* (1915), 30 W. L. R. 388; 7 W. W. R. 1134; 8 Alta. L. R. 73.—*CAN.*

*s. Right of accused to have depositions read again.*—Accused may avail himself of an omission by a magistrate to ask whether he wishes depositions to be read anew by motion to quash the indictment before the assizes.—*R. v. BEAULIEU*, [1917] Q. R. 26 K. B. 151.—*CAN.*

*a. — Not where evidence taken in shorthand.*—Criminal Code, s. 681, ss. 1, providing for the justice on a preliminary inquiry after the depositions have been signed reading, or causing them to be read, again to accused, unless accused dispenses therewith, does not apply where the evidence has been taken in shorthand.—*R. v. MACDONALD* (1920), 1 W. W. R. 1002; 51 D. L. R. 639; 15 Alta. L. R. 302.—*CAN.*

*b. Two persons accused of offence.—Depositions against one applied by consent against the other.*—Two persons were accused of an offence, & at the preliminary hearing after the depositions had been taken against one of them, the same evidence was by consent on behalf of the prosecution & of counsel for the defence applied to the other, the witnesses being called & re-sworn to the application of the same evidence:—*Held*: no objection could be taken at the trial against such use of the evidence.—*R. v. TREFTAK*, [1919] 2 W. W. R. 794; 47 D. L. R. 497; 12 Sask. L. R. 312.—*CAN.*

*c. Prisoner's mark on deposition.—Name attached by clerk.*—To the deposition of a marksman, the petty sessions' clerk attached prisoner's name, so that it appeared to have been signed by prisoner's mark:—*Held*: this deposition was properly received in evidence against prisoner.—*R. v. MULLEN* (1862), 14 Ir. Jur. 304; 9 Cox, C. C. 339.—*IR.*



*B. The Caption.*

**1735. Applies to all the depositions.]**—If there be a caption at the head of the body of depositions taken in the case, that is sufficient.

The heading applies to all the depositions (ALDERSON, B.).—*R. v. JOHNSON* (1847), 2 Car. & Kir. 354.

**1736. Is part of the deposition—Should be added when deposition is made.]**—*R. v. PRESTRIDGE* (1881), 72 L. T. Jo. 93.

**1737. Contents of.]**—Upon the trial of prisoner for unlawfully obtaining a promissory note by false pretences, the deposition of prosecutrix, proved to have been regularly taken before the committing magistrate, stated by way of caption or title that it had been taken in the presence & hearing of H., the prisoner, late of, etc., wife of J. of the same place, labourer, who is now charged before me this day for obtaining money & other valuable security for money from M., the prosecutrix, "then & there being the money of," etc.:—*Held*: such title or caption charged an offence against prisoner with sufficient distinctness, & the deposition had been properly received in evidence at the trial, after due proof of the absence of

The title or caption of the written deposition of a witness, taken before a committing magistrate, need state no more than that it is the deposition of the witness, & that the examination had reference to the particular charge upon which prisoner is being tried.—*R. v. LANGBRIDGE* (1849), 2 Car. & Kir. 975; 1 Den. 448; T. & M. 146; 3 New Sess. Cas. 645; 18 L. J. M. C. 198; 13 L. T. O. S. 551; 13 J. P. 425; 13 Jur. 545; 3 Cox, C. C. 465, C. C. R.

*Annotation*:—*Consd. R. v. Galvin* (1865), 10 Cox, C. C. 198.

**1738. —.]**—A. D. having had a rape committed upon her by the two prisoners, next day, in distress of mind, cut her throat, & being likely to die, a magistrate was sent for &, in the presence of prisoners, her deposition was properly taken. She was told she was likely to die, & she died a few days afterwards. Subsequently other witnesses gave evidence against prisoners before a different magistrate, & to these latter depositions the deposition of deceased was attached, without any separate caption:—*Held*: the deposition of deceased, having no caption showing on what charge it was taken, was inadmissible in evidence.—*R. v. NEWTON & CARPENTER* (1859), 1 F. & F. 641.

*Annotation*:—*Consd. R. v. Galvin* (1865), 10 Cox, C. C. 198.

**1739. Fresh caption for each day's hearing—Order of depositions.]**—A private prosecutor not

having the privilege that a police constable possesses of imprisoning a person on mere suspicion that a felony has been committed, false imprisonment results if the person is detained by the private prosecutor. Arrest, however, by a police constable which follows the placing of the case in his hands to do his duty is not an arrest by a private prosecutor, but is an arrest by the police constable.

The fact that a person is not actually aware that he is being imprisoned does not amount to evidence that he is not imprisoned, it being possible for a person to be imprisoned in law without his being conscious of the fact & appreciating the position in which he is placed, laying hands upon the person of the party imprisoned not being essential. The depositions of witnesses taken in pursuance of Indictable Offences Act, 1848 (c. 42), s. 17, in the form set forth in the sched. to that Act should appear in chronological order, a record of the depositions being kept day by day with a fresh caption at the beginning of each day's proceedings showing what witnesses have been examined on that day, & what part of their evidence has been given on that day.—*MEERING v. GRAHAME-WHITE AVIATION CO., LTD.* (1919), 122 L. T. 44, C. A.

*C. The Signatures of the Justices.*

**1740. Necessity for.]**—Depositions taken in cross-examination at a subsequent time to those in chief & not signed by the committing magistrate are so irregular as to prevent the whole depositions from being read against a prisoner; & this, although both are proved by one of the committing magistrates to have been accurately taken.—*R. v. FRANCE* (1839), 2 Mood. & R. 207.

*Annotation*:—*Reid. R. v. Parker* (1870), 18 W. R. 353.

**1741. When made—As the deposition is made.]**—(1) A party charged before a magistrate with an offence is entitled to copies of the depositions under Trials for Felony Act, 1836 (c. 114), s. 3, when he is finally committed or held to bail for the purpose of trial; but not on his being remanded for further examination.

(2) A magistrate committing for re-examination ought at each examination to subscribe the depositions then taken, the witnesses having first signed, & not to defer the subscription by himself & the witnesses till he determines upon committing.—*R. v. LONDON (LORD MAYOR)* (1844), 5 Q. B. 555; 1 Dav. & Mer. 484; 1 New Sess. Cas. 40; 2 L. T. O. S. 346; 8 J. P. 854; 114 E. R. 1358; *sub nom. Ex p. FLETCHER*, 13 L. J. M. C. 67; 8 Jur. 269.

**1742. Where made—At the foot of deposition.]**—A magistrate must sign a deposition of a witness

**PART V. SECT. 2, SUB-SECT. 2.—B.**

**1735 i. Applies to all the depositions.]**—*R. v. THOMPSON* (1904), 7 Terr. L. R. 188.—*CAN.*

**1735 ii. —.]**—Where the proceedings before the justice, including the depositions, appear on a number of successive pages fastened together, the evidence of each witness being signed by the witness, & on the last page just below the signature of the last witness the following statement is signed by the justice, "having considered the above evidence I remand accused for trial at the next ct. of criminal jurisdiction to be holden at B.," this is sufficient authentication of all the depositions returned into ct. by the justice.—*R. v. KOSTIUK*, [1919] 2 W. W. R. 352; 47 D. L. R. 299.—*CAN.*

**1735 iii. —.]**—Where the heading in a deposition of a deceased witness merely states "caption as in No. 1," & the deponent in No. 1 is a living

witness, the heading is sufficient to incorporate the deposition of the deceased witness with that of No. 1, & to make it admissible in evidence.—*R. v. SCANLAN* (1910), 44 I. L. T. 228.—*IR.*

**d. Contents of—Charge appearing in body of deposition.]**—In a trial for manslaughter the deposition of the deceased was offered in evidence by the Crown. It had no caption, & no statement of any particular charge against him had been made to prisoner previously to the deposition being taken. The deposition itself, however, showed that prisoner had stabbed the witness:—*Held*: the deposition was not admissible in evidence.—*R. v. GALVIN & FARRELL* (1865), 10 Cox, C. C. 198.—*IR.*

**e. Certificate of formality—When made.]**—Depositions taken under Justices of the Peace Act, 1866, s. 52, were separately signed by the witnesses & the resident magistrate, & at the end

of them there was a certificate to the effect that the requirements of the section had been complied with; but the certificate was not written until some days after:—*Held*: although it is desirable that such certificate should be written without delay, the statute does not require the certificate to be written at once, & therefore the deposition sufficiently purported to have been taken according to the Act.—*R. v. BAKER* (1871), 1 C. A. 409.—*N.Z.*

**PART V. SECT. 2, SUB-SECT. 2.—C.**

**f. How proved.]**—*R. v. THOMPSON* (1904), 7 Terr. L. R. 188.—*CAN.*

**g. When made—Failure to sign—Whether validity of trial affected.]**—The failure of the magistrate to sign the depositions at the preliminary hearing of an accused does not affect the validity of the trial.—*R. v. TREFIAR*, [1919] 2 W. W. R. 794; 47

*Sect. 2.—Preliminary examination before justices:*  
*Sub-sect. 2, C., D. & E.]*

at the foot of such deposition.—*R. v. RICHARDS* (1866), 4 F. & F. 860.

*Annotation:—***Refd.** *R. v. Parker* (1870), L. R. 1 C. C. R. 225.

**1743. Sufficiency of.]**—It was proved by the magistrate's clerk that the deposition of prosecutor was taken before the magistrate, in the presence of prisoner, who had a full opportunity of cross-examining. The deposition was taken on the same sheet of paper with those of the other witnesses. At the end of that last deposition were the words, "sworn before me," & the magistrate's signature. Prosecutor had died before the trial:—*Held:* on the above facts being proved, the deposition was receivable in evidence on the trial, although the magistrate had not put his signature to this particular deposition.—*R. v. OSBORNE* (1837), 8 C. & P. 113.

**1744. —.]**—In a case of felony the depositions had one caption, which mentioned the names of all the witnesses, & at the end had one *jurat*, which also contained the names of all the witnesses, & to which was added the signature of the magistrate, & each witness signed his own deposition:—*Held:* this was correct.—*R. v. YOUNG* (1850), 3 Car. & Kir. 106.

*Annotation:—***Foldd.** *R. v. Parker* (1870), L. R. 1 C. C. R. 225.

**1745. —.]**—*R. v. COLLINS* (1863), 60 C. C. Ct. Cas. 113.

*Annotation:—***Dbtd.** *R. v. Richards* (1866), 4 F. & F. 860.

**1746. —.]**—The fact that the whole of the depositions are signed by the magistrate is sufficient although the actual deposition is not signed.—*R. v. LEE* (1864), 4 F. & F. 63.

*Annotations:—***Foldd.** *R. v. Parker* (1870), L. R. 1 C. C. R. 225. **Refd.** *R. v. Edmunds* (1909), 25 T. L. R. 658.

**1747. —.]**—Where the deposition of deceased is on separate sheets, it is not necessary that the magistrate before whom such deposition is taken should sign his name on each separate sheet, but it is sufficient that the magistrate should sign his name on the last sheet.—*R. v. CARROL* (1869), 11 Cox, C. C. 322.

**1748. —.]**—It is not necessary that each deposition should be signed by the justice taking it. Therefore where a number of depositions taken at the same hearing on several sheets of paper were fastened together & signed by the justices taking them once only at the end of all the depositions:—*Held:* this was sufficient. *R. v. Richards*, No. 1742, *ante*, *overd.*—*R. v. PARKER* (1870), L. R. 1 C. C. R. 225; 39 L. J. M. C. 60; 21 L. T. 724; 34 J. P. 148; 18 W. R. 353; 11 Cox, C. C. 478, C. C. R.

*D. What Depositions should include.*

**1749. Everything material to the charge.]**—Though he may not in legal strictness be bound to take down more than is material to prove the felony, yet since the passing of Trials for Felony Act, 1836 (c. 114), giving prisoners the right to a copy of the depositions against them, the magistrate ought to return all that was said by the witnesses with respect to the charge, as the object of the legislature was to enable prisoners to know

what they have to answer on their trial.—*R. v. GRADY & CURLEY* (1836), 7 C. & P. 650.

**1750. —.]**—A magistrate is not bound by law to return all that is stated by the witnesses on a charge of felony, but only all that which is material to the case.—*R. v. COVENEY* (1837), 7 C. & P. 667.

**1751. —.]**—Magistrates, on the examination of persons charged with felony, are only required by law to put down so much of the evidence as is material.—*R. v. THOMAS* (1837), 7 C. & P. 817.

**1752. —.]**—*R. v. WAY* (1837), 1 J. P. 2.

**1753. Should not follow the exact words of the statute.]**—A justice of the peace should not allow depositions to be framed in the words of a clause in a statute under which the party is committed.—*MILLS v. COLLETT* (1829), 6 Bing. 85; 3 Moo. & P. 242; 2 Man. & Ry. M. C. 262; 7 L. J. O. S. M. C. 97; 130 E. R. 1212.

*Annotation:—***Mentd.** *Wilkins v. Hemsworth* (1838), 3 Nev. & P. K. B. 55.

**1754. Answers to questions—By justices to test capacity of witness.]**—It would be always desirable, when a person of weak intellect is examined before a magistrate in a case of felony, that the magistrate's clerk should take down in the depositions the questions put by the magistrate, & the answers given by the witness, as to the witness's capacity to take an oath.—*R. v. PAINTER* (1847), 2 Car. & Kir. 319; 2 Cox, C. C. 244.

**1755. — In cross-examination—By accused.]**—If prisoner or his counsel cross-examine the witnesses when before the magistrate, the answers of the witnesses to the cross-examination ought to be taken down by the magistrate, & returned to the judge.—*R. v. POTTER* (1829), 7 C. & P. 650, n.

**1756. Incidental observation made by accused.]**—*R. v. MOORE* (*temp.* 1834–55); *Matth. Cr. Law* 157; cited in 2 Russell on Crimes & Misdemeanours, 8th ed. at p. 2067.

*Annotation:—***Refd.** *R. v. Carpenter* (1847), 8 L. T. O. S. 558.

**1757. —.]**—Where, during the examination of a witness before a magistrate, in support of a charge of felony, prisoner interposed an observation which is material to the case, such observation should be taken down in the depositions; & if it be not, the judge at the trial will not allow any evidence of it to be given.—*R. v. WELLER* (1846), 2 Car. & Kir. 223.

**1758. —.]**—An incidental observation made by prisoner in the course of his examination before a magistrate, which is not taken down as part of prisoner's statement, is not admissible in evidence against him at the trial if it relate to any matter which formed part of the judicial inquiry then being conducted before the magistrate.—*R. v. CARPENTER* (1847), 8 L. T. O. S. 558; 2 Cox, C. C. 228.

**1759. Transmission of depositions to court of trial—Confession by accused.]**—It is the duty of a magistrate to return to the judge not only the depositions of witnesses, but also any confession taken down as made by a prisoner, & it is no excuse for not doing so that the confession was wanted to be sent before the grand jury.—*R. v. FALLOWS* (1832), 5 C. & P. 508; 1 Nev. & M. M. C. 354.

D. L. R. 497; 12 Sask. L. R. 312.—**CAN.**

**h. Where made—Incorrectly placed—Whether deposition rejected.]**—Depositions to which a magistrate has affixed his signature are not to be rejected because such signature is possibly not placed in the most correct place.—*R. v. JODREY* (1905), 25 C. L. T.

109.—**CAN.**

**PART V. SECT. 2, SUB-SECT. 2.—D.**

**1749 i. Everything material to the charge.]**—Prosecutor, at the trial, stated that he was assaulted by A., B., & C., & that he had deposed to same effect before the magistrates; but on production of his depositions, the name of C. did not appear therein:—*Held:*

prosecutor's credit was not necessarily affected by the non-appearance of C.'s name in the depositions, as the magistrate who took the depositions might, in the exercise of his discretion, have suppressed all mention of C., that person being then at large.—*R. v. MULLIGAN* (1839), 1 Craw. & D. 16.—**IR.**



**1760. — Statement of accused—Made before charge.]**—A., who was a witness for the prosecution against B., on a charge of arson had just been examined by the magistrate before any specific charge was made against any person, & his deposition taken in writing. A. was next accused of the offence, & his statement as a prisoner was also taken down by the magistrates. After this B. was charged with the offence, & A. examined as a witness, when A.'s statement made at the time was taken down, B. being then committed:—*Held*: all these statements of A. so taken down ought to be delivered to the judge, & not merely the statement made when B. was committed.—*R. v. SIMONS* (1834), 6 C. & P. 540; 2 Nev. & M. M. C. 598.

**1761. — Evidence of witnesses not bound over.]**—It is the duty of a magistrate to return all the depositions taken against a prisoner, & not merely the depositions of those whom he thinks proper to bind over as witnesses.—*R. v. FULLER* (1836), 7 C. & P. 269; 3 Nev. & M. M. C. 425.

**1762. — —.]**—In a case of felony the committing magistrate is not bound to bind over all the witnesses who have been examined before him in support of the charge, but only those whose evidence is material to the charge; but it is very desirable that all that has been given in evidence before the magistrate should be transmitted to the judge.—*R. v. SMITH* (1845), 2 Car. & Kir. 207.

*Annotation*:—*Mentd.* *R. v. Dibley* (1849), 2 Car. & Kir. 818.

*E. Deposition of Witness who is Dangerously ill.*

**1763. Procedure under Criminal Law Amendment Act, 1867 (c. 35), s. 6—Duty of justices—By whom depositions to be taken.]**—A magistrate, before whom a person charged with an indictable offence is brought, is bound under Indictable Offences Act, 1848 (c. 42), s. 17, to go to the residence of a witness who is so dangerously ill that he is unable to appear in ct. in order to take the deposition of the witness in the presence of accused, provided that it is practicable & permissible for him to do so. The question whether or not it is practicable for the magistrate to take the deposition must be decided by the magistrate in his discretion, which he must exercise in a judicial manner. This obligation exists whenever a person is charged with any indictable offence, & not merely in cases of murder or manslaughter, & does not depend on whether the magistrate is asked by a superior officer of the police to take the deposition. If it is not practicable to take the deposition application may be made under sect. 6 of the 1867 Act to another justice to take the deposition.—*R. v. Bros, Ex p. HARDY*, [1911] 1 K. B. 159; 80 L. J. K. B. 147; 103 L. T. 728; 74 J. P. 483; 27 T. L. R. 41; 55 Sol. Jo. 47; 22 Cox, C. C. 352, D. C.

**1764. — Notice to accused essential.]**—Q. was charged on an indictment with the wilful murder of D. D. was taken to hospital &, having been told by the medical attendant that he thought there were little hopes of her living, & that he thought she was going to die, & she herself saying,

"I know I shall never get better; what will become of my poor children"; made a statement which was taken down in writing in the presence of the magistrate. At the trial it was proposed on behalf of the prosecution to give this statement in evidence under sect. 6 of the above Act:—*Held*: the proviso at the end of the sect. overrode the whole sect. & the statement could not be read in evidence without proof of notice having been given to the accused, before it was taken, & that statute could have no operation in the case of a deposition taken while accused was keeping out of the way, as the notice was required to be given to accused before the taking of the statement, & not simply before the reading of it.—*R. v. QUIGLEY* (1868), 18 L. T. 211, N. P.

**1765. — — Notice must be in writing.]**—The notice intended by sect. 6 of the above Act is a notice in writing, & a statement on oath or affirmation by a person dangerously ill is inadmissible against a prisoner where he has only had oral notice of the intention to take the same, although he was present when the statement was taken.—*R. v. SHURMER* (1886), 17 Q. B. D. 323; 55 L. J. M. C. 155; 55 L. T. 126; 50 J. P. 743; 34 W. R. 656; 2 T. L. R. 737; 16 Cox, C. C. 94, C. C. R.

*Annotation*:—*Folld.* *R. v. Harris* (1918), 82 J. P. 196.

**1766. — — —.]**—Prisoner under arrest on a charge of performing an illegal operation was taken to the hospital where the woman on whom it was alleged that she had performed the operation was lying dangerously ill. The woman's deposition was then taken in the presence of prisoner, a justice of the peace, & a clerk of the justices, but no notice in writing had been served upon prisoner of the intention to take the evidence. The woman subsequently died, & at the trial of prisoner for murder it was sought to put the deposition of deceased in evidence under the above Act or, alternatively, under Indictable Offences Act, 1848 (c. 42):—*Held*: the deposition was not admissible in evidence under the 1867 Act, because no notice in writing of the intention to take the evidence had been served upon prisoner, nor under the 1848 Act as prisoner had not had a full opportunity of cross-examining deceased.—*R. v. HARRIS* (1918), 82 J. P. 196; 26 Cox, C. C. 143.

**1767. — — What is reasonable notice.]**—*R. v. BOTTOMLEY*, *R. v. EARNSHAW* (1903), 115 L. T. Jo. 88.

**1768. — Opportunity to cross-examine.]**—*R. v. PRESTRIDGE*, No. 1736, *ante*.

**1769. — Necessity for signature of witness.]**—A deposition of a woman who subsequently died was taken by a magistrate at a hospital. At the time the deposition was taken, it was intended that it should be taken in accordance with the provisions of sect. 6 of the above Act. Accused was present & had a full opportunity of cross-examining the witness. The deposition was read over to the witness & she assented to it as correct, but she did not sign it as her hands had been seriously burnt & were covered with bandages.

#### PART V. SECT. 2, SUB-SECT. 2.—E.

**k. Woman expecting confinement—Removal dangerous.]**—On the evidence of a medical man that a witness, who lived 40 miles from the ct., expected her confinement, & that it would be dangerous to her life to attend ct., her deposition was admitted in evidence:—*Held*: it was rightly received.—*R. v. WEBSTER & WELLS* (1880), 1 N. S. W. L. R. 331.—*AUS.*

**l. Evidence taken in narrative form—Put in as dying deposition.]**—

The statement of a person dangerously ill & not likely to recover taken by a justice with due observance of Justices Act, 1902, ss. 111, 112, is not rendered inadmissible in evidence by the fact that it has been taken in a narrative form instead of in the form of question & answer, & that it has been put in as a dying deposition.—*R. v. ALAMTOMUNDIE* (1906), 8 W. A. L. R. 130.—*AUS.*

**m. Admissibility of deposition of dying person on trial of accused for**

**murder.]**—An accused person was charged with a certain offence at a police ct., & was then brought to a room where a witness was lying dangerously ill & was again charged & informed that the witness was about to give evidence. The deposition of the witness was then taken in the form prescribed by Justices Act. Subsequently accused was committed for trial on the offence charged before the same justice:—*Held*: the deposition was taken on a preliminary or other investigation within the meaning of Justices Act,

**Sect. 2.—Preliminary examination before justices:**  
**Sub-sect. 2, E. & F.; sub-sects. 3 & 4.]**

It would have been harmful to her to take the bandages off, & it was impossible for her to sign or make a mark with them on. The magistrate who took the deposition signed it, & he was one of the magistrates who ultimately committed accused for trial:—*Held*: the deposition had been taken in accordance with the provisions of the Indictable Offences Act, 1848 (c. 42), s. 17, & was admissible, although it had not been signed by the witness.—*R. v. HOLLOWAY* (1901), 65 J. P. 712.

**1770. — Necessity for caption.] — R. v. PRESTRIDGE**, No. 1736, *ante*.

—*A deposition of a dying person taken under sect. 6 of the above Act is not admissible in evidence unless it states the place where it is taken.*—*R. v. CURTIS* (1904), 21 T. L. R. 87.

**1772. — Effect of non-compliance—Cross-examination of prisoner.]—**Upon an indictment for murder, a statement made by deceased, in the presence of prisoner, was held to be inadmissible as a dying deposition, on the grounds that the above Act had not been complied with. The statement was not admissible as a dying declaration. Prisoner was called in his own defence:—*Held*: though the whole matter of the statement might be put to prisoner in cross-examination, it was better in such a serious case to limit this part of the cross-examination as to questions then put by prisoner relating to the defence now set up by him.—*R. v. SIMPSON* (1898), 62 J. P. 825.

*Annotation*:—*Refd. R. v. Holloway* (1901), 65 J. P. 712.

**1773. Procedure under Indictable Offences Act, 1848 (c. 42), s. 17—Deposition must be taken by committing justices.]—**A deposition taken by virtue of sect. 17 of the above Act, may be read in evidence against prisoner, although taken before two magistrates who acted only upon that occasion, & prisoner was afterwards committed for trial by another magistrate.—*R. v. DE VIDIL* (1861), 9 Cox, C. C. 4.

*Annotations*:—*Consd. Re Guerin* (1888), 58 L. J. M. C. 42. *Refd. Ex p. Huguet* (1873), 29 L. T. 41.

**1774. — —.]—R. v. REES** (1888), *Times*, Dec. 20.

**1775. — —.]—R. v. DAY**, No. 1730, *ante*.

**1776. — Opportunity of accused to cross-examine—Opportunity presumed from presence.]—**Where it is proved that prisoner was present when the depositions of deceased were taken although the law will presume that, as he was present, he had a "full opportunity" within sect. 17 of the above Act, evidence may never-

theless be offered to prove that he had not a "full opportunity" within sect. 17 so as to render the depositions inadmissible.—*R. v. PEACOCK* (1870), 12 Cox, C. C. 21.

*Annotation*:—*Refd. R. v. Shurmer* (1886), 2 T. L. R. 737.

**1777. — Sufficient though Criminal Law Amendment Act, 1867 (c. 35), s. 6 not complied with.]—**A deposition of a dying person was taken by a magistrate at a hospital in the presence of accused, & all the requirements of sect. 17 of the 1848 Act were complied with:—*Held*: the deposition was admissible in evidence on the trial of accused for murder, although the requirements of sect. 6 of the 1867 Act had not been complied with.—*R. v. KATZ* (1900), 64 J. P. 807; 17 T. L. R. 67.

*Annotations*:—*Refd. R. v. Lees* (1907), 71 J. P. Jo. 342; *R. v. Harris* (1918), 82 J. P. 196.

**F. Right of Accused to Copies of the Depositions.**

**1778. On committal for trial—Not on remand.]—***R. v. LONDON* (LORD MAYOR), No. 1741, *ante*.

**1779. — Not on being bound over.]—**Indictable Offences Act, 1848 (c. 42), s. 27, which gives to accused the right to a copy of the depositions taken against him, applies only to the case of a person committed to prison or admitted to bail for the purpose of being tried. Where, therefore, H. had been committed to gaol until he should give sufficient securities for keeping the peace, & for appearing at the sessions or the assizes to do what should be then enjoined by the ct.:—*Held*: he was not entitled to a copy of the depositions under that sect.—*R. v. HEREFORDSHIRE JJ.* (1850), 1 L. M. & P. 323; *sub nom. Ex p. HUMPHRYS*, 4 New Mag. Cas. 86; 4 New Sess. Cas. 179; 19 L. J. M. C. 189; 15 L. T. O. S. 142; 14 J. P. 340; 15 Jur. 608.

**1780. No right to copy of statement made by himself.]—**A prisoner is not entitled, under Trials for Felony Act, 1836 (c. 114), s. 3, to a copy of his own statement returned by the magistrate, as made before him, but only to a copy of the depositions of the witnesses against him.—*R. v. AYLETT* (1838), 8 C. & P. 669.

**Discovery & Inspection.]—***See* Nos. 4661, 4662, *post*.

**SUB-SECT. 3.—REMAND.**

**1781. When remand granted.]—**On charges of felony, a magistrate has a power to commit for re-examination for a reasonable time. What is a reasonable time will greatly depend upon the circumstances of each case, fifteen days is an unreasonable time, unless there be circumstances to account for it, & those circumstances it will be

No. 27, of 1902, s. 409, sub-s. 3, & was admissible in evidence on the trial of the accused for an offence of a more serious nature.—*A.-G. of NEW SOUTH WALES v. JACKSON* (1906), 3 C. L. R. 730.—*AUS.*

**n. Notice served on accused—No offence specified.]—**The evidence of a person dangerously ill had been taken. Notice that this statement would be taken was served on accused. The notice did not specify any offence nor did it mention that the deposition to be taken related to an indictable offence:—*Held*: notice was not reasonable in that it gave no information as to the offence, & conviction must be quashed.—*R. v. LEUNG TAI* (1920), 15 Hong Kong L. R. 62.—*HONG KONG.*

**PART V. SECT. 2, SUB-SECT. 2.—F.**

**1778 I. On committal—Not on remand.]—**Accused, under remand is not,

before the commencement of the preliminary inquiry, entitled to copies of statements made on oath by various persons & recorded by the magistrate under Code of Criminal Procedure, ss. 162 & 164. Such statements may, however, be put to contradict the persons making them when called as witnesses, & it will then form part of the record, of which accused will be entitled to a copy after commitment. There is no general principle of common law which would entitle an accused person to copies of such documents.—*R. v. MUTHIA SWAMIYAR* (1907), 1 L. L. R. 30 Mad. 466.—*IND.*

**1778 II. — —.]—***FOLEY v. FITZGIBBON* (1888), *Crimes* (Ireland) Act Cases, 193.—*IR.*

**1780 I. No right to copy of statement made by himself.]—**Prisoner is not entitled, under 6 & 7 Will. 4, c. 114, to a copy of his own statement made

by him before a magistrate.—*R. v. GLENNON, TOOLE & MAGRATH* (1840), 1 *Craw. & D.* 359.—*IR.*

**o. After conviction—To found charge of perjury.]—**When prisoner has been tried & convicted, the ct. will not allow him copies of the depositions of a Crown witness, for the purpose of assigning perjury upon them.—*R. v. DUNNE* (1838), 1 *Jebb. & S.* 407.—*IR.*

**PART V. SECT. 2, SUB-SECT. 3.**

**p. When remand granted—Discretion of justices.]—**Unless it appears that the refusal of a justice to grant an adjournment results in the accused being prevented from having a fair trial—from making "his full answer & defence"—the *bona fide* exercise of discretion by the justice cannot be reviewed.—*R. v. TALLY* (1915), 30 W. L. R. 396; 7 W. W. R. 1178;

incumbent on the magistrate to show.—*DAVIS v. CAPPER* (1829), 4 C. & P. 134; *subsequent proceedings*, 10 B. & C. 28.

*Annotations*:—*Reid*. *Cave v. Mountain* (1840), 1 Man. & G. 257. *Mentd.* *Ash v. Dawney* (1852), 8 Exch. 237; *Kemp v. Neville* (1861), 31 L. J. C. P. 158.

*See* Indictable Offences Act, 1848 (c. 42), s. 21; & Criminal Justice Administration Act, 1914 (c. 58), s. 20 (2).

**1782. — Civil proceedings pending.]**—A magistrate cannot judicially consider, as ground for adjourning a summons for libel, pending civil proceedings between different parties for a different libel, though arising out of the same matters.—*R. v. EVANS* (1890), 62 L. T. 570; 54 J. P. 471; 17 Cox, C. C. 81, D. C.

*Annotations*:—*Reid*. *R. v. Bennett & Bond*, *Ex p. Bennet* (1908), 72 J. P. 362. *Mentd.* *R. v. Southampton JJ.*, *Ex p. Lebern* (1907), 96 L. T. 697; *R. v. Fox*, *Ex p. Plympton St. Mary R. D. C.* (1908), 6 L. G. R. 1068.

**1783. — To facilitate settlement.]**—On a summons for libel, where the parties have nearly arrived at a settlement on the basis of an apology by deft. the justices, if they think that an adjournment of more than eight days will facilitate a settlement, & provided that they do not decline to exercise jurisdiction, & do not take extra-judicial matters into consideration, have a discretionary power to adjourn the hearing for more than eight days, if deft. has never surrendered to custody or been detained in custody, as Indictable Offences Act, 1848 (c. 42), s. 21, does not apply to such a case.—*R. v. SOUTHAMPTON JJ.*, *Ex p. LEBERN* (1907), 96 L. T. 697; 21 Cox, C. C. 431; 71 J. P. 332.

**1784. Remand in custody—Commitment need not be in writing.]**—*R. v. GOODING* (1820), cited in 10 B. & C. at p. 33; 5 Man. & Ry. K. B. 58; 2 Man. & Ry. M. C. 575; 109 E. R. 363.

*Annotations*:—*Consd.* *Davis v. Capper* (1829), 10 B. & C. 28. *Reid.* *Kemp v. Neville* (1861), 10 C. B. N. S. 523.

**1785. — Procedure after remand.]**—If justice commit a person for further examination, the officer is indictable for not carrying him to prison, although he produce prisoner on the day of the next examination.—*R. v. JOHNSON* (1705), 11 Mod. Rep. 61; 88 E. R. 887.

21 D. L. R. 651; 8 Alta. L. R. 453.—**CAN.**

**q. — — —.]**—The justices have the right in any case for reasons of justice arising out of the circumstances of the case itself & for its better determination to adjourn or to postpone their decision, & if their discretion in this respect be honestly exercised & not directly or indirectly with the view of throwing in facts or evidence which have no legitimate bearing on their decision it must not be interfered with.—*LOASBY v. MAIN* (1914), 33 N. Z. L. R. 974.—**N.Z.**

**r. — To procure further evidence.]**—Accused was one of sixteen charged with the same offence on similar evidence. Fourteen, including accused, were remanded pending decision of the other two as test cases. Upon resumption of proceedings, evidence similar to that on which the two first cases were committed for trial was put in, whereupon a remand of a week was granted to permit the procuring of further evidence. Upon application for a *mandamus* requiring the magistrate forthwith to commit accused for trial:—*Held*: a writ of *mandamus* will not issue directing a magistrate to commit prior to his adjudication of the case. It is the duty of the magistrate to take the evidence of all concerned, & the ct. must not interfere with the discretion of the magistrate as to remands when that discretion is being exercised legally

& in good faith.—*Re YING FOY* (1909), 14 B. C. R. 254.—**CAN.**

**s. — — —.]**—Where evidence was available, but it appeared necessary to the magistrate to defer the examination of witnesses in order that further evidence might be produced:—*Held*: that such reason recorded by the magistrate justified a remand for five days & a further remand for four days.—*MANIKAM MUDALI v. R.* (1882), 1 L. R. 6 Mad. 63.—**IND.**

#### PART V. SECT. 2, SUB-SECT. 4.

**1788 i. Extent of jurisdiction of justices.]**—A justice of the peace cannot bind a corp. over to appear & answer to an indictment.—*Re CHAPMAN v. LONDON CITY* (1890), 19 O. R. 33.—**CAN.**

**1788 ii. —.]**—Accused were charged before justices with theft. In each case, after the depositions had been duly taken, accused expressed a desire to plead guilty. A stipendiary magistrate, who had not heard the evidence in either case, was then called in, & the pleas of "Guilty" were taken by him. Accused were then committed by the magistrate & the justices to the Supreme Ct. for sentence:—*Held*: the ct. had acted without jurisdiction, a magistrate having no power to commit prisoners for sentence, under Indictable Offences Summary Jurisdiction Amendment Act, 1900, s. 15, unless the depositions have been taken in his presence, or a similar

**1786. Remand on bail—Length of remand.]**—*R. v. SOUTHAMPTON JJ.*, *Ex p. LEBERN*, No. 1783, *ante*.

**1787. — — —.]**—The power of a metropolitan police magistrate under Metropolitan Police Cts. Act, 1839 (c. 71), s. 30, to remand a person charged before him with any felony or misdemeanour upon bail for a period of more than eight days is not cut down or affected by Indictable Offences Act, 1848 (c. 42), s. 21, Summary Jurisdiction Act, 1879 (c. 49), ss. 24, 54, 55, or by Criminal Justice Administration Act, 1914 (c. 58), s. 20.—*R. v. GARRETT*, *Ex p. DE DRYVER*, [1918] 1 K. B. 6; 87 L. J. K. B. 129; 117 L. T. 660; 82 J. P. 74; 34 T. L. R. 13; 26 Cox, C. C. 78; 62 Sol. Jo. 104, D. C.

#### SUB-SECT. 4.—COMMITMENT FOR TRIAL OR DISCHARGE OF ACCUSED.

**1788. Extent of jurisdiction of justices.]**—Justices of the peace sitting in & acting for one petty sessional division of a county have jurisdiction to commit for trial on a charge arising in another petty sessional division of the same county, & are not bound to remand such charge for hearing in the division in which the offence was committed.—*R. v. BECKLEY* (1887), 20 Q. B. D. 187; 57 L. J. M. C. 22; 57 L. T. 716; 52 J. P. 120; 37 W. R. 160; 4 T. L. R. 151; 16 Cox, C. C. 331, C. C. R.

*Annotations*:—*Follid.* *Calstoe R. D. C. v. Taylor* (1907), 97 L. T. 281; *R. v. Beacontree JJ.*, [1915] 3 K. B. 388.

**1789. —.]**—Where a rural district extends into several petty sessional divisions in a county, justices of the peace acting in & for any one of these petty sessional divisions have jurisdiction to hear & determine a complaint by the council of the rural district against overseers of a parish in one of these divisions for making default in paying over to the council a sum of money which they had been ordered by the council to pay as the contribution of the parish to the special expenses incurred by the council under the Public

procedure adopted to that followed in cases on remand.—*R. v. PARSONS*, *R. v. MCCORMICK* (1904), 23 N. Z. L. R. 722.—**N.Z.**

**t. — Inquiry commenced by one & completed by two justices.]**—Where evidence on a preliminary inquiry is commenced before one justice of the peace & finished before two justices a committal by the two is irregular unless they have heard all the evidence.—*Re NUNN* (1899), 6 B. C. R. 464.—**CAN.**

**a. — Discharge of accused at preliminary inquiry—Subsequent committal by same magistrates.]**—Accused was charged with theft before two justices, & they, after preliminary inquiry directed by Criminal Code, s. 377, discharged him, being "of opinion that no sufficient case was made out to put accused on his trial." Subsequently another information on same charge was laid against him, & after a preliminary inquiry he was committed for trial. It was objected that there is no jurisdiction in any magistrate to hear such a charge twice, & much more so in the case of the same magistrates who had before dismissed it:—*Held*: preliminary inquiry is not final in its nature, & at common law a dismissal by magistrates is not tantamount to an acquittal upon indictment.—*R. v. HANNAY* (1905), 2 W. L. R. 543.—**CAN.**

**b. — To commit upon several informations.]**—When several informa-

**Sect. 2.—Preliminary examination before justices:**  
**Sub-sects. 4 & 5.]**

Health Act, 1875; & in such cases the council may make their complaint in any one of the petty sessional divisions into which their district extends, & are not limited to that petty sessional division in which the matter of complaint arose.—

CAISTOR RURAL DISTRICT COUNCIL *v.* TAYLOR (1907), 97 L. T. 281; 71 J. P. 310; 5 L. G. R. 787.

**Annotation:—***Apld.* R. *v.* Beacontree JJ., R. *v.* Wright, [1915] 3 K. B. 388.

**1790. —.]—Sale of Food & Drugs Act, 1875 (c. 63), s. 20, provides that proceedings for the recovery of a penalty for an offence under the Act may be taken "before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner":**

**—Held:** where the article has been delivered to a purchaser at a place situated in one petty sessional division of a county, the proceedings may be taken in another petty sessional division of the county before justices who usually sit in & for that other division.—R. *v.* BEACONTREE JJ., R. *v.* WRIGHT, [1915] 3 K. B. 388; 84 L. J. K. B. 2230; 113 L. T. 727; 79 J. P. 461; 31 T. L. R. 509; 25 Cox, C. C. 89; 13 L. G. R. 1094, D. C.

**1791. When accused should be committed.]—**A magistrate is clearly bound, in the exercise of a sound discretion, not to commit any one, unless a *prima facie* case is made out against him by witnesses entitled to a reasonable degree of credit (BAYLEY, J.).—COX *v.* COLERIDGE (1822), 1 B. & C. 37; 2 Dow. & Ry. K. B. 86; 1 Dow. & Ry. M. C. 142; 107 E. R. 15.

**Annotations:—***Mentd.* Daubney *v.* Cooper (1829), 5 Man. & Ry. K. B. 314; Cowdell *v.* Neale (1856), 1 C. B. N. S. 332.

**1792. —.]—**Where a prisoner, charged with felony, had witnesses in attendance at the time of the examination before the magistrate:—

**Held:** they should be then examined if prisoner wished it, & if their evidence was believed, & answered the charge, no further proceedings need be taken. But if these witnesses contradicted those for the prosecution in material points, the case should be sent to a jury, & the depositions of prisoner's witnesses should be taken & signed by them, & transmitted to the judge, together with the depositions in support of the charge.—ANON. (1849), 2 Car. & Kir. 845.

tions are laid against a person, & in order to get the person himself the magistrate issues a warrant on one information only, with respect to which it turns out that he has, to the knowledge of the magistrate, a good defence, & should be discharged, the magistrate has power to proceed with the preliminary inquiry & to commit the prisoner for trial upon the other informations without first discharging him & having him re-arrested.—*It. v.* WEISS & WILLIAMS (1913), 25 W. L. R. 351; 13 D. L. R. 632; 6 Alta. L. R. 163.—CAN.

**c. Whether power to commit on dies non juridicus.]—**Where prisoner was committed for trial at a preliminary investigation before a magistrate on a Sunday:—**Held:** entitled to his discharge.—R. *v.* CAVELIER (1896), 11 Man. L. R. 333.—CAN.

**d. —.]—**Prisoner was, on a statutory holiday, committed for trial by a magistrate, & on being brought before the county ct. judge in compliance with Criminal Code, 1892, s. 766, consented to be tried by the judge without a jury, & was convicted:—**Held:** the fact that prisoner was committed for trial & confined in

gaol on a warrant that was a nullity could not affect the validity of the trial before the judge under Speedy Trials Act.—*It. v.* MURRAY (1897), 28 O. R. 549.—CAN.

**1791 i. When accused should be committed.]—**Defts. were brought before a justice of the peace charged with the commission of an assault upon a peace officer in the discharge of his duty. There was a preliminary inquiry, after which defts. were admitted to bail, under Criminal Code, s. 601, on giving a bond conditioned for their appearance at the time & place of trial, but, subsequently, on appln. of one of the sureties, an order was made by the judge of the county ct. under s. 910 of the Code, under which defts. were committed to gaol, & they were subsequently tried & convicted:—**Held:** defts. not having been committed for trial under Code, s. 596, the judge of the county ct. had no jurisdiction to try them, & the conviction must be set aside.—*It. v.* GIBSON (1896), 29 N. S. R. 4.—CAN.

**1793 i. — Discretion of justices.]—**An appeal will not lie by way of special case under 50 Vict. No. 17,

**1793. — Discretion of justices.]—**In the case of a fugitive criminal accused of an extradition crime, where the evidence of an accomplice is uncorroborated in any material particular, the magistrate must act on his discretion in regard to his commitment & the fact of there being no corroboration of such evidence is not conclusive against his commitment.—*Re* MEUNIER, [1894] 2 Q. B. 415; 63 L. J. M. C. 198; 71 L. T. 403; 42 W. R. 637; 18 Cox, C. C. 15; 10 R. 400, D. C.

**Annotations:—***Re*ld. R. *v.* Brixton Prison, *Exp.* Perry (1923), 87 J. P. Jo. 839. *Mentd.* R. *v.* Tate, [1908] 2 K. B. 680; R. *v.* Wilson, Lewis, & Havard (1911), 6 Cr. App. Rep. 126; R. *v.* Christie, [1914] A. C. 545; R. *v.* Baskerville, [1916] 2 K. B. 658.

**1794. — Libel.]—**Upon an information for maliciously publishing a defamatory libel under Libel Act, 1843 (c. 96), s. 5, the magistrate has no jurisdiction to receive evidence of the truth of the libel, inasmuch as his function is merely to determine whether there is such a case against accused as ought to be sent for trial.—R. *v.* CARDEN (1879), 5 Q. B. D. 1; 49 L. J. M. C. 1; 41 L. T. 504; 44 J. P. 137; 28 W. R. 133; 14 Cox, C. C. 359.

**Annotations:—***Mentd.* R. *v.* Flowers (1879), 44 J. P. 377; *Ex p.* Bottomley, [1909] 2 K. B. 14.

**1795. — Accomplices.]—**It is the duty of magistrates in all cases to commit an accomplice, & not to admit him to bail, notwithstanding it may be intended to call the accomplice as a witness on the trial.—R. *v.* BEARDMORE (1836), 7 C. & P. 497.

**Annotation:—***Mentd.* R. *v.* Osborn (1837), 7 C. & P. 799.

**1796. — Offence not within their jurisdiction.]—**Where a complaint of a criminal nature is made before justices, which, upon the evidence, amounts to an offence not within their jurisdiction to determine, it is their duty either to dismiss the complaint, or commit the person charged for trial by a jury.—*Re* THOMPSON (1860), 6 H. & N. 193; 30 L. J. M. C. 19; 3 L. T. 409; 9 W. R. 203; 9 Cox, C. C. 70; *sub nom.* *Ex p.* THOMPSON, 25 J. P. 166; 7 Jur. N. S. 48.

**Annotations:—***Re*ld. *Re* Dawson (1878), 42 J. P. 456. *Mentd.* R. *v.* Elrington (1861), 1 B. & S. 688; Wellock *v.* Constantine (1863), 32 L. J. Ex. 285; Shepherd *v.* Postmaster General (1864), 11 L. T. 369; Munday *v.* Maiden (1875), 33 L. T. 377; Crocker *v.* Raymond (1886), 3 T. L. R. 181; R. *v.* Miles (1890), 24 Q. B. D. 423.

**1797. To what court accused should be committed —Incorrigible rogue—Vagrancy Act, 1824 (c. 83).]**

—The general authority given by the commission of general gaol delivery to justices of assize to

s. 226, from a refusal of justices to commit a person charged with an indictable offence.—DALY *v.* MATHIESON (1897), 7 Q. L. J. 157.—AUS.

**1793 ii. —.]—**The duty of a committing magistrate is to ascertain whether by the evidence for the prosecution a *prima facie* case is made out against accused.—*It. v.* MAHA SINGH (1871), 3 N. W. 27.—IND.

**1793 iii. —.]—**It is not necessary that the magistrate should satisfy himself fully of the guilt of accused before making a commitment. It is his duty to commit when the evidence for the prosecution is sufficient to make out a *prima facie* case against accused, & he exercises a wrong discretion if he takes upon himself to discharge accused in the face of evidence which might justify a conviction.—R. *v.* VARIVANDAS (1902), 1 L. R. 27 Bom. 84.—IND.

**1793 iv. —.]—**A discharge means that the magistrate, after taking the evidence, found that there were not sufficient grounds for committing accused for trial.—R. *v.* LALIT MOHAN CHUCKERBUTTY (1911), 1 L. R. 38 Calc. 559.—IND.

deliver the gaols of all manner of prisoners found therein, confers no jurisdiction over prisoners directed by Vagrancy Act, 1824 (c. 83), to be dealt with by the ct. of general or quarter sessions, though found within the prison of the county. A commitment, therefore, of such prisoner to the assizes will be bad, & will entitle prisoner to his discharge from custody.—*R. v. WARD* (1883), 15 Cox, C. C. 321.

**1798. Offence punishable summarily or on indictment—Summons under Summary Jurisdiction Acts, 1848 (c. 43), & 1879 (c. 49)—Power to commit for trial.]**—Where a criminal offence is punishable either summarily or on indictment, justices, sitting in petty sessions on a day appointed for hearing indictable offences of which public notice has been given, may treat that offence as an indictable offence & commit deft. for trial, although he has been summoned under the above Acts to appear before them as a ct. of summary jurisdiction to answer the information preferred against him.—*R. v. BOLTON JJ., Ex p. HOLT* (WILLIAM A.), LTD. (1916), 85 L. J. K. B. 649; *sub nom. R. v. WALMSLEY, Ex p. HOLT* (WILLIAM A.), LTD., 80 J. P. 209, D. C.

**1799. Power to commit after consent by accused to case being dealt with summarily.]**—The power of a ct. of summary jurisdiction under Summary Jurisdiction Act, 1879 (c. 49), s. 12, to commit a person charged for trial may be exercised at any stage of the proceedings up to adjudication, notwithstanding that at an earlier stage deft. has consented to the case being dealt with summarily, & the hearing has proceeded on that basis to the close of the evidence for the defence.—*R. v. HERTFORDSHIRE JJ.*, [1911] 1 K. B. 612; 80 L. J. K. B. 437; 104 L. T. 312; 27 T. L. R. 156; 22 Cox, C. C. 378; *sub nom. R. v. HERTFORDSHIRE JJ., Ex p. R.*, 75 J. P. 91, D. C.

**1800. Committal should be for offence disclosed.]**—*R. v. LYNCH* (1904), 68 J. P. Jo. 88.

**1801. Form of commitment—Clerical error amended by court of trial.]**—The ct. of trial has power to amend a clerical error in the order of commitment.—*R. v. WOOLLEY* (1909), 3 Cr. App. Rep. 57, C. C. A.

#### SUB-SECT. 5.—RECOGNISANCES.

**1802. Of prosecutor—Who is prosecutor.]**—A person of the age of sixteen is competent to

enter into a recognisance conditioned to prosecute on a criminal charge, & if it be forfeited & estreated, the ct. will not discharge it, unless a sufficient case for relief be made out.—*Ex p. WILLIAMS* (1824), M'Cle. 493.

**1803. — — —.]**—In a case of manslaughter, the father of deceased retained an attorney to prosecute the person charged. In pursuance of this retainer, the attorney prepared & delivered briefs to counsel at the assizes, with instructions to conduct the prosecution. A constable had been bound over by recognisance to prosecute, & the solr. for the police, in pursuance of general orders given to him by the constabulary committee, prepared & delivered a brief to counsel:—*Held*: the ct. had no power to order that the attorney who has been retained by the father should be allowed the costs of preparing briefs, etc.—*R. v. YATES* (1857), 7 Cox, C. C. 361.

*Annotation*:—*Distd. R. v. Bushell* (1888), 16 Cox, C. C. 367.

**1804. — — —.]**—Where a private prosecutor instructs a solr., the magistrate's clerk has no right to bind over another person to prosecute.—*R. v. BUSHELL* (1888), 52 J. P. 136; 16 Cox, C. C. 367.

**1805. — — —.]**—*R. v. OTTEWILL* (1891), *Times*, Nov. 24.

**1806. — — —.]**—*R. v. TAYLOR* (1896), *Times*, Nov. 2.

**1807. — Under Vexatious Indictments Act, 1859 (c. 17).]**—Where prosecutor *bond fide* prefers before a justice, & within his jurisdiction, a charge or complaint in respect of an offence within the above Act, & the justice dismisses it for want of evidence, such dismissal is equivalent to a refusal to commit, & prosecutor is entitled to require the justice to take his recognisance to prosecute the charge or complaint by way of indictment.—*R. v. LONDON* (LORD MAYOR) & STUBBS & IRVING, *Ex p. GOSTLING* (1886), 54 L. T. 646; 50 J. P. 711; 16 Cox, C. C. 77, D. C.

*Annotation*:—*Mentd. Public Prosecutions Director v. Blady* (1912), 106 L. T. 302.

**1808. — By whom taken.]**—The binding over to prosecute, which is necessary to give the grand jury of the Central Criminal Ct. jurisdiction in certain cases of misdemeanour, under Central Criminal Ct. Act, 1834 (c. 36), s. 13, must take place before a magistrate, etc., previous to the session of that ct. & cannot be done by the ct. itself.—*R. v. CARLTON* (1834), 6 C. & P. 651; 2 Nev. & M. M. C. 620.

*Annotation*:—*Consd. R. v. Gregory* (1845), 7 Q. B. 274.

on bail.—*R. v. DEAN* (1913), 18 B. C. R. 18; 11 D. L. R. 598; 3 W. W. R. 781.

—CAN.

#### PART V. SECT. 2, SUB-SECT. 5.

of the Peace Act, 1908, s. 154, over a person to prosecute accused at the following criminal sittings, ~~and~~ person, not being a person who had laid the information on which the warrant for the arrest of the accused was issued:—*Held*: by Crimes Act, 1908, s. 407, sub-s. 1, the person so bound over could prefer the bill of indictment to the grand jury.—*R. v. DUNN* (1910), 29 N. Z. L. N.Z.

**1. Practice respecting recognisances—Whether English Crown Office Rules apply.]**—Crown Rules 84 & 86 apply to recognisances taken under Criminal Procedure Act, s. 81, & such rules are within the powers of the ct. under the Dominion Acts of 1889, c. 40.—*R. v. CREELMAN* (1893), 25 N. S. R. 404.—CAN.

**g. — — —.]**—The Criminal Code

**1799 i. Power to commit after consent by accused to case being dealt with summarily.]**—Where a person is charged before a magistrate with an offence which is not *per se* indictable, but in respect of which he is entitled, under Indictable Offences Summary Jurisdiction Amendment Act, 1900, s. 6, to claim to be tried by a jury, & he duly claims to be so tried, the proceeding must thenceforward be taken in all respects as if it were a proceeding for an indictable offence; & if, on the magistrate intimating at the close of the preliminary hearing that he proposes to commit, accused chooses to plead guilty, he must be committed to the supreme ct. for sentence, under s. 13 of above Act, as if the offence had been indictable *per se*.—*R. v. HILLS* (1904), 24 N. Z. L. R. 37.—N.Z.

**1800 i. Committal should be for offence disclosed.]**—Warrant of commitment must show the offence with which prisoner is charged.—*R. v. STOCKDALE* (1863), 1 Q. S. C. R. 110.—AUS.

**e. Lapse of warrant of commitment by postponement.]**—Applt. was

extradited to Canada on account of stealing a large sum of money from the Bank of Montreal at New Westminster. He had preliminary hearing before the magistrate & was committed, in Sept., to the gaol at New West-

due the an appln. was made to the presiding judge regarding the position taken by ~~the~~ <sup>he</sup> did not propose to prefer a bill of indictment to the grand jury against accused at said assizes. On this appln. it was contended by the Crown that in effect an order was made by the judge traversing the case to the next assizes. This was disputed on behalf of accused. The present application was for the discharge of accused on the ground that the warrant of commitment lapsed at the end of the assizes, & that the Crown had obtained no traverse of the proceedings to the next assizes:—*Held*: the warrant of commitment was still valid & subsisting, & the only application which prisoner could make in the circumstances was for an order to be released

*Sect. 2.—Preliminary examination before justices:*  
*Sub-sect. 5. Part VI. Sects. 1 & 2: Sub-sect.*

**1809. — Whether necessary — Prosecution for libel.]**—In a prosecution at the Central Criminal Ct. for publishing a libel, it is not necessary, for the purpose of giving jurisdiction, that prosecutor should have entered into recognisance, or that deft. should have been in custody or be bound to appear, according to Central Criminal Ct. Act, 1834 (c. 36), s. 13.—*R. v. GREGORY* (1845), 7 Q. B. 274; 14 L. J. M. C. 82; 5 L. T. O. S. 149; 9 Jur. 593; 1 Cox, C. C. 198; 9 J. P. Jo. 293; 115 E. R. 492.

**1810. Practice in taking recognisances—Effect of irregularity.]**—The usual practice in taking the recognisance of a person convicted at quarter sessions is that the person so convicted, before he is allowed to leave the ct. enters orally into the recognisance before the officer of the ct. who

makes a minute of it, & the recognisance is not formally drawn up till afterwards.

J. had been convicted at the sessions, & was sentenced, *inter alia*, to enter into her recognisance in a certain amount. She swore that after sentence she went into an outer office, where a clerk took a note of her entering into the recognisance. She, on a subsequent day, attended at the clerk of the justices' room at the sessions house, & the clerk in attendance wrote something in a book. That was all that was done. The recognisance was subsequently estreated, & an application had been made to reduce it in vain:—*Held*: no good cause had been shown to set aside the recognisance as having been irregularly taken.—*Ex p. JEFFREYS* (1888), 52 J. P. 280, D. C.

**1810a. Breach of recognisance — Whether an offence—Probation of Offenders Act, 1907 (c. 17), s. 6 (5).]**—*LONDON COUNTY COUNCIL v. BIRMINGHAM CORPN.* (1923), 87 J. P. 202; 40 T. L. R. 76; 68 Sol. Jo. 209; 21 L. G. R. 816, D. C.

## Part VI.—Indictments.

### SECT. 1.—IN GENERAL.

**1811. Definition.]**—An indictment is a written accusation of one or more persons of a crime presented upon oath by a jury of twelve or more men, termed a grand jury (DENMAN, J.).—*R. v. SLATOR* (1881), 8 Q. B. D. 267; 51 L. J. Q. B. 246; 46 J. P. 694; 30 W. R. 410.

**1812. Construction of indictments.]**—Every indictment must contain a complete description of such facts & circumstances as constitute the crime, without inconsistency or repugnancy. But except in certain cases where technical expressions, having grown by long use into law, are required to be used, the same sense is to be put on the words of an indictment which they bear in ordinary acceptation. If the sense of any word be in ordinary acceptation ambiguous, it shall be construed according as the context & subject-matter require it to be in order to make the whole consistent & sensible. The word "until" may therefore be construed either exclusive or inclusive of the day to which it is applied, according to the context & subject-matter.—*R. v. STEVENS & AGNEW* (1804), 5 East, 244; 1 Smith, K. B. 437; 102 E. R. 1063.

*Annotations:—Reid. R. v. O'Connell* (1844), 3 L. T. O. S. 323; *Douglas v. R.* (1847), 13 Q. B. 74; *R. v. Duffy* (1849), 7 State Tr. N. S. 795. *Mentd. Wilkinson v. Gaston* (1846), 9 Q. B. 137; *Bellhouse v. Mellor, Proudman v. Mellor* (1859), 4 H. & N. 116.

**1813. —.]**—An indictment in the first count

charged A. with stealing a promissory note from the person of B., in the second count with stealing a bank note from the person of B., in the third count with receiving the aforesaid goods "so as aforesaid feloniously stolen." A. was acquitted on the two first counts, & convicted on the last:—*Held*: after verdict the indictment was not bad on the ground of repugnancy because the words of reference in the third count did not necessarily import a stealing of the goods by A.; if they did, that count did not thereby become intrinsically repugnant, but was conceivably capable of proof; & after verdict the ct. would resort to any possible construction which would uphold the indictment against a purely technical objection.—*R. v. CRADDOCK* (1850), 2 Den. 31; T. & M. 361; 4 New Sess. Cas. 400; 20 L. J. M. C. 31; 16 L. T. O. S. 514; 15 J. P. 20; 14 Jur. 1031; 4 Cox, C. C. 409, C. C. R.

### SECT. 2.—SUBJECT-MATTER OF INDICTMENT.

#### SUB-SECT. 1.—DISOBEDIENCE TO PROVISIONS OF STATUTES.

*A. Where no Special Remedy provided.*

**1814. Where act prohibited or enjoined by statute.]**—*MOORE'S (SIR THOMAS) CASE* (1535), 1 State Tr. 385.

provides a complete procedure respecting recognisances & any other procedure, such as the English Crown Office Rules, would be inconsistent therewith.—*R. v. ZARKAS et al.*, [1918] 1 W. W. R. 323; 11 Saak, L. R. 51; 29 Can. Crim. Cas. 183; 39 D. L. R. 776.—CAN.

*h. — Outside justice's own county.]*—The taking of a recognisance by a justice under Grand Jury (Ireland) Act, 1836, s. 137 (as adapted), where the offender is unknown, does not involve the exercise of judicial functions. Such an act, being merely ministerial, may be done by a justice outside the county in which he has jurisdiction.—*FLOOD v. DUBLIN COUNTY COUNCIL* (1907), 41 L. T. L. 120.—IR.

*k. Several sureties bound in unequal amounts—Relative liability.]*—Sureties in a recognisance contribute in proportion to the amounts for which

they were respectively originally bound.—*Re M'DONAGHS* (1876), 10 I. R. Eq. 269.—IR.

*l. Several accused—May be sureties each for the other.]*—Where on a joint complaint, two accused persons are tried separately & convicted separately, although the convictions are embodied in one document, accused may, on appeal, enter into recognisances as sureties each for the other.—*R. v. CYR & CALVEZ*, [1923] 3 W. W. R. 699.—CAN.

*m. Application for relief from recognisance—Excuse.]*—An application to be relieved from a recognisance to appear felony was refused; the only excuse for non-attendance being that the party was in ill-health, & expected to be sent for by the Crown officer.—*R. v. GEROW* (1863), 5 All. 633.—CAN.

#### PART VI. SECT. 2, SUB-SECT. 1.—A.

**1814 i. Where act prohibited or enjoined by statute.]**—An information was laid against deft. before a police magistrate, under Consolidated Municipal Act, 1903, s. 193 (1) (b), for having fraudulently put into a ballot box a ballot paper purporting to have been used by a person who did not vote at the election. There is no provision in the section, nor elsewhere in the Act, indicating the procedure to be followed.—*Held*: the offence charged was not an offence at common law, & was punishable by indictment.—*R. v. DUROCHER* (1913), 28 O. L. R. 499; 4 O. W. N. 1057.—CAN.

**1814 ii. —.]**—A prosecution for constructing a new weir across a salmon river in violation of the provisions of 5 & 6 Vict. c. 106, s. 63, as no penalty is attached, is the subject of indictment



**1815.** —[.]—An indictment lies against a person for doing what is prohibited by statute, if no particular mode of punishment be directed.—*HOLLINGWORTH'S CASE* (1620), Cro. Jac. 577; 79 E. R. 493.

**1816.** —[.]—Whenever a statute makes a thing criminal an information will lie upon that statute, though not given by express words (*KELYNCE, C.J.*).—*TROY'S CASE* (1669), 1 Mod. Rep. 5; 86 E. R. 686.

**1817.** —[.]—An indictment lies against overseers for refusing to account within the time limited by 43 Eliz. c. 2.

The overseers are required by 43 Eliz. c. 2, s. 2, to account, & their refusal is a contempt of the law, for which they may be indicted (*per CUR.*).—*R. v. COMMINGS* (1690), 5 Mod. Rep. 179; 87 E. R. 594; *sub nom. R. v. HUMMINGS*, Comb. 374; *sub nom. R. v. HEMMINGS & GHENT*, 3 Salk. 187.

**1818.** —[.]—The disobeying of an Act of Parliament is indictable upon the principles of the common law (*per CUR.*).—*R. v. JONES* (1740), 2 Stra. 1146; 7 Mod. Rep. 410; 2 Sess. Cas. K. B. 326; 1 Bott's Poor Law, 6th ed. 360; 93 E. R. 1091.

*Annotation.*—*Consd. R. v. Hall*, [1891] 1 Q. B. 747.

**1819.** —[.]—The granting of an ale licence by magistrates, after the general meeting has refused one, is illegal & the subject of an indictment.

What the law says shall not be done, it becomes illegal to do, & is therefore the subject-matter of an indictment, without the addition of any corrupt motives (*ASHHURST, J.*).—*R. v. SAINSBURY* (1791), 4 Term Rep. 451; Nolan, 8; 100 E. R. 1113.

*Annotations.*—*Re Royal British Bank* (1857), 29 L. T. O. S. 148. *Mentd. R. v. Ellis & Greenwood* (1842), 12 L. J. M. C. 20; *R. v. Bidwell* (1847), 2 Car. & Kir. 564; *Arnold v. Gausson* (1853), 8 Exch. 463; *Brown v. Nicholson* (1858), 5 C. B. N. S. 468; *Candlish v. Simpson* (1861), 1 B. & S. 357; *Lawson v. Reynolds*, [1904] 1 Ch. 718; *R. v. Beacontree JJ.*, *R. v. Wright*, [1915] 3 K. B. 388.

**1820.** —[.]—The proper remedy against a public officer who disobeys an Act of Parliament, the meaning & effect of which is in dispute, is an indictment.—*R. v. ROCHESTER CORPN.* (1838), 2 J. P. 70; 2 Jur. 64.

**1821.** —[.]—Under Births & Deaths Registration Act, 1836 (c. 86), s. 20, the father of a child, if requested by the registrar within 42 days after the birth, is bound to inform the registrar of the particulars required by the Act to be registered touching the birth, & if he refuse the information on such request, he is indictable for a misdemeanour.—*R. v. PRICE* (1840), 11 Ad. & El. 727; 3 Per. & Dav. 421; 9 L. J. M. C. 49; 4 J. P. 58; 4 Jur. 291; 113 E. R. 590.

*Annotations.*—*Consd. R. v. Hall*, [1891] 1 Q. B. 747. *Refd. R. v. Buchanan* (1846), 8 Q. B. 883; *R. v. James* (1850), 3 Car. & Kir. 167. *Mentd. R. v. Nott* (1843), 7 J. P. 351; *Hutchinson v. Manchester, Bury & Rossendale Ry.* (1846), 15 L. J. Ex. 293.

**1822.** —[.]—The rule has always been that wherever the law simply declared an act to be unlawful, the doer of it may be punished by indictment; but where the Legislature creates an act an offence & imposes only a penalty for doing it, there no indictment lies, but the penalty may be recovered (*POLLOCK, C.B.*).—*R. v. FOX* (1859), 1 E. & E. 746; 1 L. T. 216; 5 Jur. N. S. 1248; 8 W. R. 93; 120 E. R. 1090; *sub nom. FOX v. R.*, 29 L. J. M. C. 54; 24 J. P. 132, Ex. Ch.

**1823.** —[.]—Where a duty is created by

statute which affects the public as the public, the proper remedy if the duty is not performed is to indict or to take the proceedings provided by the statute (*WILLS, J.*).—*CLEGG, PARKINSON & Co. v. EARBAY GAS CO.*, [1896] 1 Q. B. 592; 65 L. J. Q. B. 339; 44 W. R. 606; 12 T. L. R. 241, D. C.

*Annotation.*—*Refd. Bourne & Hollingsworth v. Marylebone B. C.* (1908), 72 J. P. 129.

**1824. Breach of order made under authority of statute.**—[.]—Under Epping Forest Amendment Act, 1872 (c. 95), s. 5, the Epping Forest Comrs. made a general order prohibiting all persons from committing waste upon a piece of land described until the final report, or until further order; all persons affected to be at liberty to apply to them as there might be occasion.

Deft. applied to the comrs. by counsel as a person affected, but they refused to enter into the question raised. Deft. was convicted upon an indictment for breach of this order. Upon a case stated:—*Held*: the order & the indictment were good.—*R. v. WALKER* (1875), L. R. 10 Q. B. 355; 44 L. J. M. C. 169; 33 L. T. 167; 40 J. P. 230; 13 Cox, C. C. 94.

*Annotations.*—*Refd. Willingale v. Norris*, [1909] 1 K. B. 57. *Mentd. Lascelles v. Onslow* (1877), 41 J. P. 436; *Dale's Case, Enraght's Case* (1881), 6 Q. B. D. 376; *Wiffen v. Bailey & Romford U. D. C.* (1914), 78 J. P. 189.

**1825. Breach of bye-law under public statute.**—[.]—The breach of the bye-laws made by the managers & directors of recreation grounds under 22 Vict. c. 27, is an indictable offence.—*R. v. HAMBLBY* (1879), 43 J. P. 495.

**1826. Breach of regulations made under authority of statute.**—[.]—Where a statute gives power to an authority to make regulations, a breach of the regulations so made is an offence against the provisions of the statute.—*WILLINGALE v. NORRIS*, [1909] 1 K. B. 57; 78 L. J. K. B. 69; 99 L. T. 830; 72 J. P. 495; 25 T. L. R. 19; 21 Cox, C. C. 737; 7 L. G. R. 76, D. C.

**1827. Obstruction of statutory duties.**—[.]—It is an offence at common law to obstruct the execution of powers granted by statute.—*R. v. SMITH* (1780), 2 Doug. K. B. 441; 99 E. R. 283.

*Annotations.*—*Refd. A-G. of New South Wales v. Macpherson* (1870), L. R. 3 P. C. 268; *R. v. Stephenson* (1884), 53 L. J. M. C. 176. *Mentd. Murphy v. Ryan* (1868), 16 W. R. 678.

**1828.** —[.]—If an inquest ought to be held upon a dead body, it is a misdemeanour so to dispose of the body so as to prevent the coroner from holding the inquest.—*R. v. PRICE* (1884), 12 Q. B. D. 247; 53 L. J. M. C. 51; 33 W. R. 45, n.; 15 Cox, C. C. 389.

*Annotations.*—*Refd. Re Dixon*, [1892] P. 386; *Re Kerr*, [1894] P. 284; *R. v. Byers* (1907), 71 J. P. 205.

**1829.** —[.]—It is a misdemeanour to burn or otherwise dispose of a dead body, with intent thereby to prevent the holding upon such body of an intended coroner's inquest, & so to obstruct a coroner in the execution of his duty, in a case where the inquest is one which the coroner has jurisdiction to hold.

Interference with statutory duties & the preventing of their performance is a misdemeanour in general at the common law (*GROVE, J.*).—*R. v. STEPHENSON* (1884), 13 Q. B. D. 331; 53 L. J. M. C. 176; 52 L. T. 267; 49 J. P. 486; 33 W. R. 44; 15 Cox, C. C. 679, C. C. R.

*Annotation.*—*Mentd. Bastable v. Little* (1906), 96 L. T. 115.

& not of a summary proceeding before a magistrate.—*KAVANAGH v. GLORNEY* (1876), 1 R. 10 C. L. 210.—*IR.*

**n. Obstructing officer acting under search warrant.**—[.]—Defts. were committed for trial for obstructing a peace officer acting under a search warrant

issued on an information charging that there was reasonable ground for the belief that spirituous liquors were being unlawfully kept for sale contrary to the Liquor License Act in an unlicensed house.—*Held*: the search warrant must be deemed to have been

issued under sect. 131 of the Act, & that sect. containing no provision for punishment in such case, the proceedings against defts. must be by indictment for a misdemeanour under R. S. C., c. 162, s. 134.—*R. v. HODGE* (1893), 23 O. R. 450.—*CAN.*

**Sect. 2.—Subject-matter of indictment: Sub-sect. 1, B. (a) & (b).]**

**B. Where Statute provides Special Remedy.**

(a) *When Indictment lies.*

**1830. General rule.]**—If a statute imposes a pecuniary penalty upon any one who shall be indicted & convicted of a matter which that statute prohibits, a person may be indicted for such matter.—*R. v. HARMAN* (1705), 2 *Ld. Raym.* 1104; 92 *E. R.* 231.

**1831. Newly created offence—Whether indictment lies—Other remedy by statute.]**—If a statute create a new offence, & inflict a penalty to be recovered by “bill, plaint, or information,” yet an indictment will lie, except there be the negative words, “& not otherwise.”—*CROFTON’S CASE* (1670), 1 *Mod. Rep.* 34; 1 *Sid.* 439; 1 *Vent.* 63; 86 *E. R.* 710; *sub nom. R. v. CROFTON*, 2 *Keb.* 614.

**Annotations:—***N.F. Anon.* (1729), 1 *Barn. K. B.* 209; *R. v. Manning* (1729), *Fitz-G.* 47; *R. v. Wright* (1758), 1 *Burr.* 543. **Consd.** *R. v. Buchanan* (1846), 8 *Q. B.* 883. **Refd.** *Anon.* (1697), 3 *Salk.* 25.

**1832. ———.]**—When a statute prescribes a particular method of recovering a penalty for a new offence no indictment lies.—*ANON.* (1729), 1 *Barn. K. B.* 209; 94 *E. R.* 143.

**1833. ———.]**—An indictment lies upon prohibitory words in a statute, although it also limits a penalty & a particular manner of recovering it.—*ANON.* (1675), 1 *Freem. K. B.* 393; 89 *E. R.* 292.

**1834. ——— Where other remedy is in separate clause.]**—If the prohibition & the penalty are all in one & the same clause, there no indictment will lie, unless it be one of the remedies named in the Act. But if they are in distinct & separate clauses, then an indictment will lie on the prohibitory clause.—*R. v. WRIGHT* (1758), 1 *Burr.* 543; 97 *E. R.* 441; *sub nom. R. v. BRIGHT*, 2 *Keny.* 274.

**Annotations:—****Refd.** *Forster v. Taylor* (1834), 5 *B. & Ad.* 887; *R. v. Buchanan* (1846), 8 *Q. B.* 883; *R. v. Lovibond* (1871), 24 *L. T.* 357; *R. v. Hall*, [1891] 1 *Q. B.* 747; *Mullis v. Hubbard*, [1903] 2 *Ch.* 431; *Lowe v. Dorling*, [1906] 2 *K. B.* 772.

**1835. ———.]**—It is a clear & established principle that when a new offence is created by an Act of Parliament, & a penalty is annexed to it by a separate & substantive clause, it is not necessary for prosecutor to sue for the penalty; but he may proceed on the prior clause, on the ground of its being a misdemeanour (*ASHHURST, J.*).—*R. v. HARRIS* (1791), 4 *Term Rep.* 202; 2 *Leach*, 549; 100 *E. R.* 973.

**Annotations:—****Consd.** *R. v. Hall*, [1891] 1 *Q. B.* 747. **Refd.** *R. v. Crawshaw* (1860), 30 *L. J. M. C.* 58; *Boynton v. Ancholme Drainage & Navigation Comrs.*, [1921] 2 *K. B.* 213.

**1836. ———.]**—An Act of Parliament prohibited the erection or continuance of any

building within ten feet of the road, & declared that the footpaths should be subject to the Act, & be part of the road. It further enacted, that if any such building should be erected or continued contrary to the Act, it should be deemed a common nuisance. By another clause, two magistrates were empowered to convict the proprietor & occupier of such building, & to make an order for the removal thereof:—**Held:** notwithstanding the latter clause, the party who erected or continued a building contrary to the Act might be indicted for a nuisance.—*R. v. GREGORY* (1833), 5 *B. & Ad.* 555; 2 *Nev. & M. K. B.* 478; 1 *Nev. & M. M. C.* 446; 110 *E. R.* 895.

**Annotations:—****Consd.** *R. v. Hall*, [1891] 1 *Q. B.* 747. **Refd.** *R. v. Pocock* (1851), 17 *L. T. O. S.* 91; *R. v. Crawshaw* (1860), 8 *Cox, C. C.* 375; *R. v. Lovibond* (1871), 19 *W. R.* 753.

**1837. ———.]**—Disobedience to the express prohibition of a statute is indictable as a misdemeanour, although the offence is a new one, & there is another punishment inflicted by a subsequent section. *Secus*, if the prohibition & punishment are contained in the same section.—*R. v. BUCHANAN* (1846), 8 *Q. B.* 883; 15 *L. J. Q. B.* 227; 7 *L. T. O. S.* 83; 10 *J. P.* 615; 10 *Jur.* 736; 2 *Cox, C. C.* 36; 115 *E. R.* 1107; *previous proceedings* (1845), 1 *Cox, C. C.* 200.

**Annotations:—****Refd.** *Osborne v. Milman* (1886), 17 *Q. B. D.* 514; *R. v. Hall*, [1891] 1 *Q. B.* 747; *Stevens v. Chown*, *Stevens v. Clark*, [1901] 1 *Ch.* 894.

**1838. ———.]**—By 10 & 11 *Will.* 3, c. 17, s. 1, lotteries are declared common & public nuisances. Sect. 2, which came into operation on a subsequent day, rendered persons keeping lotteries liable to a penalty to be sued for by information or action. *Gaming Act*, 1802 (c. 119), contained similar enactments:—**Held:** the keeping a lottery was an indictable offence.—*R. v. CRAWSHAW* (1860), *Bell, C. C.* 303; 30 *L. J. M. C.* 58; 3 *L. T.* 510; 25 *J. P.* 37; 9 *W. R.* 38; 8 *Cox, C. C.* 375, *C. C. R.*

**Annotation:—****Refd.** *Martin v. Benjamin*, [1907] 1 *K. B.* 61.

**1839. Where offence already indictable at common law—Indictment lies although statute provides other remedy.]**—A man may be indicted for what was an offence at common law, notwithstanding a statute may inflict a new penalty upon it, & prescribe another mode of proceeding for such penalty.—*R. v. WIGG* (1705), 2 *Ld. Raym.* 1163; 2 *Salk.* 460; 92 *E. R.* 269.

**Annotations:—****Refd.** *R. v. Belton* (1696), 1 *Salk.* 372; *R. v. Mallard* (1728), 1 *Barn. K. B.* 108; *R. v. Hill* (1729), 1 *Barn. K. B.* 259.

**1840. ———.]**—Where a statute which creates or makes a thing an offence that was not so before by the common law, gives a certain penalty, & prescribes a method for the recovery of it, there the Act must be pursued; but it is otherwise of an offence at common law, for which an Act gives a new penalty, or a new remedy;

(1903), *T. S.* 694.—**S. AF.**

**1839 iii. ———.]**—A statute imposing a special penalty for an act which is a common law offence does not repeal the common law unless an express or implied intention to repeal it is clearly manifest in the statute. In the absence of such intention the Crown may proceed either under the common law or under the statute.—*R. v. ROBERTS*, [1908] *T. S.* 279.—**S. AF.**

**P. ——— Special penalty only applied if prayed for in indictment.]**—A statutory penalty which imposes a punishment for a crime known to the common law does not *per se* abrogate the existing penalty under the common law, & the prosecution may proceed against the accused either under the

## PART VI. SECT. 2, SUB-SECT. 1.— B. (a).

**o. Newly created offence—Indictment lies on prohibitory words—Where other remedy is in separate clause.]**

*Revenue Act*, 15 *Vict. c.* 28, s. 68, enacted that any penalty or forfeiture inflicted under that Act should be recovered by action of debt or information: sect. 72 enacted that if any person should assault any revenue officer in the exercise of his office, he should, on conviction, pay a fine not exceeding £100, nor less than £50, & in case of non-payment the offender should be imprisoned for a term not exceeding twelve months, nor less than three months, at the discretion of the ct.:—**Held:** the Act only limited the discretion of the ct. as to

the amount of fine & imprisonment on conviction for an assault under sect. 72, but did not alter the ordinary mode of proceeding by indictment.—*R. v. WALSH* (1854), 3 *All.* 54.—**CAN.**

**1839 i. Where offence already indictable at common law—Indictment lies although statute provides other remedy.]**

—A soldier sold a kilt forming part of his uniform to a dealer, who knew it was Govt. property dishonestly appropriated by the seller:—**Held:** the soldier & the dealer were respectively guilty of the common law crimes of theft & receiving, although their actings were also special offences against *Army Act*, 1881, ss. 24 & 156.—*O'BRIEN v. SHATHERN*, [1922] *S. C. (J.)* 55.—**SCOT.**

**1839 ii. ———.]**—*R. v. JOLOSA*





were matters for summary conviction, & not for indictment.—*R. v. LOMBARD* (1914), 26 W. L. R. 647; 15 D. L. R. 613; 7 Alta. L. R. 270; 5 W. W. R. 1089.—**CAN.**

**misdeameour.**—*R. v. SUTTON* (1737), *Lee temp. Hard.* 370; 2 *Stra.* 1074; 95 *E. R.* 240.

*Annotations* :—*M.F. R. v. Heath* (1810), *Russ. & Ry.* 184. *Refd.* *R. v. Scofield* (1784), *Cald. Mag. Cas.* 397; *Dugdale v. R.* (1853), *Dears. C. C.* 64; *R. v. Roberts* (1855), 7 *Cox, C. C.* 39.

**1879.** —.]—Having counterfeit silver in possession with intent to utter it as good, is no offence, for there is no criminal act done.—*R. v. HEATH* (1810), *Russ. & Ry.* 184, *C. C. R.*  
*Annotation* :—*Folld. Dugdale v. R.* (1853), 1 *E. & B.* 435.

**1880.** —.]—Having counterfeit silver in possession, with intent to utter it as good, is no offence, for there is no criminal act done.—*R. v. STEWART* (1814), *Russ. & Ry.* 288, *C. C. R.*

*Annotation* :—*Refd. R. v. Jarvis* (1855), 26 *L. T. O. S.* 110.

**1881.** —.]—Certain counts in an indictment charged *deft.* with preserving & keeping in his possession obscene prints with the intent & for the purpose of unlawfully uttering & selling the same, & thereby corrupting the morals of the liege subjects of the Queen :—*Held* : upon writ of error, insufficient in law.

The law will not take notice of a bare intention without some act done in furtherance of it (*COLERIDGE, J.*).—*DUGDALE v. R.* (1853), 1 *E. & B.* 435; *Dears. C. C.* 64; 22 *L. J. M. C.* 50; 17 *J. P.* 182; 17 *Jur.* 546; 118 *E. R.* 499; *sub nom. R. v. DUGDALE*, 20 *L. T. O. S.* 219, *C. C. R.*; *subsequent proceedings*, 2 *E. & B.* 129, *Ex. Ch.*

*Annotations* :—*Consd. Bradlaugh v. R.* (1878), 3 *Q. B. D.* 607. *Refd. R. v. Roberts* (1855), 4 *W. R.* 128; *R. v. Robinson* (1915), 79 *J. P.* 303.

**1882. To try a civil right.**—An information will not lie to try a civil right, as the title to land; but an indictment will lie at common law against witnesses for the King, for perjury on an information although such perjury is not punishable by 5 *Eliz. (c. 9)*.—*NANNGE v. ROWLAND* (1608), *Cro. Jac.* 212; 79 *E. R.* 184.

**1883. Mere trespass.**—*R. v. STORR* (1765), 3 *Burr.* 1698; 97 *E. R.* 1053.

*Annotation* :—*Distd. R. v. Wilson* (1799), 8 *Term Rep.* 357.

**1884.** —.]—*R. v. ATKINS* (1765), 3 *Burr.* 1706; 97 *E. R.* 1057.

**1885.** —.]—A mere trespass which is the subject of a civil action cannot be converted into an indictable offence (*LORD KENYON, C.J.*).—*R. v. WILSON* (1799), 8 *Term Rep.* 357; 101 *E. R.* 1432.

*Annotations* :—*Refd. Newton v. Harland* (1840), 1 *Man. & G.* 644; *R. v. Newlands* (1840), 4 *Jur.* 322; *Harvey v. Brydges* (1845), 14 *M. & W.* 437.

**1886. Private wrong or breach of civil contract.**—*R. v. STONEHOUSE* (1696), 3 *Salk.* 188; 91 *E. R.* 787.

**1887.** —.]—Deceitfully receiving money from one man to the use of another, on a pretended order for such purpose, is not indictable at common law.—*R. v. JONES* (1704), 1 *Salk.* 379; 2 *Ld. Raym.* 1013; 91 *E. R.* 330; *sub nom. ANON.*, 6 *Mod. Rep.* 105.

*Annotations* :—*Refd. R. v. Munocs* (1740), 7 *Mod. Rep.* 315; *R. v. Wheatly* (1761), 2 *Burr.* 1125; *R. v. Southerton* (1805), 6 *East*, 126; *R. v. Woolley* (1850), 3 *Car. & Kir.* 98.

**1888.** —.]—Indictment lies not against a miller for detaining part of the corn.—*R. v. CHANNEL* (1728), 2 *Stra.* 793; 1 *Sess. Cas. K. B.* 366; 93 *E. R.* 852.

**1886i. Private wrong or breach of civil contract.**—The indictment stated that D., being aged, & unable to maintain himself, assigned his farm to prisoner, upon the terms of being maintained by prisoner; but prisoner refused & neglected to maintain D., by reason whereof D. languished & died :—*Semble* : the indictment was bad, as charging a breach of contract only.—

*R. v. SHEALS* (1845), 3 *Craw. & D.* 330. —*IR.*

*r. Using false weights.*—An indictment for false pretences by using false scales & weights :—*Held* : bad, the offence charged not being an in- CASE (1841),

*r. Car. Rep.* 191. —*IR.*

*s. Using insulting & abusive lan-*

**1889.** —.]—Delivering less beer than contracted for as the due quantity is not indictable.

The offence that is indictable must be such a one as affects the public. As if a man uses false weights & measures & sells by them to all or to many of his customers, or uses them in the general course of his dealing; so, if a man defrauds another, under false tokens (*LORD MANSFIELD, C.J.*).—*R. v. WHEATLY* (1761), 2 *Burr.* 1125; 1 *Wm. Bl.* 273; 97 *E. R.* 746.

*Annotations* :—*Apld. R. v. Lara* (1794), 2 *Leach*, 647. *Refd. R. v. Bower* (1775), 1 *Cowp.* 323; *R. v. Haynes* (1815), 4 *M. & S.* 214; *R. v. Vreones* (1891), 60 *L. J. M. C.* 62; *R. v. Brailford*, (1905) 2 *K. B.* 730.

**1890.** —.]—Delivering less oats than the quantity contracted for as the due quantity is not indictable.—*R. v. DUNNAGE* (1761), 2 *Burr.* 1130; 97 *E. R.* 749.

**1891.** —.]—An indictment will not lie for selling as two chaldrons of coals a less quantity; it must be for selling by false measure.—*R. v. OSBORN* (1765), 3 *Burr.* 1697; 97 *E. R.* 1052.

**1892.** —.]—Knowingly exposing to sale, & selling wrought gold under the sterling alloy, as & for gold of the true standard weight, which is indictable in goldsmiths, is a private imposition only in a common person.—*R. v. BOWER* (1775), 1 *Cowp.* 323; 98 *E. R.* 1110.

*Annotation* :—*Mentd. R. v. Siddon* (1830), 9 *L. J. O. S. Ex.* 7.

**1893.** —.]—Indictment does not lie against a miller for receiving good barley to grind at his mill, & delivering a mixture of oat & barley meal different from the produce of the barley, & which is musty & unwholesome.

If the indictment alleged that *deft.* had delivered the barley as an article for the food of man, it might possibly have been sustained (*LORD ELLENBOROUGH, C.J.*).—*R. v. HAYNES* (1815), 4 *M. & S.* 214; 105 *E. R.* 814.

**1894.** —.]—Indictment for supplying a workhouse with bread short of weight, with intent thereby to defraud the poor in the house of a portion of their allowance. The contract into which the *deft.* had entered with the *corpn.* to provide bread for the workhouse, each loaf to weigh 1 lb. 15 oz., was proved. The mayor, who was one of the committee, was examined, & stated that he weighed one of the loaves sent by *deft.* on July 16, 1815, & it weighed only 1 lb. 11 oz.; he then weighed a score of loaves, & found a deficiency of 4 lbs. in weight; after which he weighed six score, & there was a deficiency of 25½ lbs.; but an objection was taken on the part of *deft.* that the offence with which he was charged was not an indictable offence, as, in order to constitute such an offence, it was necessary that the public should be injured by it; & further, that it must be such as ordinary prudence could not provide against. It was also urged that sending a less quantity than was contracted for is merely a breach of civil contract, & not an indictable offence :—*Held* : according to strict law, it was not an indictable offence, but only a breach of civil contract, & therefore the indictment could not be supported.—*R. v. HARLING* (1815), 3 *C. L. R.* 1148, n.

**1895. Non-performance of promise.**—*R. v. BRADFORD* (1698), 1 *Ld. Raym.* 366; 3 *Salk.* 189; 91 *E. R.* 1142.

*guage in public street*—Calculated to provoke breach of the peace.]—A. was charged at common law before the Sheriff with the crime & offence of disorderly conduct in a public street in a town where there was no police magistrate, by using insulting & abusive language to B., calling aloud that B. was a thief :—*Held* : the charge was not relevant.—*BANKS v.*

*Sect. 2.—Subject-matter of indictment: Sub-sect. 3.*  
*Sect. 3: Sub-sects. 1 & 2.]*

**1896. Words spoken to prejudice public market.]**—*R. v. HARWOOD* (1893), 1 Salk. 370; 91 E. R. 322.

**1897. Improper but not fraudulent expenditure of money.]**—The surveyor of a high road having improperly expended a large sum of money, borrowed by the trustees under an Act of Parliament, without the consent of the trustees, which the Act required to sanction the expenditure, the ct. refused a criminal information against the surveyor in the absence of any corrupt motive expressly alleged. The ct. will not convert a civil into a criminal remedy.—*R. v. FRIAR* (1819), 1 Chit. 702.

**1898. Enticing servant from master.]**—*R. v. DANIELL* (1704), 6 Mod. Rep. 99, 182; Holt, K. B. 346; 1 Salk. 380; 3 Salk. 191; 2 Ld. Raym. 1118; 87 E. R. 856, 937.

*Annotations:—Consd. R. v. Higgins* (1801), 2 East, 5. *Refd. R. v. Collingwood* (1704), 6 Mod. Rep. 288. *Mentd. R. v. Rowed* (1842), 11 L. J. M. C. 74; *Mogul S.S. Co. v. McGregor*, Gow (1889), 23 Q. B. D. 598.

**1899. Entertaining vagrants.]**—*R. v. LANGLEY* (1702), 2 Ld. Raym. 790; 92 E. R. 27.

**1900. Receiving unmarried woman into house for childbirth.]**—*R. v. MACDONALD* (1765), 3 Burr. 1645; 97 E. R. 1026.

### SECT. 3.—PREFERRING AN INDICTMENT.

#### SUB-SECT. 1.—IN GENERAL.

**1901. Who may prefer indictment — Breach of Foreign Enlistment Act, 1819 (c. 69)—Foreign Government.]**—Indictment, on the prosecution of the Sicilian minister in London, against G. & others for a breach of the above Act. The British Govt. had declined to prosecute.

This is a prosecution instituted by the Neapolitan Govt., & there is no doubt they have as much right

to adopt such a proceeding as any person under Her Majesty's protection (COLTMAN, J.).—*R. v. GRANATELLI* (1849), 7 State Tr. N. S. 979.

*Annotation:—Mentd. A.-G. v. Sillem*, Alexandra Case (1864), 33 L. J. Ex. 92.

**1902. ——— Private person.]**—If a private person desires to punish an infraction of the above Act he must do so by the ordinary machinery for the administration of justice, the preferring of an indictment.—*Ex p. CRAWSHAY* (1860), 3 L. T. 320; 24 J. P. 805; *sub nom. Ex p. CRAWSHAY v. LANGLEY*, 8 Cox, C. C. 356.

**1903. Concurrent trial of separate indictments for same offence.]**—Where two indictments are for the same fact, it is proper to try on both at once.—*R. v. CULLIFORD* (1704), 1 Salk. 382; 91 E. R. 332; *sub nom. CULLIFORD'S CASE*, 6 Mod. Rep. 219; 3 Salk. 39.

*Annotations:—Refd. Campbell v. R.* (1846), 11 Q. B. 799; *R. v. Toole* (1867), 11 Cox, C. C. 75.

**1904. ———.]**—Two indictments for the same offence, one for the felony under a statute, & the other for the misdemeanour at common law, ought not to be preferred or found at the same time.—*R. v. DORAN* (1790), 1 Leach, 538.

*Annotations:—Refd. R. v. Stockley* (1842), 3 Q. B. 238. *Mentd. R. v. Kitson* (1853), 22 L. J. M. C. 118.

**1905. ———.]**—If two bills of indictment be preferred for the same offence, the one charging it capitally, the other as a misdemeanour, & both be found, the judge will put the party to his election which he will go upon, & direct an acquittal on the other.—*R. v. SMITH* (1828), 3 C. & P. 412.

**1906. ———.]**—An indictment for stealing valuable securities, the property of L., & an indictment for misdemeanour in selling & converting securities of the same description in all respects, the property of the same L., & entrusted by him to deft. for safe custody, were found, at the same session of the Central Criminal Ct., against the same party, & removed by *certiorari*. Deft. moved that the indictments or one of them might be quashed, on affidavit that both were preferred

*MCLENNAN* (1876), 4 R. (Ct. of Sess.) 8; 14 Sc. L. R. 79.—**SCOT.**

**t. Loudly reading, singing & preaching in public street.]**—A police complaint charged that on a street in L. accused did loudly read, sing, pray, & preach, by which a large crowd was collected, & the residents & others in the neighbourhood were annoyed & disturbed:—*Held*: this did not constitute a relevant charge of any offence at common law, & conviction following thereon set aside.—*HUTTON v. MAIN* (1891), 19 R. 5; 29 Sc. L. R. 45.—**SCOT.**

#### PART VI. SECT. 3, SUB-SECT. 1.

**a. Who may prefer indictment — Barrister appointed by A.-G.]**—By statute there is imposed upon the A.-G. the duty of appointing some Queen's counsel, or other competent barrister of the ct., to attend the criminal business of each sittings of the Supreme Ct., in each county in the province: such authority to be conveyed by written instructions under the hand of the A.-G., the presentment of which, to the presiding judge, in the absence of the A.-G., is made sufficient authority for any barrister to take charge, on behalf of the Crown, of criminal business, & conduct the trial of criminals at any sittings or term:—*Held*: these words were sufficient to cover the specific act of preferring an indictment, but the A.-G. must direct the preferring of the bill in the particular case, & it will not do to direct the counsel to prepare bills in all cases which may arise.—*R. v. TOWNSEND & WHITING* (1896), 28 N. S. R. 468.—**CAN.**

**b. ———.]**—Deft. was committed for trial on a charge of assaulting, wounding, & doing grievous bodily harm to W., who was bound over in regular form to prosecute. At the next term of the Supreme Ct. the grand jury found an indictment against deft. W. was not present, & was not examined as a witness. The A.-G. was not present, & no one had any special directions from him to prefer an indictment. No one had the written consent of a judge, & no order of ct. was made to prefer an indictment. The point was reserved whether the indictment should not be quashed, because it was not preferred by any of the persons authorised by Criminal Code, s. 641. Under an Act of the Provincial Legislature, crimes such as that for which deft. was indicted, are prosecuted by an officer appointed by the A.-G. at each term of the ct., or, in default of such appointment, by the ct.:—*Held*: in these circumstances the presence of the prosecutor was not necessary, & no special direction from the A.-G., or written consent of a judge, or order of the ct., was necessary to make the indictment valid.—*R. v. HAMILTON* (1898), 30 N. S. R. 322.—**CAN.**

**c. ———.]**—*R. v. WILSON* (1913), 26 W. L. R. 148.—**CAN.**

**d. ——— Without preliminary inquiry.]**—*R. v. LEVERTON*, [1917] 2 W. W. R. 584; 28 Can. Crim. Cas. 61; 34 D. L. R. 514; 11 Alta. L. R. 355.—**CAN.**

**e. Leave to prefer—When refused.]**—Leave to prefer an indictment may properly be refused the Crown when

the accused has been discharged on a *habeas corpus* reviewing a magistrate's commitment for trial in respect of the same charge & holding the evidence insufficient on the merits to justify a commitment for trial.—*R. v. MACKAY* (1918), 29 Can. Crim. Cas. 419.—**CAN.**

**f. ——— Opposed by A.-G.]**—Where the Crown declined to lay any charge against one committed for trial upon an information for criminal libel & also opposed an appln. by the private prosecutor for consent as the ct. under sect. 873A to lay a charge the ct. refused its consent as the Crown could, notwithstanding such consent & laying of the charge, stop all proceedings.—*R. v. EDWARDS* (1919), 2 W. W. R. 600.—**CAN.**

**g. Charge entirely different from that on which prisoner committed.]**—A prisoner may at his trial be charged in the presentment with an offence entirely different from that for which he is committed for trial.—*R. v. MARTIN* (1884), 10 V. L. R. 343.—**AUS.**

**h. ———.]**—Prisoners were committed for trial on a charge of gambling in a railway train. On the trial, an indictment was preferred, under 42 Vict. c. 44, s. 3 (D), for obtaining money by false pretences. The prisoners' counsel objected to the prisoners being tried on a different charge from that on which they had been committed. The objection was overruled, & the charge read over to prisoners, & on its being explained that they could be tried forthwith or remain in custody until the next sitting of oyer & terminer, they pleaded not guilty, & said that they were ready for trial. The

for the same alleged offence:—*Held*: a rule to show cause would be refused.—*R. v. STOCKLEY* (1842), 3 Q. B. 238; 2 Gal. & Dav. 728; 11 L. J. M. C. 105; 6 J. P. 552; 114 E. R. 498.

**1907. Separate indictments in respect of same transaction—Where act constitutes more than one offence.**—*ANON.* (1601), Gouldsb. 132; 75 E. R. 1045.

**1908.** ———.]—Where a person stole two pigs belonging to the same person at the same time, & after being convicted & punished for stealing one of the pigs, was again indicted at a subsequent assize for stealing the other:—*Held*: this might legally be done. *Semble*: in such a case the second prosecution ought not to be proceeded with.—*R. v. BRETTEL* (1842), Car. & M. 609.

**1909.** ——— Where transaction consists of distinct acts.]—A. was indicted for shooting at B., a gamekeeper. There being another indictment against A. for night poaching:—*Held*: although both indictments related to the same transaction, yet the offences were quite distinct from each other, & prosecutor, therefore, ought not to be put to his election to go upon one indictment & abandon the other.—*R. v. HANDLEY* (1833), 5 C. & P. 565.

**Found at quarter sessions & at assizes—Indictment at quarter sessions not transmitted to assizes.**]—An indictment was found at the county sessions at B. against deft. for obstructing a highway. Upon the certificate of such finding, deft. was taken before a magistrate & bound by recognisance to appear & plead at assizes. The indictment was not transmitted to assizes, but was in the custody of the clerk of the peace:—*Held*: the judge of assize had no power to order the clerk of the peace to send the indictment to assizes; as it was found at sessions, & not transmitted for trial at the assizes, the ct. had no jurisdiction to try the same.

A second indictment for the same offence being found by the grand jury at the assizes:—*Held*:

prisoners were convicted; no question having been raised as to their having been tried without their consent, although their counsel took other objections to the proceedings. A writ of *habeas corpus* having been issued, & the prisoners' discharge moved for, on the ground of the absence of such consent:—*Held*: the motion must be refused.—*R. v. GOODMAN* (1883), 2 O. R. 468.—**CAN.**

**k. Adding count to indictment—No previous hearing before magistrate of matter in new count.**]—Accused was tried upon an indictment containing two counts, the first for theft, & the second for obtaining money under false pretences. The accused was committed for trial only on the charge contained in the first count, the charge contained in the second count having been withdrawn:—*Held*: the judge had the right, under the Criminal Code, as amended in 1909, to add the second count:—*Held*: also, accused had elected to be tried by the judge on both charges.—*R. v. STICKLER* (1910), 13 W. L. R. 316.—**CAN.**

**l.** ———.]—Deft. was charged with stealing from his employer. Upon his trial, under the speedy trials provisions of the Criminal Code, a count was added to the original charge to the effect that deft., a clerk in the service of C., with intent to defraud, "omitted particulars from books of account belonging to & in the possession of his employer" & was, therefore, guilty of an indictable offence. The judge quashed the original indict. & allowed the Crown to proceed upon the added count, & convicted deft. Upon a case

deft., being bound to appear by recognisance, must be called upon to plead to the second indictment.—*R. v. WILDMAN* (1872), 12 Cox, C. C. 354.

**1911. Election—Two indictments for same offence.**—*R. v. SMITH*, No. 1905, *ante*.

**1912.** ———.]—A prosecutor cannot maintain two indictments for misdemeanour for the same transaction; he must elect to proceed with one, & abandon the other.—*R. v. BRITTON* (1833), 1 Mood. & R. 297.

*Annotations*:—*Mentd.* *R. v. Wheeler* (1838), 2 Mood. C. C. 45; *R. v. Scott* (1856), 7 Cox, C. C. 164.

**1913.** ———.]—*R. v. HANDLEY*, No. 1909, *ante*.

**1914. Information & indictment for same offence—Information discharged—Right to prefer indictment.**]—Where a rule for a criminal information had been discharged on the payment of costs by deft.:—*Held*: from these circumstances no agreement was to be implied that prosecutor should not institute any other proceedings, & an indictment having been afterwards preferred by him for the same offence, the ct. would refuse to stay the proceedings under it.—*R. v. STANSFIELD* (1837), Will. Woll. & Dav. 147.

#### SUB-SECT. 2.—VEXATIOUS INDICTMENTS ACT, 1859.

**1915. Application of statute—Every count must comply with provisions.**]—An indictment contained two counts for obtaining money by false pretences on two several occasions, the requirements of the above Act having been complied with in respect of one of the cases only. The prisoner refused to plead; & a plea of not guilty was entered by the direction of the ct. Evidence was given upon each count, & the prisoner was convicted upon each:—*Held*: the second count ought to have been quashed, & therefore the conviction upon that count could not stand.—*R. v. FUDGE* (1864), Le. & Ca. 390; 3 New Rep.

stated:—*Held*: the pinning or annexing of the new count to the formal charge in writing signed by the counsel & agent for the A.-G., was sufficient to incorporate it in the charge.—*R. v. WILSON* (1913), 26 W. L. R. 148; 15 D. L. R. 168; 6 Sask. L. R. 348; 5 W. W. R. 620.—**CAN.**

**m.** ———.]—*Semble*: where, after an accused person has been committed for trial, the consent of a judge is asked *ex parte*, under Crimes Act, 1908, s. 407, to add a count to the indictment to be preferred against him, charging him with an offence not disclosed in the depositions & not investigated in the ct. below, the judge has jurisdiction to give such consent; but such jurisdiction should only be exercised upon sufficient *prima facie* evidence being placed before him.—*R. v. O'KEEFE* (1909), 23 N. Z. L. R. 502.—**N.Z.**

**n.** ——— Order should be made at commencement of trial.]—At the commencement of a trial before a ct. of session on a charge under Penal Code, s. 206, the Public Prosecutor applied to the ct. to frame new heads of charge under Code, ss. 423 & 424. The Sessions Judge postponed passing any final decision upon this application, until it became apparent that the charge under sect. 206 was not sustainable on the evidence to be adduced by the prosecution. After hearing the evidence for the prosecution on this charge, the judge, without going into the defence or recording the opinions of the assessors, passed an order of acquittal. At the same time, he rejected the application for framing new

heads of charge, holding that he had no power to frame any new charges in addition to the original charge. He was also of opinion that the dismissal of a complaint, which the prosecutor had previously filed against the accused on the very charges which were sought to be added, was also a sufficient ground for rejecting the application:—*Held*: the judge ought to have finally disposed of the application for framing additional charges at the very commencement of the trial when it was made, especially because it did not purport to be based on any facts other than those contained in the depositions recorded by the committing magistrate.—*R. v. VAJIRAM* (1892), 1 L. R. 16 Bom. 414.—**IND.**

**o.** ——— At trial without jury—Election of accused.]—When an accused person elects to take his trial before a judge without a jury, on the charge upon which he was committed, or to answer which he was bound over to take his trial under Criminal Code, 1892, s. 601, leave should not be granted, under sect. 773, for the addition to the indictment of new or other charges for offences substantially different, unless the accused elect to be tried on such other charges also by a judge without a jury.—*R. v. DOUGLAS* (1906), 5 W. L. R. 6; 16 Man. L. R. 345.—**CAN.**

**p. Alternative charge not laid.**]—The fact that a person charged with an offence might, upon the facts, have been charged with a conspiracy with another, is no objection to the individual charge.—*R. v. CLARK* (1892), 2 B. C. R. 191.—**CAN.**





his memory as to the facts, on which he wrote, "I consent to the prosecution in this case":—*Held*: it was sufficient within the statute.

(2) The ct. will not interfere with the exercise of the discretion of the judge under this statute.—*R. v. BRAY* (1862), 3 B. & S. 255; 1 New Rep. 17; 32 L. J. M. C. 11; 7 L. T. 248; 27 J. P. 165; 11 W. R. 7; 9 Cox, C. C. 215; 122 E. R. 96.

*Annotation*:—*As to* (1) & (2) *Consd. R. v. Bradlaugh* (1882), 31 W. R. 229.

1927. ———. ]—*R. v. LYNCH* (1904), 68 J. P. Jo. 88.

1928. ———. **Accused not in custody.**—Deft had been committed for conspiring with one B. to obtain property by false pretences. A warrant had been granted for the arrest of B., but he had not been arrested. The hearing at the police ct. took a considerable time, & in order to avoid the necessity of a second lengthy hearing at the police ct. in the event of B.'s arrest, leave was applied for, & granted, to prefer a bill of indictment against B. for conspiracy.—*R. v. KOPELWITZ* (1905), 69 J. P. 216.

1929. ———. **Preferring indictment on fiat of Attorney-General—Committal of three for conspiracy—Indictment preferred against them & another accused.**—Three defts. were severally bound by recognisance to appear at the next session of the Central Criminal Ct., & there surrendered themselves, & pleaded to such indictment as might be found against them for or in respect of the charge of conspiracy to cheat & defraud. Prosecutors were also bound over to appear at such next session, & to prefer or cause to be preferred a bill of indictment against the persons accused for the offence of conspiracy to cheat & defraud, & duly to prosecute such indictment & give evidence thereon. At the next session an indictment was preferred & found, & defts. surrendered; but in consequence of the absence of a material witness for the prosecution the trial was put off, & the recognisances duly respited until the next session. Before the next session the Solr. General directed an indictment for a conspiracy to be preferred against a fourth deft., C.; & a second indictment was preferred & found against them all, upon which the original defts. appeared, but refused to plead. A plea of not guilty was entered for them, & they were tried & found guilty and sentenced. On a writ of error:—*Held*: (1) it was not necessary that the indictment should aver that the conditions imposed by sect. 1 of the above Act (c. 17), had been performed, *e.g.*, that it had been preferred by the direction or with the consent of a judge or of the A.-G. or Solr. General; (2) the indictment was preferred with proper authority, & the recognisances duly entered into, as the charge on which defts. were tried was the same as that to which the recognisances related; & those recognisances were not exhausted by the first indictment being preferred & defts. surrendering.—*KNOWLTON v. R.* (1864), 5 B. & S. 532; 4 New Rep. 268; 33 L. J. M. C. 219; 10 L. T. 691; 29 J. P. 5; 10 Jur. N. S. 1177; 12 W. R. 957; 9 Cox, C. C. 483; 122 E. R. 930.

*Annotations*:—*As to* (1) *Follid. Boaler v. R.* (1888), 57 L. J. M. C. 85. *Appld. R. v. Waller*, [1910] 1 K. B. 364; *R. v. Cuthbert, Brown & Newman* (1887), 31 J. P. 455.

1930. ———. **Fiat need not be proved.**—It is not necessary to produce & prove the A.-G.'s fiat for the presentment of an indictment under

the above Act.—*R. v. DEXTER, LAIDLER & COATES* (1890), 19 Cox, C. C. 360.

*Annotations*:—*Refd. R. v. Turner* (1909), 3 Cr. App. Rep. 103; *R. v. Waller* (1909), 3 Cr. App. Rep. 213.

1931. ———. ]—**A charge was preferred before a magistrate against a person for an offence within the above Act. The magistrate refused to commit accused for trial & he was discharged. No prosecutor was bound over to prefer an indictment. The prosecution subsequently obtained the fiat of the A.-G. directing the prosecution of the accused for the offences with which he had been charged as above:—***Held*: the prosecution had complied with the provisions of the Act, & the indictment was good.—*R. v. ROGERS* (1902), 66 J. P. 825.

#### SUB-SECT. 3.—ADDING COUNTS WITHOUT LEAVE OF COURT.

1932. **If dependent upon facts appearing in depositions—Criminal Law Amendment Act, 1867 (c. 35), s. 1.**—*R. v. BELL*, No. 1923, *ante*.

1933. ———. ]—Where accused summoned before justices in respect of an offence triable summarily, elects, under Summary Jurisdiction Act, 1879 (c. 49), s. 17, to be tried by a jury, the subsequent procedure before justices is the same as that which is applicable to the case of indictable offences, & not that applicable to summary proceedings. Accused may therefore be committed to take his trial in respect of any indictable offence disclosed by the depositions; & in cases not falling within Vexatious Indictments Act, 1859 (c. 17), or in which the operation of that Act is limited by Criminal Law Amendment Act, 1867 (c. 35), s. 1, counts may be added to the indictment in respect of any indictable offence disclosed by the depositions, although accused was not summoned before the justices in respect of such offence.—*R. v. BROWN*, [1895] 1 Q. B. 119; 64 L. J. M. C. 1; 72 L. T. 22; 59 J. P. 485; 43 W. R. 222; 11 T. L. R. 54; 39 Sol. Jo. 64; 18 Cox, C. C. 81; 15 R. 59, C. C. R.

*Annotations*:—*Mentd. R. v. Worton* (1894), 72 L. T. 29; *Hawke v. Dunn*, [1897] 1 Q. B. 579; *Stoddart v. Argus Printing Co.*, [1901] 2 K. B. 470; *Ashley & Smith v. Hawke* (1903), 89 L. T. 538; *Taylor v. Monk* (1914), 83 L. J. K. B. 1125; *R. v. Bradbury*, *R. v. Edlin*, [1921] 1 K. B. 562.

1934. ———. **Addition before indictment presented to grand jury.**—It is not necessary to obtain the leave of the ct. under Criminal Law Amendment Act, 1867 (c. 35), for the addition of counts for offences within Vexatious Indictments Act, 1859 (c. 17), if the facts on which the counts are founded appear on the depositions, before the indictment is presented to the grand jury.—*R. v. CLARKE & LYONS* (1895), 59 J. P. 248.

*Annotation*:—*Follid. R. v. Hogan* (1922), 16 Cr. App. Rep. 182.

1935. ———. **No committal for further offence.**—The indictments charged deft. with committing certain offences for which they had been committed for trial, & also charged them with committing a further offence for which they had not been committed for trial, although the depositions contained evidence of such further offence. The ct. refused to allow the prosecution to give evidence of such further offence, being of opinion that defts. would be improperly embarrassed if such charge were gone into then.—*R. v. HARRIS* (1900), 64 J. P. 360.

charge.—*R. v. LEVERTON*, [1917] 2 W. W. R. 584; 28 Can. Crim. Cas. 61; 34 D. L. R. 514; 11 Alta. L. R. 355. —CAN.



*Sect. 3.—Preferring an indictment: Sub-sects. 3 & 4.*  
*Sect. 4: Sub-sect. 1.]*

**1936.** ——. *—*].—A farmer was charged with an offence under Criminal Law Amendment Act, 1885 (c. 35), s. 5, upon J. H., a girl 15 years of age. On motion to quash the indictment, on the ground that the requirements of the Vexatious Indictments Act, 1859 (c. 17), had not been complied with. The magistrates had committed the prisoner for trial on a charge of rape only. Accordingly, prosecutrix had never been bound over to prosecute on the present charge. The Vexatious Indictments Act constantly spoke of such offence & it was submitted that could only mean the offence for which he was ultimately indicted. No doubt the jury could convict of the offence under the Criminal Law Amendment Act on an indictment charging him only with rape; but that did not mean that in contemplation of law the minor offence formed part of the indictment. Objection overruled.—*R. v. HARDCASTLE* (1907), 71 J. P. Jo. 580.

**1937.** ——. *—*].—New counts for charges on which there has not been a committal for trial may be added to an indictment without the leave of the ct. of trial if those charges be founded on the evidence disclosed in the depositions, subject to such counts being disallowed by the ct. at the trial.

If on the submission by one deft. that there is no case to go to the jury, the ct. holds that there was a case, it will not interfere if the judge uses the subsequent evidence of defts. against that deft.—*R. v. HOGAN* (1922), 16 Cr. App. Rep. 182, C. C. A.

**1938.** ——. *Effect of Grand Juries (Suspension) Act, 1917 (c. 4), s. 1 (2).*].—The provision of sect. 1 (2) of the above Act that in certain cases an indictment may be presented without its having been found by a grand jury "but in other respects as heretofore," preserves the right, without the leave of the ct., to add counts to the indictment before presentation provided that they are founded on facts disclosed in the depositions.—*R. v. KNOWLES* (1918), 34 T. L. R. 440; 13 Cr. App. Rep. 147, C. C. A.

**1939.** *Counts improperly added may be quashed.*].—*R. v. DAVIES* (1862), 9 L. T. 778, n.; 9 Cox, C. C. 431, n.

*Annotation:—Refd. R. v. Fudge* (1864), 9 Cox, C. C. 430.

**1940.** ——. *—*].—*R. v. FUDGE*, No. 1915, ante.

**1941.** ——. *Method of obtaining leave of court.*].—Deft. B. with others was charged with having published alleged blasphemous libels on certain dates, in the F. newspaper. The fiat of the Director of Criminal Prosecutions had been obtained authorising the prosecution. The summons on which the defts. were charged specified the particular dates of the libels on which the prosecution relied. At the first hearing before the magistrates the alleged libels were not read out in ct., but counsel for the prosecution gave an undertaking to furnish both to the ct. & defts. particulars of the numbers of the newspaper & articles prosecuted. At the adjourned hearing deft. B. called the attention of the ct. to the fact that the particulars furnished in pursuance of the undertaking contained a reference to an alleged libel published in an earlier number of the same newspaper, but not included in the summons. Counsel for the prosecution then withdrew the number as not being in the summons. Defts. were committed for trial. Counsel for the prosecution subsequently applied *ex p.* to the Recorder of London under Criminal Law Amendment Act,

1867 (c. 35), s. 1, to add two counts to the indictment based upon the alleged libel contained in the number withdrawn before the police magistrate; counsel for the prosecution did not state in his application that he had so withdrawn the said number of the newspaper. The recorder granted leave; the two counts were added, & the indictment sent up to the grand jury, who found a true bill against defts. in respect of the whole indictment. The indictment was removed by *certiorari* from the Central Criminal Ct. into the Q. B. Div. of the High Ct. Defts. then obtained a rule *nisi*, calling upon the prosecution to show cause why the two additional counts should not be quashed. On argument of the rule:—*Held*: the counts must be quashed on the ground that the leave of the ct. to add them was obtained on materials insufficient for the exercise of its discretion; & the obtaining of such leave in cases under Vexatious Indictments Act, 1859 (c. 17), & Acts amending it, was not a mere formality, but must conform to the spirit & intention of those Acts.—*R. v. BRADLAUGH* (1882), 47 L. T. 477; 47 J. P. 71; 31 W. R. 229; 15 Cox, C. C. 156, D. C.

**1942.** ——. *Indictment differing from committal.*].—Where the indictment was framed under Libel Act, 1843 (c. 96), ss. 4, 5, but defts. were only committed under sect. 5 of the same Act:—*Held*: the indictment could not be quashed except in so far as it purported to charge deft. under sect. 4.—*R. v. FELBERMANN & WILKINSON* (1887), 51 J. P. 168.

**1943.** ——. *—*].—*R. v. AYLMEY* (1891), 113 C. C. Ct. Cas. 337.

*Annotation:—Distd. R. v. Crabbe* (1895), 59 J. P. 247.

**1944.** ——. *—*].—Where a magistrate has committed a deft. to take his trial on some allegations of perjury, & refused to commit on others, prosecutor cannot add counts to the indictment containing allegations on which the magistrate refused to commit unless he has been bound over to prosecute those charges.—*R. v. CRABBE* (1895), 59 J. P. 247.

**1945.** ——. *—*].—If a magistrate commits accused person for trial for offences within Vexatious Indictments Act, 1859 (c. 17), but refuses to commit him for trial on other such offence prosecution cannot add counts alleging the latter offences to the indictment. Prosecutd ought in such circumstances to be bound over to prosecute the offences on which the magistrate has refused to commit the accused for trial.

Deft. was arrested upon a warrant charging him with committing an offence within Bkpcy. Act, 1883 (c. 52), s. 31. The solr. for the prosecution told the magistrate that the accused would be charged with committing other offences within this section, & also with obtaining money by false pretences. Evidence of the offences within Bkpcy. Act was then given. The solr. for the prosecution then said that he intended to call other witnesses, when the magistrate said that he did not consider it was necessary as he was going to commit the accused for trial for the offences under the Bkpcy. Act. No further evidence was called on the false pretence charges, & the magistrate was not asked to commit the accused for trial on these charges, nor did he express any opinion on them, & all the evidence on these charges was not before him. Deft. was indicted for the offences under the Bkpcy. Act & counts were added for obtaining money by false pretences:—*Held*: these latter counts must be quashed.—*R. v. COYNE* (1905), 69 J. P. 151.

## SUB-SECT. 4.—EFFECT OF REPEAL OF STATUTE ON PENDING PROCEEDINGS.

**1946. Offence committed before repeal.**—A person charged with an offence under an Act of Parliament which is repealed before the time of trial comes must not be put upon trial.—*ANON.* (1826), 2 *Lew. C. C.* 22.

**1947.** —.]—Where an Act of Parliament upon which an indictment for a nuisance in not repairing a highway was framed, was repealed after the indictment was found by the grand jury, but before plea pleaded:—*Held*: the judgment must be arrested.—*R. v. DENTON (INHABITANTS)* (1852), 18 *Q. B.* 761; *Dears. C. C.* 3; 21 *L. J. M. C.* 207; 19 *L. T. O. S.* 216; 16 *J. P.* 471; 17 *Jur.* 453; 118 *E. R.* 287, *C. C. R.*

*Annotation* :—*Mentd.* *R. v. Haughton* (1853), 1 *E. & B.* 501.

**1948. Conspiracy to commit offence.**—An indictment for a conspiracy to violate the provisions of a statute will lie after the repeal of such statute for an offence committed before the repeal.—*R. v. THOMPSON* (1851), 16 *Q. B.* 832; 20 *L. J. M. C.* 183; 17 *L. T. O. S.* 72; 15 *J. P.* 484; 15 *Jur.* 654; 5 *Cox, C. C.* 166; 117 *E. R.* 1100.

*Annotations* :—*Mentd.* *R. v. Manning* (1883), 12 *Q. B. D.* 241; *R. v. Plummer*, [1902] 2 *K. B.* 339; *R. v. Stoddart* (1909), 73 *J. P.* 348.

**1949. Effect of new statute.**—An Act, from its passing, repealed a former Act which ousted clergy from a certain offence, & imposed a new punishment on the same offence from & after its passing:—*Held*: an offence committed before the passing of the new Act, but not tried till after, was not liable to be punished under either of these statutes.—*R. v. M'KENZIE* (1820), *Russ. & Ry.* 429, *C. C. R.*

*Annotations* :—*Consd.* *R. v. Ellis, Ex p. Amalgamated Engineering Union* (1921), 125 *L. T.* 397. *Refd.* *R. v. Denton* (1852), *Dears. C. C.* 3.

**1950.** —.]—Transportation for life is the proper sentence on persons convicted before the passing of 2 & 3 *Will.* 4, c. 62, of offences punishable within that Act, & sentenced after.—*R. v. LEWIS* (1832), 1 *Mood. C. C.* 372, *C. C. R.*

**1951.** —.]—A presentment for the non-repair of a highway was made under 13 *Geo.* 3, c. 78, s. 24, before this statute was repealed by *Highway Act*, 1835 (c. 50), s. 99, which annulled the proceeding by presentment, & a conviction was had under such presentment after the commencement of the operation of the latter:—*Held*: a rule in arrest of judgment upon such conviction would be made absolute, on the ground that the conviction being founded on a process subsequently made void by statute, could not be

supported.—*R. v. MAWGAN (INHABITANTS)* (1838), 8 *Ad. & El.* 496; 3 *Nev. & P. K. B.* 502; 1 *Will. Woll. & H.* 438; 7 *L. J. M. C.* 98; 2 *J. P.* 517; 2 *Jur.* 841; 112 *E. R.* 927.

*Annotations* :—*Refd.* *Barrow v. Arnaud* (1846), 10 *Jur.* 319; *R. v. Denton* (1852), 18 *Q. B.* 761; *Spencer v. Hooton*, *Spencer v. Newton & Pycroft*, *Briggs v. G. N. Ry.*, *Parkinson v. Wigan Coal & Iron Co.*, *Harrison v. Wigan Coal & Iron Co.* (1920), 37 *T. L. R.* 280; *R. v. McLain*, *R. v. Barr* (1922), 91 *L. J. K. B.* 562.

**1952.** —.]—When a statute creating an offence is repealed, a person cannot be afterwards proceeded against for any offence within it committed whilst it was in operation, even although the repealing statute re-enacts the penal clauses of the statute repealed.—*R. v. SWAN* (1849), 14 *J. P.* 161; 4 *Cox, C. C.* 108.

*Annotation* :—*Refd.* *R. v. Smith* (1862), *Le. & Ca.* 131.

**1953.** —.]—Prisoner had been guilty of an offence against 12 & 13 *Vict.* (c. 106), s. 251, in not surrendering himself to the ct., & an information had been laid before a magistrate, who had issued a warrant for his apprehension. Subsequently 24 & 25 *Vict.* c. 134, came into operation, which, by s. 230, repealed 12 & 13 *Vict.* (c. 106), s. 251, subject to the exceptions therein contained. Prisoner was afterwards indicted & convicted under the repealed enactment:—*Held*: there was a proceeding pending within the meaning of 24 & 25 *Vict.* c. 134, s. 230.—*R. v. SMITH* (1862), *Le. & Ca.* 131; 31 *L. J. M. C.* 105; 5 *L. T. R.* 761; 26 *J. P.* 388; 8 *Jur. N. S.* 199; 10 *W. R.* 273; 9 *Cox, C. C.* 110, *C. C. R.*

*Annotations* :—*R. v. O'Connor*, [1913] 1 *K. B.* 557. *Mentd.* *R. v. Purdey* (1864), 13 *W. R.* 75.

*See Interpretation Act*, 1889 (c. 63), s. 38.

## SECT. 4.—FORM OF INDICTMENTS.

## SUB-SECT. 1.—IN GENERAL.

*See Indictments Act*, 1915 (c. 90).

**1954. General rule—Must not be in general terms.**]

—*CORNWALL'S CASE* (1591), *Moore, K. B.* 302; 72 *E. R.* 594.

**1955.** —.]—An indictment charging a man to be *communis oppressor* is too general.—*R. v. LEGINHAM* (1670), 1 *Mod. Rep.* 71; 2 *Keb.* 697; 86 *E. R.* 740; *sub nom.* *R. v. LEDGINGHAM*, 1 *Vent.* 97; 1 *Mod. Rep.* 288; *sub nom.* *R. v. LESINGHAM*, 1 *Lev.* 299; *T. Raym.* 205.

*Annotations* :—*Mentd.* *R. v. Carlile* (1831), 9 *L. J. O. S. K. B.* 250; *Winsor v. R.* (1866), 12 *Jur. N. S.* 91.

**1956.** —.]—*BURROUGH'S CASE* (1677), 1 *Vent.* 305; 86 *E. R.* 197.

—*R. v. KERR* (1876), 26 *C. P.* 214.—*CAN.*

## PART VI. SECT. 4, SUB-SECT. 1.

*t. General rule.*—In an indictment each separate count must disclose a complete offence, & the allegations contained in one count cannot cover the insufficiency of the others. An offence created by statute must be drawn so as to meet all the requirements of that statute or it must be drawn in the very words used by the statute. The words "and the jurors aforesaid do further present" are indicative of a new presentment & of a distinct count from the preceding one.—*R. v. SAMUELS* (1888), 16 *R. L. O. S.* 576.—*CAN.*

**a.** — *Entry of Chinaman into Canada without paying tax.*—*Deft.* was convicted for violation of *Chinese Immigration Act*, *Canada, R. S. C.* c. 95, for that he being a person of Chinese origin entered Canada without

## PART VI. SECT. 3, SUB-SECT. 4.

**1949i. Offence committed before repeal—Effect of new Statute.**—An offence committed before, though tried after, the Revised Statutes came in force, is not indictable under those statutes, though the words creating the offence are not altered thereby.—*R. v. McLAUGHLIN* (1855), 3 *All.* 159.—*CAN.*

**1949ii.** —.]—The prisoner was convicted upon four indictments laid under the *Regulation of Trade & Commerce Act*, 1914, which statute had been repealed. The offences complained of had been committed while the statute was in force:—*Held*: the effect of *Acts Interpretation Act*, 1908, s. 20 (h), was to continue the repealed statute in force so that prisoner could be prosecuted & punished thereunder.—*R. v. DUREKOP* (1915), 34 *N. Z. L. R.* 474.—*N.Z.*

**r. Offence committed before disallowance.**—Where an Act passed by the Provincial Legislature was subse-

quently disallowed, but while in force the plff. had been convicted under it by defts. & a warrant was properly issued by defts. for his arrest & imprisonment, which was not executed until after the disallowance of the Act was published in the *Gazette*:—*Held*: the conviction & warrant were legal.—*CLAPP v. LAWRASON* (1872), 6 *O. S.* 319.—*CAN.*

**s. Effect of saving clause.**—Prisoners were indicted under *Insolvent Act*, 1869, s. 147, for having within three months preceding the execution of an assignment in insolvency pawned, pledged, & disposed of otherwise than in the way of trade, certain goods which had remained unpaid for during the three months.

By the *Act of 1875*, s. 149, the *Act of 1869* was repealed, but there was a saving clause as regarded proceedings commenced & pending thereunder:—*Held*: the prosecution as well as the offence came within the saving clause.

Sect. 4.—Form of indictments: Sub-sect. 1.]

**1957.** — — —.]—Where an information stated that the usual rates of a common ferry were one penny for a man & horse, & two pence for a score of sheep, & that deft., being the common ferry-man, did, between such a day & such a day, extort from divers persons unknown divers sums of money, exceeding the ancient rate & price of passage, viz. for carrying over one man & a horse twopence, & for every score of sheep four pence, etc.:—*Held*: the information was bad, for every extorsive taking is a separate offence, & ought to be precisely & distinctly laid, but here a number of offences were accumulated under a general charge.—*R. v. ROBERTS* (1692), 4 Mod. Rep. 100; Carth. 226; Comb. 193; Holt, K. B. 363; 1 Show. 389; 3 Salk. 198; 87 E. R. 286.

*Annotations*:—*Distd.* *R. v. Bowen* (1844), 1 Cox, C. C. 88. *Mentd.* *R. v. Young* (1788), 1 Leach. 505.

**1958.** — — —.]—An indictment for being a common drunkard is too general.—*R. v. BUCKBRIDGE* (1702), 7 Mod. Rep. 52; 87 E. R. 1089.

**1959.** — — —.]—An indictment for being a common cheat is too general.—*R. v. HANNON* (1704), 6 Mod. Rep. 311; 87 E. R. 1050.

*Annotation*:—*Mentd.* *R. v. Southerton* (1805), 6 East, 126.

**1960.** — — —.]—Indictment that a constable in the execution of his duty conducted himself negligently & badly is too general.—*R. v. WINTERINGHAM* (1716), 1 Stra. 2; 93 E. R. 347.

**1961.** — — —.]—*R. v. TAYLER* (1729), 1 Barn. K. B. 229; 2 Stra. 849; 94 E. R. 156.

**1962.** — — —.]—Judgment was arrested for the generality of a charge of false pretences in an information.—*R. v. ROBE* (1734), 2 Stra. 999; 93 E. R. 993.

*Annotation*:—*Refd.* *Davy v. Baker* (1769), 4 Burr. 2471.

**1963.** — — —.]—*R. v. BOYALL* (1759), 2 Burr. 832; 2 Keny. 549; 97 E. R. 586.

*Annotations*:—*Refd.* *Noden v. Johnson* (1850), 16 Q. B. 218; *R. v. Hall*, [1891] 1 Q. B. 747. *Mentd.* *Jones v. Bright* (1829), 5 Bing. 533.

**1964.** — — —.]—A general charge in an indictment may be sufficient, but those of barratry & keeping a disorderly house are almost the only

instances (*ASHHURST, J.*)—*J'ANSON v. STUART* (1787), 1 Term Rep. 748; 99 E. R. 1357.

*Annotations*:—*Foldd.* *R. v. Hepper* (1825), 1 C. & P. 608. *Mentd.* *Holmes v. Catesby* (1809), 1 Taunt. 543; *Jones v. Stevens* (1822), 11 Price, 235; *Clement v. Chives* (1829), 4 Man. & Ry. K. B. 127; *Young v. Murphy* (1836), 3 Bing. N. C. 54; *Hickinbotham v. Leach* (1842), 10 M. & W. 361; *Burgess v. Beaumont* (1844), 9 Jur. 14; *O'Brien v. Clement* (1846), 16 M. & W. 159; *Behrens v. Allen* (1862), 8 Jur. N. S. 118; *Gourley v. Plimsoll* (1873), 28 L. T. 698; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524; *Zierenberg v. Labouchere*, [1893] 2 Q. B. 183.

**1965.** — — —.]—An indictment charging that two defts., in a certain open & public place, frequented by divers of the liege subjects, unlawfully met together for the purpose & with the intent of committing with each other, openly, lewdly & indecently, in the public place, divers nasty, wicked, filthy, lewd, beastly, unnatural & sodomitical practices, & then & there unlawfully, wickedly, openly, lewdly & indecently did commit with each other, in the sight of divers of the liege subjects, in the public place there passing, divers such practices as aforesaid, is bad, as not specifying any offence with legal certainty.—*R. v. ROWED* (1842), 3 Q. B. 180; 2 Gal. & Dav. 518; 11 L. J. M. C. 74; 6 Jur. 396; 114 E. R. 476; *sub nom.* *R. v. HOARD*, 6 J. P. 445.

*Annotations*:—*Foldd.* *R. v. Orchard & Thurtle* (1848), 3 Cox, C. C. 248. *Refd.* *R. v. O'Connor* (1843), 4 State Tr. N. S. 935; *Burder v.* — (1845), 9 J. P. Jo. 293.

**1966.** — — —.]—An indictment alleging that prisoner had in his possession a mould for coining, is bad for uncertainty, unless it expressly states that at the time it was in his possession it was impressed with the stamp of a current coin of the realm.—*R. v. RICHMOND* (1843), 1 Car. & Kir. 240; 2 L. T. O. S. 230; 1 Cox, C. C. 9.

**1967.** — — —.]—An indictment under 1 Will. IV. (c. 66), s. 20, is not bad for multifariousness or uncertainty, if it charges the "destroying, defacing, & injuring" the register cumulatively; & such an indictment is supported by proof of either a destroying, or a defacing, or an injuring.

The statute provides, that if any person "shall wilfully destroy, deface, or injure," etc.:—*Held*: an indictment which charged the offence to have been done "wilfully" was sufficient; & it was not necessary to charge it with a *scienter*.—*R.*

paying the tax required by the Act. The question reserved for review by the ct. was, "does the accusation sufficiently charge deft. with an indictable offence under ss. 7 & 30:—*Held*: there was nothing in the Act which made it an offence for a Chinaman to enter Canada, & the conviction was unwarranted.—*R. v. SAM CHAK* (1907), 4 E. L. R. 381; 42 N. S. R. 374.—*CAN.*

*b.* *Indictment must not be couched in general terms.*—Everything that is necessary to constitute the offence must be alleged in the indictment.—*R. v. BOURDON & MCCULLY* (1876), 2 R. L. O. S. 713.—*CAN.*

*c.* — — —.]—An indictment which does not set up in the statement of the charge all the essential ingredients is defective & cannot be sustained. An indictment charging the publication of a defamatory libel, which does not state that the accused intended to injure the reputation of the libelled person & to bring him into public contempt or ridicule or to expose him to public hatred, or to insult him, is bad by reason of the omission of an essential ingredient of the offence; & it cannot be amended & must be set aside & quashed.—*R. v. CAMERON* (1898), Q. R. 7 Q. B. 162.—*CAN.*

*d.* — — —.]—*R. v. BECKWITH* (1903), 23 C. L. T. 307.—*CAN.*

*e.* — — —.]—In drawing an indictment, under Criminal Code, s. 517, it

is not sufficient to allege that the accused "did unlawfully, in a manner likely to cause danger to valuable property without endangering life, or person, do an unlawful act" without giving some particulars showing in what the alleged unlawful act consisted, & such an information, or indictment, will be bad as not disclosing any offence.—*R. v. PORTE* (1908), 18 Man. L. R. 222.—*CAN.*

*f.* — — —.]—Criminal Code, s. 852, provides that every count of an indictment shall contain, & shall be sufficient if it contains, a statement that the accused has committed some indictable offence therein specified; but this does not mean merely naming an offence as murder or theft. The offence itself must be described with reasonable certainty. Sect. 861, which declares that no count for publishing a seditious libel shall be deemed insufficient on the ground that it does not set out the words thereof dispenses only with the *ipsissima verba*, there must be substantial references to identify the words or locate the objectionable parts.—*R. v. BAINBRIDGE* (1918), 42 O. L. R. 203; 13 O. W. N. 218; 28 Can. Crim. Cas. 444; 42 D. L. R. 493.—*CAN.*

*g.* — — —.]—An accused is entitled to know with certainty & accuracy the exact nature of the charge brought against him, & unless he has this knowledge he must be seriously prejudiced in his defence.—*BEHARI MAH-*

*TON v. R.* (1884), 11 L. R. 11 Calc. 106.—*IND.*

*h.* — — —.]—An indictment for perjury, stating that the traverser "did maliciously depose & swear," & concluding, "that so the traverser falsely, maliciously, & wickedly, in manner & form aforesaid," did commit perjury, is bad.—*R. v. TIERNEY* (1836), Jebb, Cr. & Pr. Cas. 179.—*IR.*

*k.* — — —.]—An indictment bore that the panel, having acted as sub-factor for an heritable securities assocn. from March, 1882, to July, 1883, & having at various dates in the course of that period received from tenants of the assocn. who were named, "sums of money amounting to £864 10s. 5d. & various other sums, being the rents & feu-duties of the" properties belonging to the assocn. "accruing & paid during that period"; & further, it being the panel's duty to account for these rents & feu-duties & in no event to appropriate them or any part of them to his own uses & purposes, did "on several or one or more occasions during the period" specified, steal the sum mentioned, or otherwise did embezzle it:—*Held*: the charges of theft & embezzlement were both bad for want of specification.—*H.M. ADVOCATE v. FLEMING* (1885), 12 R. (Cl. of Sess.) 23; 22 Sc. L. R. 435, 591.—*SCOT.*

*l.* — — —.]—No conclusion against statute.]—A motion was made to quash an indictment for breaking & entering

BOWEN (1844), 1 Car. & Kir. 501; 1 Den. 22; 4 L. T. O. S. 140 a; 1 Cox, C. C. 88; 8 J. P. Jo. 771, C. C. R.

*Annotation* :—*Refd.* Wray v. Toke (1848), 12 Q. B. 492.

1968. ———.]—*R. v. O'CALLAGHAN*, No. 2204, *post*.

1969. ———.]—An indictment under Corrupt & Illegal Practices Prevention Act, 1883 (c. 51), ss. 3 & 33, which merely charges deft. with being guilty of a corrupt practice at an election, but does not specifically allege against him what that corrupt practice was, is bad for generality.—*R. v. NORTON* (1886), 16 Cox, C. C. 59.

1970. ———.]—*R. v. STROULGER*, No. 2183, *post*.

1971. ———.]—Applt. was charged with stealing & receiving a quantity of tins of floor polish " & other goods." It would have been open to prosecutor to give evidence that he had stolen a horse under the expression " & other goods." An indictment in these terms is quite improper (AVORY, J.).—*R. v. YATES* (1920), 15 Cr. App. Rep. 15, C. C. A.

*Annotation* :—*Refd.* R. v. Young (1923), 129 L. T. 64.

1972. Exceptions to general rule—Charge of barratry.]—An indictment of barratry must state that it was against the peace or the form of the statute, but it need not state the special matter.—*PALFREY'S CASE* (1619), Cro. Jac. 527; 79 E. R. 451.

*Annotation* :—*Refd.* R. v. Tucker (1693), 12 Mod. Rep. 51.

1973. ———.]—*J'ANSON v. STUART*, No. 1964, *ante*.

1974. ——— Common law charge of keeping a disorderly house.]—*CLARKE v. PERIAM*, No. 2240, *post*.

1975. ———.]—*J'ANSON v. STUART*, No. 1964, *ante*.

1976. Compounding felony—Need not allege accused desisted from prosecuting felon.]—*R. v. BURGESS* (1885), 16 Q. B. D. 141; 55 L. J. M. C. 97; 53 L. T. 918; 50 J. P. 520; 34 W. R. 306; 2 T. L. R. 176; 15 Cox, C. C. 779, C. C. R.

1977. Conspiracy to defraud—Necessity for particulars.]—Indictment, charging defts. with conspiring to cheat & defraud the just & lawful creditors of F. without any further statement of the conspiracy, or of any overt act, is bad as being too general.—*R. v. FOWLE* (1831), 4 C. & P. 592.

*Annotations* :—*Consd.* R. v. Kenrick (1843), 5 Q. B. 49; White v. R. (1876), 13 Cox, C. C. 318. *Refd.* King v. R. (1844), 7 Q. B. 795. *Mentd.* Keable v. Payne (1838), 8 Ad. & El. 555; Williams v. Gerry (1842), 10 M. & W. 296.

1978. ———.]—An indictment charged, in the first count, that defts. unlawfully conspired to defraud divers persons of great quantities of merchandise, without paying for the same, with intent to obtain to themselves money & other profit. The second count charged that two of the defts., being in partnership in trade, & being indebted to divers persons, unlawfully conspired to defraud creditors of payment of their debts, & that they & the other

deft., in pursuance of the conspiracy, falsely & wickedly made a fraudulent deed of bargain & sale of the stock-in-trade of the partnership for fraudulent consideration, with intent thereby to obtain to themselves money & other emoluments, to the great damage of the creditors :—*Held* : (1) the first count was not bad for omitting to state the names of the persons intended to be defrauded, as it could not be known who might fall into the snare, but was bad for not showing by what means they were to be defrauded; (2) the second count was bad for not alleging facts to show in what manner the deed of sale was fraudulent.—*R. v. PECK* (1839), 9 Ad. & El. 686; 112 E. R. 1372; *sub nom.* PECK v. R., 1 Per. & Dav. 508; 8 L. J. M. C. 22.

*Annotations* :—*As to* (1) *Refd.* R. v. Parker (1842), 3 Q. B. 292; R. v. Kenrick (1843), 5 Q. B. 49; R. v. Blake (1844), 6 Q. B. 126; R. v. O'Connell (1844), 5 State Tr. N. S. 1; King v. R. (1845), 7 Q. B. 795; White v. R. (1876), 13 Cox, C. C. 318. *As to* (2) *Refd.* R. v. O'Connor (1843), 4 State Tr. N. S. 935. *Generally*, *Refd.* Heymann v. R. (1873), L. R. 8 Q. B. 102.

1979. Obtaining property by false pretences—False pretences must be set out.]—*R. v. MUNOZ* (1740), 2 Stra. 1127; 7 Mod. Rep. 315; 93 E. R. 1078.

*Annotation* :—*Appld.* R. v. Mason (1788), 1 Leach. 487.

1980. ———.]—Indictment charging deft. with obtaining money by false pretences is insufficient unless it shows what the false pretences were, & if deft. be convicted on it, the ct. will reverse the judgment on a writ of error.—*R. v. MASON* (1788), 2 Term Rep. 581; 1 Leach, 487; 100 E. R. 312.

*Annotations* :—*Consd.* R. v. Goldsmith (1873), L. R. 2 C. C. R. 74. *Refd.* R. v. Hunter (1796), 2 Leach, 624; R. v. Tomkins (1807), 8 East, 180; R. v. Perrott (1814), 2 M. & S. 379; O'Connell v. R. (1844), 11 Cl. & Fin. 155; Heymann v. R. (1873), L. R. 8 Q. B. 108; White v. R. (1876), 13 Cox, C. C. 318; Bradlaugh v. R. (1878), 3 Q. B. D. 607. *Mentd.* R. v. Duffy (1849), 4 Cox, C. C. 294.

1981. ———.]—The indictment stated that prisoner did unlawfully attempt & endeavour fraudulently, falsely, & unlawfully to obtain from the A. Co. a large sum of money, to wit, the sum of £22 10s., with intent thereby then & there to cheat & defraud the co., etc. :—*Held* : (1) the nature of the attempt was not sufficiently set forth; (2) the indictment did not contain facts amounting to a statement of a misdemeanour, as the money was not laid to be the property of any one.—*R. v. MARSH & LORD* (1849), 1 Den. 505; T. & M. 192; 3 New Sess. Cas. 699; 19 L. J. M. C. 12; 14 L. T. O. S. 296; 13 J. P. 746; 13 Jur. 1010; 3 Cox, C. C. 570, C. C. R.

*Annotation* :—*Mentd.* R. v. Moss (1856), 23 L. T. O. S. 109.

1982. Receiving property obtained by false pretences—Whether false pretences need be set out.]—In an indictment under Larceny Act, 1861 (c. 96), s. 95, for knowingly receiving goods obtained by false pretences under sect. 88 of the above Act, it is necessary to set out the false pretences by

with intent to steal, & for stealing certain goods described, because, charging statutory offences, it did not conclude with the words " against the form of the statute in such case made & provided, & against the peace of Our Lady the Queen, Her Crown & Dignity " :—*Held* : the indictment was good.—*R. v. DOYLE* (1894), 27 N. S. R. 294.—*CAN.*

m. ——— No objection raised.]—Where an indictment is informal, but the accused is not thereby prejudiced in his defence, & does not raise any objection on that ground at trial, the ct. will not on appeal quash a conviction merely on the ground of such informality.—*R. v. WANG YUNG SHAN*

(1905), T. S. 397.—*S. AF.*

1977 i. Conspiracy to defraud—Necessity for particulars.]—W. was indicted & convicted on an indictment charging that he & others conspired by false pretences to defraud of large sums of money all such persons as should apply to or negotiate with them for a loan of money :—*Held* : the indictment was too vague & uncertain in its language to sustain a conviction.—*WHITE v. R.* (1876), 13 Cox, C. C. 318.—*IR.*

n. Identity of language with information.]—An indictment, within R. S. C., c. 174, s. 140, need not follow the exact language of the information. That sect. does not prevent the finding of any indictment founded upon the

facts disclosed in the depositions.—*R. v. HOWES* (1887), 5 Man. L. R. 339. *CAN.*

o. Larceny—Description of stolen property.]—Prisoner was indicted for stealing " one parcel of the value of one shilling, of the goods," etc. The parcel in question was taken from the hold of a vessel, out of a box broken open by prisoner :—*Held* : an insufficient description.—*R. v. BONNER* (1855), 7 Cox, C. C. 13.—*IR.*

p. ———.]—In an indictment for stealing goods & receiving the same knowing them to be stolen, a blank was left for the name of the owner of the goods :—*Held* : this omission was not a formal defect, within 14 & 15

**Sect. 4.—Form of indictments: Sub-sects. 1, 2 & 3.]**

which the goods were obtained.—*R. v. MACKAY & BALL* (1893), 17 Cox, C. C. 713.

**1983.** —[—]—Certain counts of an indictment charged deft., with unlawfully receiving goods well knowing at the time that they had been unlawfully obtained from one B. by false pretences, but did not set out the false pretences or specifically refer to them as being the same as were set out in former counts against another deft. for obtaining the same goods:—*Held*: the counts were good, inasmuch as the gist of the offence was the receiving of the goods knowing they had been unlawfully obtained by false pretences, & not the particulars of the false pretences, & all the ingredients necessary to constitute the offence charged were sufficiently shown on the indictment.—*TAYLOR v. R.*, [1895] 1 Q. B. 25; 64 L. J. M. C. 11; 71 L. T. 571; 59 J. P. 393; 11 T. L. R. 6; 43 W. R. 24; 39 Sol. Jo. 11; 18 Cox, C. C. 45; 15 R. 66, D. C.

*Annotation*:—*Refd.* *R. v. Riley*, [1896] 1 Q. B. 309.

**1984. Obtaining credit by false pretences—Debtors Act, 1869 (c. 62), s. 11.]**—An indictment charged that deft., a trader, “did within four months next before the commencement of the liquidation by arrangement of his affairs obtain from W. goods upon credit under the false pretence, etc., with intent to defraud,” & in another count in similar terms deft. was charged with unlawfully disposing of the goods otherwise than in the ordinary way of his trade. Both counts were framed under above Act:—*Held*: the counts were good after verdict, & sufficiently averred that deft. was a person whose affairs were liquidated by arrangement within the meaning of sect. 11.—*R. v. KNIGHT* (1878), 37 L. T. 801; 42 J. P. 166, 14 Cox, C. C. 31, C. C. R.

**1985. Conspiracy & Protection of Property Act, 1875 (c. 86), s. 7—Sufficient if allegation of offence follows statute.]**—An indictment under sect. 7 of the above Act, 1875, is not bad because the words “being an act which the said prosecutor had a legal right to do or abstain from doing,” are omitted, provided the allegation of the offence follows the statute.—*R. v. HULME* (1913), 9 Cr. App. Rep. 77, C. C. A.

See Indictments Act, 1915 (c. 90), s. 3, & Sched. I., r. 4.

**SUB-SECT. 2.—DESCRIPTION OF PERSONS.**

**1986. Persons must be described by name or as persons unknown.]**—In an indictment for child

murder, the child must be named, or stated to be of name unknown. It is not enough to describe the child as not baptised.—*R. v. BISS* (1839), 2 Mood. C. C. 93; 8 C. & P. 773, C. C. R.

*Annotations*:—*Refd.* *R. v. Caspar* (1839), 9 C. & P. 289; *R. v. Hicks* (1840), 4 J. P. 527; *R. v. Waters* (1849), 18 L. J. M. C. 53.

**PART VI. SECT. 4, SUB-SECT. 2.**

**1993 i. Description of peer.]**—In an indictment for receiving certain cattle, the property of J. B. R., Viscount & Baron O’Neil, knowing them to have been stolen. It was proved that J. B. R. was not a baron:—*Held*: the indictment was supported by the evidence.—*MORRIS’S CASE* (1843), 1r. Cir. Rep. 766.—*IR.*

**r. Description of newly born infant.]**—An indictment against a woman for

the murder of her child, not stating that the child was born alive, but stating that it was exposed by the prisoner, & in consequence lived for half an hour, & then died:—*Semle*: an indictment for the murder of a “certain male child,” without further description is sufficient.—*R. v. KELLY* (1840), Jebb, Cr. & Pr. Cas. 299.—*IR.*

—[—]—Indictment for the murder of a male child, whose name was unknown. It was proved that the prisoner, who was the mother of the child, had been in the habit of calling it “John,” & that it was several months old:—*Held*: sufficient evidence of the child’s name being John, & therefore the indictment was not sustained by the evidence.—*R. v. SWEENEY* (1841), 2 Craw. & D. 260; 1r. Cir. Rep. 366.—*IR.*

**t. Description of bastard born in wedlock.]**—Prisoner was charged with murder, & the child alleged to have been murdered was described as a certain male child born then lately

murder, the child must be named, or stated to be of name unknown. It is not enough to describe the child as not baptised.—*R. v. BISS* (1839), 2 Mood. C. C. 93; 8 C. & P. 773, C. C. R.

**1987.** —[—]—An indictment against a woman for the wilful murder of her “male bastard child” did not allege the name of the child, or state the name to be to the jurors unknown:—*Held*: the indictment was bad, & the indictment for murder being bad the jury could not convict prisoner of concealing the birth.—*R. v. HICKS* (1840), 2 Mood. & R. 302; 4 J. P. 527.

**1988.** —[—]—*R. v. PERRIN & BURST*, No. 2232, *post*.

**1989. Name stated may be assumed name.]**—Prosecutor may be described by a name he has assumed, though it be not his right name.—*R. v. NORTON* (1823), Russ. & Ry. 510, C. C. R.

*Annotation*:—*Refd.* *R. v. Gregory* (1846), 8 Q. B. 508.

**1990. Name stated should be name by which generally known.]**—In an indictment for robbery the property was laid in J. H. It appeared that prosecutor’s name was J. W. H.:—*Held*: if he was generally known by the name of J. H., the error was not material.—*R. v. BERRIMAN* (1833), 5 C. & P. 601.

**1991. Description of bastard.]**—*R. v. WATERS*, No. 1997, *post*.

**1992.** —[—]—In an indictment for the murder of “Wm. Scarborough,” it appeared that deceased was the illegitimate son of Sarah Scarborough, & was four years old, was generally called “William” & “Coley,” & was spoken of as “Sarah Scarborough’s child.” On one or two occasions he had been spoken of as “Wm. Scarborough,” in his mother’s presence, but there was no proof of his having been baptised:—*Held*: there was sufficient evidence to go to the jury, that deceased had acquired the name of “Wm. Scarborough” by reputation.—*R. v. SCARBOROUGH* (1848), 12 J. P. 265; 3 Cox, C. C. 72.

**1993. Description of peer.]**—In an indictment for larceny of goods, the property of a peer who is a baron, the goods may be laid as the goods & chattels of G., Lord D., without styling him Baron D., although the more proper way to describe a peer is by his christian name & his degree in the peerage.—*R. v. PITTS* (1839), 8 C. & P. 771.

*Annotation*:—*Dbtd.* *R. v. Elliott* (1839), 8 C. & P. 772, n.

**1994.** —[—]—*R. v. ELLIOTT* (1839), 8 C. & P. 772, n.

before of the body of prisoner, & that the name of the murdered child was to H.M. A.-G. unknown. The child was born three months after prisoner’s marriage, & prisoner’s husband was not the father of the child:—*Held*: that the child was sufficiently described.—*R. v. JUDGE* (1885), 2 Q. L. J. 61.—*AUS.*

**a. Persons described under alias dictus.]**—Where two or more names are laid in an indictment under an *alias dictus* it is not necessary to prove them all. J. was indicted for the murder of J., otherwise called K., & on trial, was convicted of manslaughter. Deceased was known by the name of K., but there was no evidence that she ever went by the other name:—*Held*: this variance between the indictment & the evidence did not invalidate the conviction for manslaughter.—*JACOBS v. IL* (1890), 16 S. C. R. 433.—*CAN.*

**b. Where surname unknown—Amendment.]**—Deft was indicted for that she, being mistress of a certain

**1995.** —.]—In an indictment, the Duke of C. was described as G. W. F. C. Duke of C. It was proved that G. W. were two of his christian names, but that he had other christian names which were unknown to the witnesses & were not proved. The jury found a verdict of guilty, & stated that they were satisfied with the evidence of the identity of the Duke :—*Held* : (1) the conviction was wrong, as matter of description in an indictment, though unnecessarily alleged, must be proved as laid ; (2) the ct. of quarter sessions were not bound to amend at the trial, but under Criminal Procedure Act, 1851 (c. 100), s. 24, they might in their discretion have made an amendment by which the conviction would have been supported, by striking out all the christian names, which would have been a sufficient description, & an amendment by striking out only the two names which were not proved would have been wrong ; (3) all amendments should be made before a case goes to the jury, & it was now too late to amend.—*R. v. FROST* (1855), *Dears. C. C.* 474 ; 24 *L. J. M.* 116 ; 25 *L. T. O. S.* 133 ; 19 *J. P.* 279 ; 1 *Jur. N.* 406 ; 3 *W. R.* 401 ; 3 *C. L. R.* 665 ; 6 *Cox, C. C.* 526, *C. C. R.*

See Indictments Act, 1915 (c. 90), Sched. I., r. 7.

#### SUB-SECT. 3.—STATEMENTS AS TO AGE.

**1996.** Where age material, it should be stated—Statement should be made in each count.]—An indictment in the first count charged deft. with having assaulted R., an infant above the age of ten years & under the age of twelve years, with intent to carnally know & abuse her, & in the second count charged that deft. unlawfully did put & place the private parts of him, the said M., against the private parts of her, the said R., & did thereby then & there unlawfully attempt & endeavour to carnally know & abuse the said R. :—*Held* : (1) the second count was bad, as it did not allege that R. was between the ages of ten & twelve ; (2) the words “ the said R. ” merely meant that she was the same person as was mentioned in the first count, but those words did not import unto the second count the description of R. with respect

(3) Every attempt, not every intention, but every attempt, to commit a misdemeanour is a misdemeanour.—*R. v. MARTIN* (1840), 9 *C. & P.* 213, 215 ; 2 *Mood. C. C.* 123, *C. C. R.*

*Annotations* :—As to (2) *Refd.* *R. v. Waters* (1849), 1 *Den.* 356 ; *R. v. Waverton* (1851), 5 *Cox, C. C.* 400. As to (3) *Refd.* *R. v. House* (1845), 9 *J. P.* 182 ; *R. v. Stevens*

girl called M., her servant, her maiden name being unknown, of the age of eight years, did unlawfully & maliciously do grievous bodily harm to M., whereby her health was permanently injured. At the trial the indictment was amended by omitting the words “ then being mistress of ” & “ her servant, her maiden name being unknown,” & by adding after the name M. the name of V. in the three places where the name M. occurs. The trial proceeded on the indictment so amended, & prisoner was found guilty of common assault :—*Held* : the finding was legal.—*R. v. BISSONETTE* (1879), 2 *L. N.* 212 ; 23 *L. C. J.* 249.—*CAN.*

c. *Description of rector.*]—An indictment or sending to the Lord Lieutenant a false recommendation of persons convicted, charged that the prisoner forged the signature of “ T. King, Rector of T.” The evidence was, that the name forged by the

prisoner was “ T. Knox, Rector of T.” The judge having given leave to amend by substituting “ Knox for King ” :

*Held* : there was no fatal variance, on the ground of its appearing in the evidence that T. Knox was in fact rector of A., & that there was no such parish as that of T.—*R. v. DWYER* (1836), *Jebb, Cr. & Pr. Cas.* 198.—*IR.*

d. *Same person differently described in different parts of indictment.*]—In an indictment for subornation of perjury, the prosecutor was, in the first instance, styled M., merchant, afterwards M., esquire, without any averment connecting the one with the other, & showing that the person first named was one & the same with the person afterwards mentioned in the indictment. Error alleged on this ground disallowed, it being only necessary to charge the offence in the indictment in language sufficiently precise to show that the M. named in one part of the indictment was the

(1845), 1 *Cox, C. C.* 225 ; *Christopherson v. Bare* (1848), 11 *Q. B.* 473 ; *R. v. Read* (1849), 2 *Car. & Kir.* 957 ; *R. v. Bird* (1851), 2 *Den.* 94 ; *R. v. Johnson* (1865), 11 *Jur. N. S.* 532 ; *R. v. Stephenson* (1912), 8 *Cr. App. Rep.* 36.

**1997.** —.]—Prisoner was charged in first count, that she in & upon a child born of her body & of the tender age of about two days, & not named, feloniously made an assault, & caused to take poison, & so murdered her. In second count, that she in & upon the child so born of her body & not named as aforesaid, feloniously did make an assault, & that she wilfully did cast the child upon a heap of ashes, & did then & there leave the child, in the open air, exposed to the cold air, of which said exposure & of the chilling thereby caused, the child then & there died :—*Held* : (1) there is a difference between an indictment which is bad for charging an act which as laid is no crime, & an indictment which is bad for charging a crime defectively. The latter may be aided by verdict. the former cannot ; (2) the description of the child in the second count was not incorporated by reference in the description given in the first count, viz., that it was of tender age, & the second count was defective in not showing that the child was able to take care of itself ; (3) if the act of the prisoner charged in that count was a nonfeasance, the indictment would have been bad after verdict, but as it was a misfeasance, & the death of the child was alleged to have been caused thereby, the defective statement in the indictment must be taken to be supplied by the verdict ; (4) “ Not named ” is a sufficient description of the child ; “ not baptised,” would be insufficient.

It is not averred that the child was of such tender years, or so feeble that she could not walk away, & take care of herself, but that is implied, for if she had been sufficiently old, or strong to do so, the death would not have arisen from the exposure by prisoner, but from the act of the child in not walking away & taking care of herself. The jury could not have found prisoner guilty, without actually negating the power of the child to take care of herself, & so to escape the consequences of the unlawful act of prisoner, & consequently after verdict that fact must be implied (*per CUR.*).—*R. v. WATERS* (1849), 2 *Car. & Kir.* 864 ; 1 *Den.* 356 ; *T. & M.* 57 ; 18 *L. J. M. C.* 53 ; 13 *J. P.* 69 ; 13 *Jur.* 130 ; 3 *Cox, C. C.* 300, *C. C. R.*

*Annotations* :—As to (2) *Refd.* *R. v. Waverton* (1851), *Cox, C. C.* 400. As to (3) *Refd.* *R. v. Bowen* (1849), 13 *Q. B.* 790. *R. v. S.*—(1851), 5 *Cox, C. C.* 279.

**1998.** —Indecent assault upon girl under thirteen—Failure to state age does not vitiate indictment.]—Applt. was indicted for indecently assaulting a girl. The girl was in fact under the age of thirteen years. The age of the girl was not

same person mentioned in another part of it.—*R. v. Rowe* (1830), 3 *Ir. L. Rec.* 1st ser. 153.—*IR.*

e. *Description of unincorporated company.*]—An unincorporated co. trading under the name of “ The City & Suburban Dairies ” was charged under that name without the addition of the name of the partners :—*Held* : complaint was competent.—*CITY & SUBURBAN DAIRIES v. MACKENNA*, [1918] *S. C. (J.)* 105.—*SCOT.*

#### PART VI. SECT. 4, SUB-SECT. 3.

1. *Where age material it should be stated—Sufficiency of statement.*]—Where an act is a criminal offence only because the person injured is below the age of puberty the complaint ought to set forth distinctly the age of the person, & the mere addition of figures in brackets after the person's name is insufficient.—*LOCKWOOD v. WALKER*, [1910] *S. C. (J.)* 3.—*SCOT.*



**Sect. 4.—Form of indictments: Sub-sects. 3, 4 & 5.]** averred in the indictment:—*Held*: the indictment was not bad on the ground that the age of the girl was not averred.

Having regard to the provisions of Children Act, 1908 (c. 67), s. 123 (2), & sched. I., the prosecution would gain an advantage by averring the age of the girl in the indictment, & as a matter of good drafting this might be done (*per* CUR.).—*R. v. STEPHENSON*, [1912] 3 K. B. 341; 82 L. J. K. B. 287; 107 L. T. 656; 70 J. P. 408; 56 Sol. Jo. 764; 23 Cox, C. C. 214; 8 Cr. App. Rep. 36, C. C. A.

See Indictments Act, 1915 (c. 90), sched. I., r. 9.

#### SUB-SECT. 4.—STATEMENTS AS TO TIME.

**1999. When material to offence, time must be stated.]**—*AYLETT v. R.*, No. 2322, *post*.

**2000. —.]**—Time & place must be added to every material fact in an indictment.—*R. v. HOLLOND* (1794), 5 Term Rep. 607; 101 E. R. 340.

*Annotations:—Refd. R. v. O'Connor* (1843), 7 Jur. 719; *R. v. Gompertz* (1845), 2 Dowl. & L. 1001. *Mentd. R. v. Morley* (1826), 4 Dow. & Ry. M. C. 109; *Gwynne v. Burnell* (1840), 6 Bing. N. C. 453.

**2001. — Night poaching—Actual time held material.]**—Where an indictment alleged that three & more, together did by night unlawfully enter divers closes, armed with guns, for the purpose of destroying game:—*Held*: it did not contain a sufficient averment that defts. were by night in the closes armed, for the purpose of destroying game.—*DAVIES v. R.* (1829), 10 B. & C. 89; 5 Man. & Ry. K. B. 78; 2 Man. & Ry. M. C. 562; 8 L. J. O. S. M. C. 49; 109 E. R. 384.

*Annotation:—Refd. Cureton v. R.* (1861), 30 L. J. M. C. 149.

**2002. — Burglary—Actual time held material.]**—Prisoner was indicted for burglary, the indictment alleging the act to have been committed in the night, but not expressing at or about what hour it was done:—*Held*: the indictment was insufficient for burglary, as the hour between twilight of the evening & that of the morning must be specified.—*R. v. WADDINGTON* (1771), 2 East, P. C. 513.

**2003. — Actual time held not material.]**—In an indictment for burglary, it is sufficient to allege that prisoners burglariously broke & entered a dwelling-house, without any further allegation of time.—*R. v. THOMPSON* (1847), 10 L. T. O. S. 251; 2 Cox, C. C. 445.

**2004. If material & stated time must be taken to be the true time.]**—*R. v. NAPPER*, No. 2022, *post*.

**2005. —.]**—Where under a statutable offence time is material, the time stated in the indictment must, in arrest of judgment, be taken to be the

true time, without a substantive averment.—*R. v. BROWN* (1828), Mood. & M. 163, N. P.

**2006. —.]**—Where dates are laid under a *videlicet* but they are material, the *videlicet* may be rejected, & then they must be taken to be true.—*RYALLS v. R.* (1849), 11 Q. B. 795; 18 L. J. M. C. 69; 12 L. T. O. S. 557; 12 J. P. 581; 13 Jur. 259; 3 Cox, C. C. 254; 116 E. R. 672, Ex. Ch.

*Annotations:—Mentd. King v. R.* (1849), 13 Jur. 742; *Lavey v. R.* (1851), 2 Den. 504; *R. v. Castro* (otherwise Orton, otherwise Tichborne) (1880), 49 L. J. Q. B. 747; *R. v. Pierce* (1887), 56 L. J. M. C. 85; *R. v. Paul* (1890), 25 Q. B. D. 202.

**2007. If not material to offence—Variance with date proved is no objection.]**—*VANE'S CASE* (1662), Kel. 14; 6 State Tr. 120; 2 Harg. State Tr. 431; 84 E. R. 1060.

*Annotations:—Mentd. Bellew's Case* (1674), 1 Vent. 254; *Sydney's Case* (1683), Skin. 145; *R. v. Dowling* (1848), 3 Cox, C. C. 509.

**2008. —.]**—Where a statute makes an offence committed after a given day triable in the county where the party is apprehended, & authorises laying it as if committed in that county, & does not vary the nature & character of the offence, it is no objection that the day laid in the indictment is before the day the statute mentions, if the offence were, in fact, committed after that day.—*R. v. TREHARNE* (1831), 1 Mood. C. C. 298, C. C. R.

**2009. —.]**—If there is evidence of the commission of an offence, the jury are entitled to find accused guilty, although the offence was not committed on the actual date specified in the indictment.

*Semble*: the indictment may be amended under Indictments Act, 1915 (c. 90), s. 5 (3), after the jury has returned a verdict of "guilty, if the indictment covers other dates."—*R. v. DOSSI* (1918), 87 L. J. K. B. 1024; 34 T. L. R. 498; 13 Cr. App. Rep. 158, C. C. A.

*Annotation:—Consd. R. v. James* (1923), 17 Cr. App. Rep. 116.

**2010. —.]**—A mistaken date in an indictment, unless the date is of the essence of the offence, or the accused is prejudiced, need not be formally amended.—*R. v. JAMES* (1923), 17 Cr. App. Rep. 116, C. C. A.

**2011. — Need not be stated.]**—When a penal statute does not limit the offence to time, it need not be stated in the indictment.—*R. v. JOHNSON* (1621), Cro. Jac. 610; 79 E. R. 520.

*Annotation:—Mentd. R. v. Haddock* (1737), Andr. 137.

**2012. Not material as to inception of a conspiracy.]**—On an indictment for conspiracy the prosecution is not bound to allege a precise date or act for or as the inception of the conspiracy.—*R. v. PEPPER*, *R. v. PLATT* (1921), as reported in 16 Cr. App. Rep. 12, C. C. A.

*Annotation:—Mentd. R. v. Hales* (1923), 17 Cr. App. Rep. 193.

**2013. Time may be laid as between certain dates.]**—In an information on a penal statute, it is sufficient to lay the offence as committed between

ENGLAND, [1920] 48 N. B. R. 192.—CAN.

**2007 iii. —.]**—The Informations, warrant of committal, & indictment, stated an offence committed on Monday, the 12th. In the course of the trial it became necessary to fix the precise date of the offence, which was proved to be Monday, the 5th:—*Held*: a conviction in these circumstances was legal.—*R. v. JONES* (1827), Jebb, Cr. & Pr. Cas. 72.—IR.

**2013 i. Time may be laid as between certain dates.]**—A presentment charged prisoner with embezzlement, of a certain amount between Jan. 21, 1895, & July 28, 1896, & it was proved that on examination of the prisoner's books there was a general deficiency extend-

#### PART VI. SECT. 4, SUB-SECT. 4.

**2007 i. If not material to offence—Variance with date proved is no objection.]**—Prisoner was presented on a charge of larceny of a cow on or about Dec. 29, 1906. Evidence was given both by accused & witnesses for the prosecution that the accused became possessed of the cow in Nov. 1905, & that he advertised & sold her in Dec. 1906. The jury found that accused had stolen the cow in Nov. 1905. No amendment of the presentment was asked for:—*Held*: in the circumstances the variance between the presentment & the finding of the jury as to the date of the offence was immaterial.—*R. v. TIEMAN*, [1908] V. L. R. 4.—AUS.

**2007 ii. —.]**—Where, in an action for forgery, the indictment contained four counts, two charging forgery of two prescriptions for intoxicating liquor on Mar. 18, 1920, & two for uttering the prescriptions on the same day, knowing them to be forged, & the judge in answer to a question by one of the jurors, informed the jury that if they believed beyond a reasonable doubt that the man did forge the documents or utter them knowing them to be forged, that it was their duty to find him guilty without any regard to dates, & the jury found deft. guilty of uttering forged documents:—*Held*: the date specified in an indictment does not form a material part of the indictment unless it is an essential part of the alleged offence.—*R. v.*



such a time & such a time.—*R. v. SIMPSON* (1714), 10 Mod. Rep. 248; 88 E. R. 713.

*Annotations* :—*Refd.* *R. v. Bissex* (1756), Say. 304. *Mentd.* *R. v. Clegg* (1721), 8 Mod. Rep. 3.

**2014. Omission to state date of offence does not vitiate indictment.**—Prisoner was convicted of stealing a number of articles, the property of his master, during a period extending over several months. The indictment did not specify any date when the articles were alleged to have been stolen. Before trial objection was taken that the indictment ought to be quashed, as no such date was specified:—*Held*: it was not necessary to state any date in the indictment, though on the trial a date for the taking must be proved, & the prosecution might have been put to their election to say upon which three cases they intended to proceed.—*R. v. NICHOLLS* (1904), 68 J. P. 452, C. C. R.

**2015. Averment that limitation of time has been observed not necessary.**—It is not necessary to allege in an indictment that the prosecution was commenced within a time limited by statute.—*R. v. PARSONS* (1875), 1 Freem. K. B. 406; 3 Keb. 485; 89 E. R. 301.

**2016. Citation of statutes.**—An indictment alleged that prisoner, after the passing & coming into operation of certain statutes, to wit, on May 20, 1859, presented his petition. The time when two of the statutes were passed was inaccurately described, & although the indictment purported to set out the titles of the statutes *in haec verba*, it inaccurately described the title of one of them:—*Held*: (1) it was competent for the judge at the trial to amend the indictment by striking out the words which stated the time when the Acts were passed; (2) as to the misdescription of the title of the statute, which was not amended at the trial, as the reference was made to the statute only to indicate that the petition was presented after the passing of such statute, & as it was also alleged in the indictment that the petition was presented on May 20, 1859, being a day after such passing of which the ct. was bound to take notice, the description of the title of the statute might be altogether rejected; (3) *semble*: when the title of a statute is not correctly set out in an indictment, but is so described as to enable the ct. to know with certainty what statute is referred to, no objection to the indictment on account of such variance would now be sustained.—*R. v. WESTLEY* (1859), Bell, C. C. 193; 29 L. J. M. C. 35; 23 J. P. 805; 5 Jur. N. S. 1362; 8 W. R. 63; 8 Cox, C. C. 244, C. C. R.

See Indictments Act, 1915 (c. 90), sched. I., r. 9.

ing over that period. Prisoner was convicted:—*Held*: conviction was good.—*R. v. FEWERERE* (1897), 23 V. L. R. 403.—*AUS.*

**g. — When too vague.**—An indictment which alleged that the accused had committed the crime of incest "upon divers dates, between Jan. 1, 1913, & Jan. 19, 1917":—*Held*: bad on the ground that the period of time alleged was too vague.—*R. v. GRAAFF*, [1917] C. P. D. 65.—*S. AF.*

**2014 i. Omission to state date of offence does not vitiate indictment.**—In a r unlawfully & carnally in circumstances which constitute an offence under Crimes Act, 1915, s. 46, the presentment charged that the offence was committed "in the month of July, 1915." The evidence was that in 1915 during a period commencing some months before & ending some months after July & including July prisoner & the girl against whom the offence was alleged to have been com-

mitted continuously & regularly met once a week, & that on nearly every occasion the prisoner had intercourse with her, but the evidence did not distinguish any one of these occasions from any other. No objection was taken at the trial on the ground of duplicity in the charge:—*Held*: in the absence of objection jury could properly find prisoner guilty of the offence charged.—*R. v. CONLEY*, [1916] V. L. R. 639.—*AUS.*

**h. Interpretation of a month.**—A charge that a person committed an offence between Feb. 1

W. W. R. 337; 33 D. L. R. 556; 27 Can. Crim. Cas. 116; 10 Alta. L. R. 139.—*CAN.*

#### PART VI. SECT. 4, SUB-SECT. 5.

**2025 i. Sufficiency of local description.**—Where in the body of the indictment there was no venue stated, & the

#### SUB-SECT. 5.—STATEMENTS AS TO PLACE.

**2017. Venue must be stated.**—An indictment must show in what county it was taken, & where the offence arose.—*LENTHAL'S CASE* (1589), Cro. Eliz. 137; 78 E. R. 394.

*Annotation* :—*Refd.* *R. v. O'Connor* (1843), 5 Q. B. 18.

**2018. —**—The venue must always be stated in an indictment.—*R. v. COURTNEY* (1922), 17 Cr. App. Rep. 1, C. C. A.

**2019. Necessity for local description.**—*LENTHAL'S CASE*, No. 2017, *ante*.

**2020. — When material must be shown with certainty.**—*Ross v. MORRIS* (1595), Cro. Eliz. 436; 78 E. R. 676.

**2021. —**—Indictment for breaking the chamber of S. in the house of James, & taking goods:—*Held*: evidence that it was the house of Jamson would not maintain the indictment.—*R. v. CRANAGE* (1712), 1 Salk. 385; 91 E. R. 335.

**2022. — Must be correct.**—Where time & place are material, the time & place stated shall be taken to be the true time & place.

In an indictment for stealing in a dwelling-house, if it is not expressly stated where the dwelling-house is situated, it shall be taken to be situated at the place named in the indictment by way of venue.—*R. v. NAPPER* (1824), 1 Mood. C. C. 44, C. C. R.

*Annotation* :—*Mentd.* *R. v. Treharne* (1831), 1 Mood. C. C. 298.

**2023. — Night poaching.**—An indictment under 57 Geo. 3 (c. 90) charging a party with having entered into a forest, chase, etc., with intent to destroy game, & being found armed in the night, must, in some way or other, particularise the place.—*R. v. RIDLEY* (1823), Russ. & Ry. 515, C. C. R.

*Annotation* :—*Refd.* *Davies v. R.* (1829), 8 L. J. O. S. M. C. 49.

**2024. — Burglary.**—Where persons are charged under Larceny Act, 1861 (c. 96), s. 58, with being found by night armed with an offensive weapon, with intent to break & enter into a dwelling-house or other building, & to commit a felony therein, the particular house or building must be specified in the indictment, & proof given of their intent to break & enter such house or building.—*R. v. JARRALD & OST* (1863), Le. & Ca. 301; 2 New Rep. 289; 32 L. J. M. C. 258; 8 L. T. 515; 27 J. P. 628; 9 Jur. N. S. 629; 9 Cox, C. C. 307; *sub nom.* *R. v. JERRALD & OST*, 11 W. R. 787, C. C. R.

**2025. Sufficiency of local description.**—In a conviction of deft. for causing to be acted at the C. theatre in the parish of St. Mary, Lambeth, a

marginal venue was simply British Columbia "to wit":—*Held*: the venue was sufficiently stated in the record, & the marginal venue was at worst but an imperfect venue, & therefore cured by Criminal Procedure Act, 1869, s. 23.—*SPROULE v. R.* (1886), 1 B. C. R., pt. II. 219; 12 S. C. R. 140.—*CAN.*

**2025 ii. —**—The traverser was indicted for forging a letter in the county of the city of D. The letter was originally a printed circular, dated from 13, M. Street, & signed M. Then followed a portion in writing, which was in the traverser's handwriting, & was the part forged, signed M., but not dated from any place. M. proved that he had lived at 13, M. Street, in the city of D., & this was the only evidence that the writing was done in D.:—*Held*: the venue was not proved, & an acquittal was directed.—*R. v. DALY* (1842), Arm. M. & O. 360.—*IR.*

**2025 iii. —**—A venue is sufficiently stated in an indictment as

**Sect. 4.—Form of indictments: Sub-sects. 5, 6, 7 & 8, A. (a).]**

certain entertainment, the evidence stated that the C. theatre, where the offence was laid, was in the parish of Lambeth, & the adjudication of the penalty was to the poor of the parish of St. Mary, Lambeth:—*Held*: this was no variance, it not appearing that there were two distinct parishes so named.—*R. v. GLOSSOP* (1821), 4 B. & Ald. 616; 106 E. R. 1062.

*Annotations*:—*Mentd.* *R. v. Neville* (1830), 1 B. & Ad. 489; *Rwing v. Osbaldiston* (1837), 2 My. & Cr. 53.

**2026.** —[*J*].—Prisoners were convicted of larceny, on an indictment for breaking & entering a dwelling-house situate in the parish of St. Botolph, Aldgate. It was proved that the proper name of the parish where prosecutor's house was situate, was St. Botolph-without-Aldgate. There was no negative evidence of there not being such a parish as St. Botolph, Aldgate:—*Held*: the conviction for larceny was right.—*R. v. BULLOCK* (1825), 1 Mood. C. C. 324, C. C. R.

**2027.** —[*J*].—If a parish be partly situate in the county of W. & partly in the county of S., it is sufficient, in an indictment for larceny, to state the offence to have been committed at the parish of H. in the county of W.—*R. v. PERKINS* (1830), 4 C. & P. 363; 2 Man. & Ry. M. C. 485.

**2028.** —[*J*].—In an indictment alleging a dwelling-house to be "situate at the parish aforesaid," the parish last mentioned must be intended.—*R. v. RICHARDS* (1832), 1 Mood. & R. 177; 1 Nev. & M. M. C. 362.

**2029.** —[*J*].—An indictment charged that deft., at the township of W. on a highway there, leading from a highway, leading from the village of W. towards C., to another highway, leading from the village of W. towards L. by a wall there, extending into the said highway by him erected, had encroached, etc.:—*Held*: the indictment was not uncertain as the words "there" & "said" could be referred only to the highway first mentioned.—*R. v. WRIGHT* (1834), 1 Ad. & El. 434; 3 L. J. Ex. 370; 110 E. R. 1273; *sub nom.* *WRIGHT v. R.*, 3 Nev. & M. K. B. 892, Ex. Ch.

*Annotations*:—*Refd.* *Ashton v. Brevitt* (1845), 14 M. & R. 106. *Mentd.* *De Bode v. R.* (1848), 13 Q. B. 364; *R. v. Seale*, *R. v. Alford* (1855), 24 L. J. Q. B. 221; *Moore v. Smith* (1859), 5 Jur. N. S. 892; *Weymouth Corp. v. Nugent* (1865), 5 New Rep. 302; *Itathbone v. Munn* (1868), 9 B. & S. 708.

**2030.** —[*J*].—At the Central Criminal Ct. a person was indicted for a burglary in a house, which was stated in the indictment to be "at the parish of W." Prosecutor stated that the correct name of the parish was St. Mary, W. In Central Criminal Ct. Act, 1834 (c. 36), s. 2, this parish is called "the parish of W.":—*Held*: the description was sufficient.—*R. v. ST. JOHN* (1839), 9 C. & P. 40.

**2031.** —[*J*].—An indictment for non-repair of a highway stated there was a Queen's highway for carriages, etc., leading from the town of A. in the county of B. towards & unto the village of E. in the same county, a part of which was out of repair. The part of the road charged to be out of repair was a portion of a lane called F. lane, & it was proved that to go from the town of A. to the village of E. with a carriage, a person must go

four miles along the C. turnpike road, then all along F. lane, & then cross the W. turnpike road, & for a short distance go along a road which goes from the W. turnpike road to the village of E.:—*Held*: the road was not misdescribed.—*R. v. STEVENTON* (INHABITANTS) (1843), 1 Car. & Kir. 55; 1 L. T. O. S. 56.

*Annotation*:—*Mentd.* *R. v. Turweston* (1850), 16 Q. B. 109.

**2032.** —[*J*].—Where an indictment preferred in the Central Criminal Ct. has the proper venue in the margin, it is not necessary to state the jurisdiction in the body of the indictment, in the exact words prescribed by Central Criminal Ct. Act, 1834 (c. 36), s. 3:—*Held*: "within the jurisdiction of this ct." was sufficient, although another & a different ct. had been referred to in the paragraph immediately preceding that allegation.—*R. v. SATCHELL* (1847), 2 Cox, C. C. 137.

**2033.** *When offence alleged to have been committed outside England—In foreign country.*—An indictment for murder committed by a British subject abroad ought not to state it to have been committed at B., in the kingdom of France, to wit, at the parish of St. Mary-le-Bow, etc., & it being so stated, the ct. directed the London venue to be struck out before the bill was found by the grand jury.—*R. v. HELSHAM* (1830), 4 C. & P. 394.

*Annotations*:—*Mentd.* *R. v. de Mattos* (1836), 7 C. & P. 458; *R. v. O'Connor* (1843), 13 L. J. M. C. 33; *R. v. Lewis* (1857), 7 Cox, C. C. 277.

**2034.** —[*J*].—*On high seas.*—In an indictment preferred at the assizes for a felony committed on the high seas, it is sufficient to allege that the offence was committed "on the high seas," without also averring that the offence was committed within the jurisdiction of the admty.—*R. v. JONES* (1845), 2 Car. & Kir. 165; 1 Den. 101, C. C. R.

*Annotation*:—*Refd.* *R. v. Cunningham* (1859), Bell, C. C. 72.

*See* Indictments Act, 1915 (c. 90), sched. I., r. 9.

**SUB-SECT. 6.—STATEMENTS AS TO VALUE.**

**2035.** *General rule.*—If an indictment against a bkpt. for concealing property, in stating the property does not sufficiently specify particular parts of it, though it may sufficiently specify others, & those specified may be of the necessary value, the indictment will be bad.

Where value is essential to constitute an of & the value is ascribed to many articles collectively, the offence must be made out as to every one of those articles, for the grand jury has only ascribed that value to all those articles collectively.—*R. v. FORSYTH* (1814), Russ. & Ry. 274, C. C. R.

*Annotation*:—*Mentd.* *Nash v. R.* (1864), 9 Cox, C. C. 424.

**2036.** *Sufficiency of allegation of value—Value of aggregate in indictment under Malicious Damage Act, 1861 (c. 97), s. 51.*—In an indictment under sect. 51 of the above Act for maliciously damaging personal property, the damage exceeding £5, it is not necessary to allege the value of each article injured, but only that the amount of the damage done to the several articles exceeded £5 in the aggregate.—*R. v. THOMAN* (1871), 24 L. T. 398; 35 J. P. 518; 12 Cox, C. C. 54, C. C. R.

**2037.** *Value of bank-note.*—An averment in an indictment of the value of a bank-note is material.

"Northern District," without the word "Newfoundland."—*R. v. BAIRD* (1853), 3 Nfld. L. R. 398.—*NFLD.*

*J.* — *Offence committed on boundaries of two counties.*—In an indictment under 9 Geo. 4, c. 54, s. 26, the county in which the offence was actually committed should be stated in the indictment, with an averment

that such offence took place within five hundred yards of the county in which the indictment was laid.—*R. v. BROWN* (1837), Craw. & D. Abr. C. 46.—*IR.*

**2034 i.** *When offence alleged to have been committed outside territory—On high seas.*—In an indictment for a larceny, committed on board a British

vessel, it is sufficient to say upon the sea without saying upon the high seas.—*R. v. SPRUNGLI* (1878), 4 Q. L. R. 110.—*CAN.*

**PART VI. SECT. 4, SUB-SECT. 6.**

**2035 i.** *General rule.*—*R. v. HORSEMAN* (1881), 20 N. B. R. 4 (Pug.) 529.—*CAN.*

Therefore where a prisoner was indicted for stealing a bank-note of the value of £10, & it was proved to be of the value of £5 only:—*Held*: the variance was material.—*R. v. JONES* (1844), 3 L. T. O. S. 22; 1 Cox, C. C. 105.

See Indictments Act, 1915 (c. 90), sched. I., r. 9.

#### SUB-SECT. 7.—STATEMENTS AS TO INTENT OR KNOWLEDGE.

**2038. Indictment for obtaining by false pretences—“With intent to defraud” an essential averment.]**—Where in an indictment for false pretences the words “with intent to defraud” are omitted, the indictment is bad & cannot be amended under Criminal Procedure Act, 1851 (c. 100), s. 1.—*R. v. JAMES* (1871), 12 Cox, C. C. 127. *Annotation*:—*Refd.* *R. v. Benson* (1908), 98 L. T. 933.

**2039. Punishment according to intent found—Defence of the Realm (Consolidation) Regulations, 1914 (Regs. 18 & 57—Averment as to intent.)**—Applt. was indicted under the above regs. for attempting to communicate military information to the enemy with the intention of assisting the enemy, the averment as to the intent being contained in the same count as the charge of the attempt:—*Held*: the averment as to intent was rightly inserted in the count charging the attempt.—*R. v. M.* (1915), 32 T. L. R. 1; 79 J. P. Jo. 508; 11 Cr. App. Rep. 207, C. C. A.

**2040. Indictment for receiving stolen property—Must aver guilty knowledge.]**—*R. v. KERNON* (1788), 2 Russell on Crimes & Misdemeanours, 7th ed., p. 1479, n.

Indictment Act, 1915 (c. 90), sched. I., r. 10.

#### 8.—DUPLICATION OF CHARGE.

*A. When more than one Offence may be charged in the same Count.*

(a) *Same or Continuous Acts.*

**2041. Where offence consists of only one act—Libelling two persons by same words.]**—*R. v. BENFIELD & SAUNDERS*, No. 2078, *post*.

#### PART VI. SECT. 4, SUB-SECT. 7.

**2038 i. Indictment for obtaining by false pretences—“Falsely & fraudulently.”]**—An indictment against J. S. bore, “You did pretend to J. H. . . . that you were possessed of a sum of money amounting to £1,900 . . . & that you were about to receive payment of the money, & did thus induce him to give you credit to the amount of £46 9s. 9d., which you failed to pay & had no intention of paying.” Objection to the relevancy in respect that the facts set forth did not constitute a crime repelled, on the ground that under the Criminal Procedure Act, 1887, the words “falsely & fraudulently” were to be read into the indictment as qualifying the word “pretend,” & that when this was done the indictment was relevant.—*H. M. ADVOCATE v. SWAN* (1888), 16 R. (Ct. of Sess.) 34.—*SCOT*.

**k. Grievous bodily harm—“Maliciously.”]**—An indictment under 12 Vict. s. 29, for causing grievous bodily harm must allege the offence to have been committed “maliciously” in the words of the Act.—*R. v. JOPE* (1855), 3 All. 161.—*CAN.*

**l. ———.]**—An indictment for doing grievous bodily harm, which alleged that the prisoner did “feloniously stab, cut, & wound” instead of alleging, in the terms of 32 & 33 Vict. c. 20, s. 17, that he did “unlawfully &

maliciously” stab, is good.—*R. v. FLYNN* (1878), 2 L. & B. 321.—*CAN.*

**m. Larceny — “Feliciously.”]**—An indictment charged that the “prisoner did steal,” without charging that it was done feloniously. Before pleading the prisoner’s counsel moved to quash the indictment. After argument, the presiding judge allowed the indictment to be amended under 32 & 33 Vict. c. 29, s. 32, by adding the word “feliciously.” The prisoner was found guilty upon the amended indictment:—*Held*: the indictment without the “feliciously” was bad.—*R. v. MORRISON* (1879), 18 N. B. R. 682.—*CAN.*

**n. ———.]**—*R. v. INGLIS* (1893), 25 N. S. R. 259.—*CAN.*

**o. — “Unlawfully did steal.”]**—Prisoner was tried on the charge that he “unlawfully did steal one piece of Oregon pine wood”:—*Held*: the words “unlawfully did steal” in the charge meant & included everything necessary to constitute the offence of theft or stealing as defined by the Code, s. 305.—*R. v. GEORGE* (1902), 35 N. S. R. 42.—*CAN.*

**p. Malicious injury to property—“Feliciously.”]**—In an indictment purporting to be under 32 & 33 Vict. c. 22, s. 45 (D), for malicious injury to property, the word “feliciously” was omitted:—*Held*: bad.—*R. v. GOUGH* (1883), 3 O. R. 402.—*CAN.*

**2042. — Uttering of a number of forged instruments at the same time.]**—An indictment may charge in the same count the uttering of a number of forged instruments if these were all uttered at the same time, nor will the ct. put prosecutor to election on which receipt to proceed.—*R. v. THOMAS* (1800), 2 East, P. C. 934; 2 Leach, 877.

**2043. — Assaulting two persons at the same time.]**—*ANON.* (1773), Lofft, 271; 98 E. R. 646.

**2044. — Robbing from two persons by the same acts.]**—An indictment for robbery, which charges prisoners with having assaulted G. & H. & stolen 2s. from G. & 1s. from H., is correct, if the robbing of G. & H. was all one act.—*R. v. GIDDINS* (1842), Car. & M. 634.

**2045. — Stealing coal of several proprietors at one shaft.]**—Where a prisoner was indicted in one count, for stealing from the mine of one G. coal, the property of the said G., & in the same count, for stealing from the mines of thirty other proprietors coal, the property of each of such other proprietors, & it appeared that all the coal so alleged to have been stolen had been raised at one shaft:—*Held*: although, for the sake of convenience in trying prisoner, the judge might direct the jury to confine their attention to one particular charge, yet prosecutor was entitled to give evidence in support of all the charges laid in the indictment.—*R. v. BLEASDALE* (1848), 2 Car. & Kir. 765.

*Annotations*:—*Refd.* *R. v. Rearden* (1864), 4 F. & F. 76; *R. v. Firth* (1869), L. R. 1 C. C. R. 172; *R. v. Henwood* (1870), 22 L. T. 486.

**2046. Indictment for stealing various goods—**

presumption is that the taking is at one time.—*R. v. RYE* (1909), 2 Cr. App. Rep. 155, C. C. A.

**2047. Where offence consists of continuous acts—Larceny of gas.]**—A. stole gas for the use of a manufactory by means of a pipe which drew the gas from the main without allowing it to pass through the meter:—*Held*: as the pipe always remained full, there was, in fact, a continuous taking of the gas, & not a series of separate takings, but, even if the pipe had not been thus kept full,

**q. Shooting with intent to murder — “Feliciously.”]**—*Of Malice aforethought.*—*R. v. BULMER* (1881), 33 L. C. J. 57.—*CAN.*

**r. ———.]**—An indictment that “A. B. attempted to kill & murder C. D.” sufficiently discloses an indictable offence, & the ct. has the power to allow it to be amended so as to read that “A. B. with intent to commit murder, shot at C. D.”—*R. v. MOONEY* (1905), Q. R. 15 K. B. 57.—*CAN.*

**s. — “Unlawfully & maliciously.”]**—An accused is entitled to know with certainty & accuracy the exact value of the charge brought against him. But where the accused fully understood the nature of the offence with which they were charged, they had clearly not been prejudiced by the omission of the words “unlawfully & maliciously” occurring in Act VI of 1908, s. 4 (b).—*AMRITA LAL HAZRA v. R.* (1915), 1 L. R. 42 Calc. 957.—*IND.*

#### PART VI. SECT. 4, SUB-SECT. 8.— A. (a).

**t. Where offence consists of only one act—False pretences.]**—The indictment charged that doft. unlawfully & by false pretences obtained an order from A., one of the municipality of B., requiring the delivery of certain wheat by C., & by presenting the order to C., did fraudulently procure nine bushels of wheat from C., of the goods

**Sect. 4.—Form of indictments: Sub-sect. 8, A. (a) &**

the taking would have been continuous, as it was substantially all one transaction.—*R. v. FIRTH* (1869), L. R. 1 C. C. R. 172; 38 L. J. M. C. 54; 19 L. T. 746; 33 J. P. 212; 17 W. R. 327; 11 Cox, C. C. 234, C. C. R.

**Annotations:—***Refd.* *R. v. Henwood* (1870), 22 L. T. 486; *R. v. Bond*, [1906] 2 K. B. 389; *Erie County Natural Gas & Fuel Co. v. Carroll*, [1911] A. C. 105.

**2048. — Keeping a betting house.]—**Where an information charged deft. with having on Oct. 5, & on divers other days & times between Oct. 5 & the laying of the information, Nov. 16, being then the occupier of a certain house, knowingly & wilfully kept & used the same for the purpose of his betting with persons resorting thereto:—*Held*: a conviction for so keeping & using the house on Nov. 8 was good & valid.—*ONLEY v. GEE* (1861), 30 L. J. M. C. 222; 4 L. T. 338; 25 J. P. 342; 7 Jur. N. S. 570; 9 W. R. 662.

**Annotations:—***Refd.* *Ex p. Burnby*, [1901] 2 K. B. 458; *Parker v. Sutherland* (1917), 116 L. T. 820.

**2049. — Keeping a brothel.]—**A conviction for permitting premises to be used as a brothel upon several separate days is good, as the offence is a continuing one.—*Ex p. Burnby*, [1901] 2 K. B. 458; 45 Sol. Jo. 579; *sub nom. R. v. Burnby*, 70 L. J. K. B. 739; 85 L. T. 168; 20 Cox, C. C. 25, D. C.

**2050. — Embezzlement of various sums charged in the aggregate.]—**If a servant be indicted under 7 & 8 Geo. 4, c. 29, for embezzlement, & the indictment contain only one count, charging receipt of a gross sum on a particular day, & if it turn out that the money was received in different sums, on different days, prosecutor must make his election, & confine himself to one sum & one day.—*R. v. WILLIAMS* (1834), 6 C. & P. 626; 2 Nev. & M. M. C. 190.

**Annotation:—***Refd.* *R. v. Hawtin* (1836), 7 C. & P. 281; *R. v. Balls* (1871), 24 L. T. 760.

**2051. — ]—**It was the duty of prisoner, a member of a copartnership, to receive money for the copartnership, & once a week to render an account & pay over the gross amount received during the previous week. During each of three several weeks, within six months, prisoner received various small sums, & failed to account for them at the end of the week, or to pay over the gross amount, but embezzled the money:—*Held*: he might properly be charged with embezzling the weekly aggregates. Three acts of embezzlement of such weekly aggregates within six months might be charged & proved under one indictment, & evidence of the small sums received during each week was admissible to show how these aggregates were made up.—*R. v. BALLS* (1871), L. R. 1 C. C. R. 328; 40 L. J. M. C. 148; 24 L. T. 760; 35 J. P. 820; 19 W. R. 876; 12 Cox, C. C. 96, C. C. R.

**(b) Acts laid Conjunctively.**

**2052. Endeavouring to incite to mutiny—Two separate offences comprised in one endeavour may**

& chattels of the municipality, with intent to defraud:—*Held*: sufficient in substance, but not being uncertain or double, but in effect charging that deft. obtained the order & by presenting it obtained the wheat by false pretences.—*R. v. CAMPBELL* (1859), 18 U. C. R. 413.—**CAN.**

**Larceny.]—***R. v. NOLAN* (1920), 54 N. S. R. 102; 57 D. L. R. 304; 35 Can. Crim. Cas. 20.—**CAN.**

**PART VI. SECT. 4, SUB-SECT. 8.—**  
**A. (b).**

**b. Wounding & maiming.]—**The

indictment charged in the second count that H. did stab, cut, & wound B., with intent, wilfully & feloniously, to maim, disable, & disfigure him:—*Held*: this count was not bad for duplicity, as joining in the same count several felonies committed with several intents; as even if the felonies were several, they were of the same degree, & related to the same transaction.—*R. v. HINCHY* (1828), Batt. 509.—**IR.**

**PART VI. SECT. 4, SUB-SECT. 8.—**  
**B. (a).**

**c. General rule.]—**An indictment is

**be charged in same count.]—***Semble*: if one endeavour to incite to mutiny comprise two separate offences, a count in an indictment charging that endeavour may contain those two offences.—*R. v. FULLER* (1797), 1 Bos. & P. 180; 2 Leach, 790; 126 E. R. 847.

**Annotations:—***Refd.* *R. v. Bowen* (1844), 1 Cox, C. C. 88; *R. v. Jennings* (1844), 4 L. T. O. S. 233; *Wray v. Toke* (1848), 12 Q. B. 492. *Mentd.* *R. v. Nield* (1805), 6 East, 417; *Peake v. Carrington* (1821), 2 Brod. & Bing. 399; *R. v. Caspar* (1839), 9 C. & P. 289; *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *R. v. Hague* (1864), 4 B. & S. 715; *Allen v. Flood*, [1898] A. C. 1.

**2053. Composing, printing & publishing a libel.]**

—If deft. is charged by a count in an indictment with having composed, *printed* & published a libel, & the evidence is that he only composed & published it, he may be found guilty of composing & publishing & acquitted of the printing.—*R. v. WILLIAMS* (1811), 2 Camp. 646, N. P.

**2054. Publishing libel with intent to defame & to bring administration of justice into contempt.]—**Where a libel was alleged to have been published with intent to defame certain magistrates & also to bring the administration of justice into contempt:—*Held*: it was sufficient to prove a publication with either of these intentions.—*R. v. EVANS* (1821), 3 Stark. 25, N. P.

**2055. Assault with intent to abuse & carnally know.]—**Where an indictment charges an assault, with intent to abuse & carnally know, deft. may be convicted of an assault with intent to abuse simply.—*R. v. DAWSON* (1821), 3 Stark. 62, N. P.

**2056. Assault & carnally knowing & abusing.]—**An indictment charged that G., in & upon D., a girl above the age of ten & under the age of twelve, unlawfully did make an assault, & did then unlawfully & carnally know & abuse her:—*Held*: the indictment contained two charges, one of common assault, & the other of the misdemeanour under Offences against the Person Act, 1861 (c. 100), s. 51, & prisoner might be convicted of a common assault upon it.—*R. v. GUTHRIE* (1870), L. R. 1 C. C. R. 241; 39 L. J. M. C. 95; 22 L. T. 485; 34 J. P. 501; 18 W. R. 792; 11 Cox, C. C. 522, C. C. R.

**Annotations:—***Consd.* *Boaler v. R.* (1888), 21 Q. B. D. 284; *R. v. Bostock* (1893), 17 Cox, C. C. 700. *Mentd.* *R. v. Coney* (1882), 8 Q. B. D. 534.

**2057. Destroying, defacing & injuring register.]—***R. v. BOWEN*, No. 1967, ante.

**2058. Training & drilling—Unlawful Drilling Act, 1819 (c. 1).]**—A count in an indictment, under sect. 1 of above Act, is not bad for duplicity, though it charges the offence which is prohibited, & the offence for which a penalty is imposed.—*R. v. HUNT* (1848), 3 Cox, C. C. 215.

**B. When more than one Offence may not be charged in the same Count.**

**(a) Different Acts.**

**2059. Manslaughter against two by different acts.]—**A coroner's inquisition stated that D., or May 27, struck R. with a poker on the head, & with his hands on the breast, & gave her divers

clearly bad where two offences are charged in a single count.—*R. v. BLACKIE* (1868), 7 N. S. R. 383.—**CAN**

**d. —.]—**An indictment or charge was bad for uncertainty & for having charged in one count more offence than one.—*R. v. QUINN* (1918), 4 O. L. R. 385; 44 D. L. R. 707.—**CAN**

**e. —.]—**A single head of charge relating to three offences of the same kind, is defective for duplicity & not misjoinder; but a trial under such a charge is not bad unless the accused has been prejudiced thereby.—

mortal bruises & contusions, & that F., on June 23, kicked R. on the belly, & thereby gave her one mortal bruise & contusion. It then averred that R., of the mortal bruises, etc., given by D., languished from May 27 until July 1, & of the mortal bruise, etc., given by F. languished from June 23 till July 1, & then died of the mortal bruises & contusions on the head and breast, together with the mortal bruise & contusion on the belly. The conclusion was, that D. & F. in manner & by the means aforesaid, feloniously did kill & slay R.:—*Held*: the indictment was bad.—*R. v. DEVETT & FOX* (1838), 8 C. & P. 639.

**2060. Assaulting two persons.**—A man cannot be prosecuted upon one indictment for assaulting two people.—*R. v. CLENDON* (1730), 1 Barn. K. B. 337; 2 Ld. Raym. 1572; Sess. Cas. K. B. 132; 2 Stra. 870; 92 E. R. 517.

*Annotations*:—*Distd.* *R. v. Benfield* (1760), 2 Burr. 980; *R. v. Pelham* (1846), 8 Q. B. 959 (*R. v. Clendon* is not law now (LORD DENMAN, C.J.)).

**2061. Incest on divers days.**—An indictment under Punishment of Incest Act, 1908 (c. 45), charged in one count that offences were committed "on divers days between the month of Jan., 1909, & Oct. 4, 1910," & in another count that offences were committed "on divers days between Oct. 4, 1910, & the end of Feb. 1913." At the trial, after prisoner had pleaded not guilty & the jury had been sworn, objection was taken that the indictment was bad for duplicity. The objection was overruled & prisoner was convicted. On appeal:—*Held*: the indictment was bad in that it charged more than one offence in each count, but as prisoner had not in fact been embarrassed or prejudiced in his defence by the presentment of the indictment in this form, there had been "no substantial miscarriage of justice," & the appeal must therefore, be dismissed under Criminal Appeal Act, 1907 (c. 23), s. 4 (1).

*Qu.*: whether an objection that an indictment is bad on its face can be taken after plea or after verdict.—*R. v. THOMPSON*, [1914] 2 K. B. 99; 83 L. J. K. B. 643; 110 L. T. 272; 78 J. P. 212; 30 T. L. R. 223; 24 Cox, C. C. 43; 9 Cr. App. Rep. 252, C. C. A.

**2062. Extortion from different persons on different days.**—*R. v. ROBERTS*, No. 1957, *ante*.

**2063. Subornation of four persons to commit**

**perjury.**—An indictment charged that prisoners & each of them did endeavour to suborn four persons to commit perjury.

"They did suborn" implies that they & each of them did suborn, & if the indictment were, that they did suborn, it would have been good (*RAYMOND, C.J.*).—*R. v. LONGBOTOM* (1729), 1 Barn. K. B. 314; Fitz-G. 56; 94 E. R. 213.

**2064. Unlawful acquisition of various articles of food—Food Hoarding Order, 1917.**—Where a person was convicted for that he, on or between Apr. 9, 1917, & Nov. 22, 1917, did unlawfully acquire various articles of food, to wit, sugar & flour, so that the quantity in his possession at any one time exceeded the quantity ordinarily required for use & consumption in his household, contrary to the above ord.:—*Held*: a separate offence was committed in respect of each article of food hoarded, & as the conviction disclosed two offences, it was bad for duplicity.—*R. v. HAMMICK, Ex p. MURDOCH* (1918), 87 L. J. K. B. 846; 82 J. P. 169; 34 T. L. R. 342; 16 L. G. R. 467, D. C.

#### (b) Acts charged Disjunctively.

**2065. Where indictment may apply to either of two offences.**—An indictment which may apply to either of two different definite offences, & does not specify which, is bad.—*R. v. MARSHALL* (1827), 1 Mood. C. C. 158, C. C. R.

*Annotations*:—*Reid.* *R. v. Bowen* (1844), 1 Cox, C. C. 88; *R. v. O'Brian, Rogan, Donovan, Power, Quinn & McCann* (1844), 1 Cox, C. C. 126.

**2066. Doing or causing to be done.**—An indictment in the disjunctive for "making & forging, or causing to be made & forged," is bad, for uncertainty.—*R. v. STOCKER* (1895), 5 Mod. Rep. 137; 1 Salk. 371; 87 E. R. 568.

*Annotations*:—*Fold.* *R. v. Flint* (1737), Lee temp. Hard. 370. *Consd.* *R. v. Morley* (1827), 1 Y. & J. 221. *Reid.* *R. v. Ward* (1726), 1 Barn. K. B. 10; *R. v. Stoughton* (1731), 2 Stra. 901; *R. v. Middlehurst* (1757), 1 Burr. 399.

**2067.** —[*R. v. STOUGHTON* (1731), 2 Stra. 901; 1 Barn. K. B. 347; 93 E. R. 927; *sub nom.* *R. v. STOWTON*, 1 Barn. K. B. 425.

**2068.** —[An indictment charging the offence in the disjunctive, as "conveying or causing to be conveyed," is bad.—*R. v. FLINT* (1737), Lee temp. Hard. 370; 95 E. R. 240.

*Annotation*:—*Reid.* *R. v. Morley* (1827), 1 Y. & J. 221.

MUSAI SINGH v. R. (1913), 1 L. R. 41 Cal. 66.—*IND.*

**f.** —[An accused should not be charged with more than one offence in a particular count. If it is clear on the face of the indictment that a count contains more than one offence, & no objection is taken before the plea, or if it is not clear, & evidence is attempted to be led & no objection is taken, it is too late to raise the objection afterwards where there is no prejudice to the accused.—*R. v. VIVIAN* (1917), T. P. D. 588.—*S. AF.*

**g. Offence charged on divers days.**—While an indictment charging the commission of a certain offence "on or about Aug. 8, 1920, & on & at divers other days & times, before that date" is objectionable in that it charges the commission of more than one offence, yet if no evidence is offered of other offences before said date, it cannot be said that the irregularity caused any substantial wrong or miscarriage to the accused, & under Criminal Code, s. 1019, a ct. of appeal should not hold that the trial judge was wrong in refusing to quash the indictment.—*R. v. PARKIN*, [1922] 1 W. W. R. 732; 66 D. L. R. 175; 37 Can. Crim. Cas. 35; 31 Man. L. R. 438.—*CAN.*

**h. Embezzlement.**—Deft. was charged with having between certain dates,

while acting as cashier, received various sums of money for which he was bound to account, but which he unlawfully & fraudulently converted to his own use. Objection was taken on the part of deft., that each taking constituted a separate offence, leave to amend was granted by substituting separate charges covering the amount specified in the original charge.—*R. v. CROSS* (1909), 43 N. S. R. 320; 6 E. L. R. 414; 14 Can. Crim. Cas. 171.—*CAN.*

**k.** —[Under Embezzlement Act no one act of embezzlement can be added or in any way worked out by proving any other act of embezzlement; each charge is perfectly independent of the other, & the corpus of the crime in each case is the particular act of embezzlement charged, & not a general intention or design to embezzle. It is therefore right that the different acts of embezzlement, neither having any legal connection with the crime involved in the other, should be stated in different counts.—*R. v. DUFFY* (1849), 1 Ir. Jur. 81, 105.—*IR.*

**l. Assault & neglect.**—A father was charged with neglect of his son. The first count of the indictment averred not only wilful neglect but also assault. There was a second count for assault. The only evidence

of assault was that the son was deprived of his liberty by the door of his room being fastened. The jury found prisoner guilty of wilful neglect, but acquitted him of assault:—*Held*: the conviction should stand.—*R. v. WATSON* (1896), 30 I. L. T. 135.—*IR.*

**m. Adultery.**—A conviction for adultery on two counts of an indictment, the first charging an offence on Sept. 16, 1913, & the second an offence on Mar. 14, 1914, will not be quashed on a case reserved on objection that the evidence adduced in support of the second count was not admissible in support of the first, if the accused failed to avail himself of the privilege of applying to have each count tried separately.—*R. v. STRONG* (1915), 43 N. B. R. 100.—*CAN.*

#### PART VI. SECT. 4, SUB-SECT. 8.—B. (b).

**2065 i. Where indictment may apply to either of two offences.**—An indictment libelled that the accused, M. & C., "did steal E., a girl aged eight years & three months, then resident with her grandfather, N.": " & further or otherwise," the accused C., "knowing E. to have been stolen, did, for the purpose & with the effect of presenting the girl's mother, R. & N., or either of them, obtaining the custody

## Sect. 4.—Form of indictments: Sub-sect. 8, B. (b);

**2069.** —.]—Upon indictments it has been so determined that an alternative charge is not good; as forged or caused to be forged, though one only need be proved if laid conjunctively as "forged & caused to be forged" (LORD MANSFIELD, C.J.).—R. v. MIDDLEHURST (1757), 1 Burr. 399; 97 E. R. 369.

*Annotations.*—**Refd.** *Ex p. Rabbits & Parsons* (1825), 3 L. J. O. S. K. B. 230; *Ex p. Pain* (1826), 5 B. & C. 251; *Ex p. Purdy* (1850), 9 C. B. 201.

**2070.** —.]—An information stating that deft. imported or caused to be imported foreign silks, is bad for uncertainty.—R. v. MORLEY (1827), 1 Y. & J. 221; 148 E. R. 653.

*Annotation.*—**Refd.** A.-G. v. Barrell (1827), 1 Y. & J. 495.

**2071.** —.]—R. v. BRADLAUGH, No. 2106, *post*.

**2072. "Assisting or otherwise concerned in"**—8 Anne, c. 7, s. 17.]—On objection to a count in an information under sect. 17 of the above Act, charging that deft. was assisting, or otherwise concerned in, the unshipping of prohibited & uncustomed goods, that it was a charge of two distinct offences by the same count, & therefore bad, either for duplicity or uncertainty:—**Held:** the words did not involve two distinct offences. It was the established & ancient practice, *curso scaccarii*, so to charge the offence in such informations.—A.-G. v. FARR (1817), 4 Price, 122; 146 E. R. 414.

*Annotation.*—**Consd.** R. v. Morley (1827), 1 Y. & J. 221.

**2073. Servant or agent.**—SMYTHES CASE (1022), Palm. 318; 81 E. R. 1101.

*Annotation.*—**Mentd.** Shoppee v. Nathan, [1892] 1 Q. B. 245.

**2074. Messuage or tenement.**—Where an indictment was laid for a forcible entry into a certain messuage or tenement, & one garden & one orchard:—**Held:** the indictment was faulty as to the messuage or tenement, but good for the residue.—R. v. BANKS (1725), Sess. Cas. K. B. 103; 93 E. R. 104.

**2075. Used violence or intimidated—Conspiracy & Protection of Property Act, 1875 (c. 86), s. 7 (1).**—Three counts of an indictment charged a prisoner under sect. 7, sub-sect. 1 of the above Act with having "with a view to compel K. to abstain from that for which he had a legal right to do, used violence to or intimidated K."—**Held:** the indictment was bad for duplicity.—R. v. EDMONDES (1895), 59 J. P. 776.

**2076. Not authorised by Indictments Act, 1915 (c. 90)—Stole or with intent to steal ripped & severed or broke—Larceny Act, 1916 (c. 50), s. 8 (1).**—The Indictments Act, 1915, (c. 90) Sched. 1, r. 5, does not authorise the charging in one count of an indictment of two separate felonies in the alternative. Therefore an indictment under the Larceny Act, 1916 (c. 50), s. 8 (1), which charges a prisoner in one count that he "stole, or, with intent to steal, ripped & severed or broke," certain fixtures, is bad for uncertainty.—R. v. MOLLOY, [1921] 2 K. B. 364; 90 L. J. K. B. 862; 85 J. P. 233; 37 T. L. R. 611; 65 Sol. Jo. 534; 27 Cox, C. C. 34; 15 Cr. App. Rep. 170, C. C. A.

of the girl E., detain & secrete the girl "between certain specified dates in certain specified houses.—**Held:** the charges were libelled alternatively, & it did not make the indictment incompetent that they were also libelled cumulatively.—H.M. ADVOCATE v. COOK (1897), 2 Adam, 471; 5 S. L. T. 254.—**SCOT.**

n. "Manage or assist in management of."—A husband & wife were charged that they did manage or assist in the management of a brothel:

—**Held:** conviction was not open to the objection of being a general conviction upon alternative charges in respect that "manage" & "assist in the management of" were not mutually exclusive & consequently were not truly alternative charges.—VAUGHAN v. SMITH, [1919] S. C. (J.) 9.—**SCOT.**

o. "Cheque or order."—An indictment describing the forged instrument as a cheque or order for the payment of money was held good, the

## SUB-SECT. 9.—JOINDER OF DEFENDANTS.

## A. Joint Offences.

**2077. General rule.**—Two persons may be jointly indicted for speaking words, though a joint action of the case cannot be brought against two for words spoken by them both (*per CUR.*).—WILLIAMS v. CUSTODES, (1650), Sty. 244; 82 E. R. 680.

**2078.** —.]—Where two persons joined in an act of singing a libellous song in the street at a person's door with intent to discredit him & his children:—**Held:** this was one entire offence & both defts. might be joined in the same indictment.—R. v. BENFIELD & SAUNDERS (1760), 2 Burr. 980; 97 E. R. 664.

*Annotations.*—**Folld.** Young v. R. (1789), 3 Term Rep. 98. **Refd.** O'Connell v. R. (1844), 11 Cl. & Fin. 155; R. v. Castro (1880), 5 Q. B. D. 490; R. v. Lockett, Grizzard, Gutwirth & Silverman, [1914] 2 K. B. 720.

**2079.** —.]—YOUNG v. R., No. 2148, *post*.

**2080.** —.]—Where A., knowing that goods have been stolen, directs B., his servant, to receive them into his premises, & B., in pursuance of that direction, afterwards receives them in A.'s absence, B. knowing that they had been stolen, they may be jointly indicted for receiving them.—R. v. PARR, BROWN, MILLER & HOLBORNE (1841), 2 Mood. & R. 346.

*Annotations.*—**Distd.** R. v. Matthews (1850), 4 Cox, C. C. 214. **Refd.** R. v. Wiley (1850), 2 Don. 37.

**2081. Extortion by two—From same person.**—If two collectors of rates collect money fraudulently from the same person, they may be indicted for it jointly.—R. v. ATKINSON (1706), 11 Mod. Rep. 79; 1 Salk. 382; 2 Ld. Raym. 1248; 88 E. R. 906.

*Annotation.*—**Refd.** Hardyman v. Whitaker (1748), 2 East, 573, n.

**2082. Joint result—From acts of defendants severally.**—On an indictment for nuisance to a public canal navigation, the jury found that the acts creating the nuisance were done by defts. severally:—**Held:** as the nuisance was the result

in one indictment, which stated the acts to have been several.—R. v. TRAFFORD (1831), 1 B. & Ad. 874; 109 E. R. 1011; *on appeal, sub nom.* TRAFFORD v. R. (1832), 8 Bing. 204, Ex. Ch.

*Annotations.*—**Mentd.** R. v. Derbyshire (1842), 2 Q. B. 745; Tancred v. Christy (1843), 12 M. & W. 316; R. v. G. N. of England Ry. (1846), 9 Q. B. 315; Campbell v. R. (1847), 11 Q. B. 814; De Bode v. R. (1849), 14 Jur. 970; Rochdale Canal Co. v. King (1849), 14 Jur. 16; R. v. Charlesworth (1861), 1 B. & S. 460. Ridge v. Mid. Ry. (1888), 53 J. P. 55; Gerrard v. Crowe, [1921] 1 A. C. 395.

**2083. Defendants not jointly implicated in each offence—Election by prosecution.**—If several defts. are charged in one indictment with several assaults, & the evidence shows that they were not all jointly implicated in each, prosecutors will be put to their election as to which count they will proceed upon. They will not be allowed to convict some of the defts. on one count, & others upon another.—R. v. GREEN (1847), 11 J. P. 246.

**2084. Effect of proof of distinct felonies.**—Two persons charged in an indictment with a joint felony ought not to be sentenced thereon on proof of two distinct felonies. If a verdict of

word "or" being taken not as disjunctive, but as meaning otherwise called.—R. v. HALL (1877), 3 C. A. 317.—**N.Z.**

## PART VI. SECT. 4, SUB-SECT. 9.—A.

p. *Misdemeanour against registrar & his deputy.*—An indictment charging a misdemeanour against a registrar & his deputy jointly is good if the facts establish a joint offence.—R. v. BENJAMIN (1854), 4 C. P. 179.—**CAN.**



guilty be given against both, judgment may be given against the party who is proved to have committed the first felony in order of time.—*R. v. DOVEY & GRAY* (1851), 2 Den. 86; 4 New Sess. Cas. 572; 20 L. J. M. C. 105; 16 L. T. O. S. 539; 15 J. P. 69; 15 Jur. 230; 4 Cox, C. C. 428; *sub nom. R. v. GRAY*, T. & M. 411, C. C. R.

**2085. Court may order separate trials—Indictment containing joint & several counts.]**—An indictment on which several defts. are charged may contain counts charging offences against individual prisoners as well as counts charging all the prisoners jointly. If it is likely that injustice may be caused to any prisoner by trying all the prisoners together, the ct. may order prisoners to be tried separately.—*R. v. COX* (1898), 77 L. T. 534; 14 T. L. R. 122; 18 Cox, C. C. 672, C. C. R.

**2086. Each defendant need not be charged in each count of joint indictment.]**—In a joint indictment each deft. need not be charged in each count thereof.

What charges may be joined in the same indictment is within the discretion of the judge at the trial, subject to the provisions of Indictments Act, 1915 (c. 90).—*R. v. HOOLEY, MACDONALD & WALLIS* (1922), 92 L. J. K. B. 78; *sub nom. R. v. HOOLEY, R. v. MACDONALD, R. v. WALLIS*, 127 L. T. 228; 87 J. P. 4; 38 T. L. R. 724; 27 Cox, C. C. 248; 16 Cr. App. Rep. 171, C. C. A.

#### B. Separate Offences.

**2087. General rule.]**—Although four persons can be indicted for several offences in one indictment, yet if their offences are several the indictment ought to be severable.—*R. v. ANON.* (1623), Palm. 367; 2 Roll. Rep. 345; 81 E. R. 1127.

*Annotations:—Refd. R. v. HARVEY* (1731), Sess. Cas. K. B. 122; *R. v. KINGSTON* (1806), 8 East, 41.

**2088. —.]**—*BROOKE'S CASE* (1640), 2 Hale, P. C. 174; 2 Roll. Abr. 81.

*Annotations:—Refd. R. v. ATKINSON* (1706), 1 Salk. 382; *R. v. WESTON* (1725), 1 Stra. 623; *Hardyman v. Whitaker* (1748), 2 East, 573, n.; *R. v. KINGSTON* (1806), 8 East, 41.

**2089. —.]**—*ANON.* (1647), cited 2 Hale, P. C. 174.

*Annotation:—Refd. R. v. KINGSTON* (1806), 8 East, 41.

**2090. —.]**—Where several persons were indicted jointly for an offence which must be several:—*Held*: the indictment would be quashed.—*R. v. WESTON* (1725), Sess. Cas. K. B. 188; 1 Stra. 623; 93 E. R. 190.

**2091. —.]**—An indictment for unlawfully exercising a trade may be quashed if several defts. be joined in it.—*R. v. TUCKER* (1767), 4 Burr. 2046; 98 E. R. 66.

**2092. — Not an absolute rule of law.]**—

#### PART VI. SECT. 4, SUB-SECT. 9.—B.

**2087 i. General rule.]**—Several accused cannot be charged in the same indictment if the facts constituting the alleged offence are in each case distinct & separate, even though the charges are in respect of the same class of offence.—*CHANG WING v. R.* (1905), T. S. 767.—**S. AF.**

**2087 ii. —.]**—Where two accused persons were jointly charged in one count with having used abusive language in contravention of Police Offences Act, s. 10:—*Held*: the use of abusive language by the two accused, being an offence which is several in its nature, it was not competent to charge the accused jointly.—*R. v. KEYTER* (1917), E. D. L. 250.—**S. AF.**

**2095 i. On charge of perjury.]**—In cases of giving false evidence, a separate charge against each prisoner must be framed, & separate trials held.—*ANON.* (1867), 3 Mad. 32.—**IND.**

**2095 ii. —.]**—A person accused of perjury is entitled to have the specific charge made against him tried quite independently of a like charge against another person.—*R. v. BHAVANISKAR HARIBHAI* (1868), 5 Bom. Cr. Ca. 55.—**IND.**

**2095 iii. —.]**—*R. v. RUTTEE RAM* (1870), 2 N. W. 21.—**IND.**

**2095 iv. —.]**—*R. v. MAHARAJ MISSEER* (1871), 7 B. L. R. 66; 16 W. R. 47.—**IND.**

**2095 v. —.]**—The act of perjury being a separate act prisoners should be indicted separately therefor.—*R. v. APRIL* (1889), 9 E. D. C. 177.—**S. AF.**

#### PART VI. SECT. 4, SUB-SECT. 9.—C.

**2100 i. Matter for discretion of court.]**—*PROSKO v. R.* (1922), 66 D. L. R. 340; 37 Can. Crim. Cas. 199; 63 S. C. R. 226.—**CAN.**

**2100 ii. —.]**—*H.M. ADVOCATE v. DREVER & TYRE* (1885), 5 Couper, 680; 23 S. L. R. 77.—**SCOT.**

It is no objection on demurrer that several different defts. are charged in different counts of an indictment for offences of the same nature, though it may be a ground for application to the discretion of the ct. to quash the indictment.—*R. v. KINGSTON* (1806), 8 East, 41; 103 E. R. 259.

*Annotations:—Refd. R. v. COX* (1897), 77 L. T. 534. *Refd. R. v. CASPAR* (1839), 9 C. & P. 289; *Castro v. R.* (1881), 6 App. Cas. 229.

**2093. —.]**—If two persons are jointly indicted for obstructing a highway, & on the evidence no joint act of obstruction appears, the judge will, as soon as the case for the prosecution is closed, put prosecutor's counsel to elect which of them they would proceed against, & then take an acquittal for the other.—*R. v. LYNN & DEBNEY* (1824), 1 C. & P. 527, N. P.

**2094. —.]**—Larceny Act, 1861 (c. 96), s. 5, does not authorise the joinder in one indictment of a count for larceny against one deft. alone with a count for another larceny against the same deft. & another person jointly. Such an indictment is bad & may be quashed after verdict.—*R. v. EDWARDS*, [1913] 1 K. B. 287; 82 L. J. K. B. 347; 108 L. T. 815; 29 T. L. R. 181; 23 Cox, C. C. 380; 8 Cr. App. Rep. 128; *sub nom. R. v. GILBERT, R. v. EDWARDS*, 77 J. P. 135; 57 Sol. Jo. 187, C. C. A.

*Annotation:—Refd. R. v. THOMPSON*, [1914] 2 K. B. 99.

**2095. On charge of perjury.]**—*R. v. MACAJAH* (1731), 2 Barn. K. B. 24; 94 E. R. 332.

**2096. —.]**—Several defts. cannot be joined in one indictment for perjury.—*R. v. PHILIPS* (1731), 2 Stra. 921; 2 Barn. K. B. 80; 93 E. R. 943.

*Annotations:—Distd. R. v. YOUNG* (1788), 1 Leach, 505. *Refd. Ruck v. A.-G.* (1858), 3 H. & N. 208.

**2097. —.]**—Perjury is not an act in which several can join, & several defts. cannot be joined in an indictment for perjury.—*R. v. HARVEY* (1731), Sess. Cas. K. B. 122; 93 E. R. 124.

**2098. No objection after verdict unless application made for separate trial.]**—Where two receivers are charged in the same indictment with separate & distinct acts of receiving, it is too late after verdict to object that they should have been indicted separately.—*R. v. HAYES* (1838), 2 Mood. & R. 155, N. P.

**2099. —.]**—If a co-prisoner does not apply to be tried separately, no objection on the ground of a joint trial will be entertained by the Ct. of Criminal Appeal.—*R. v. BAKER* (1909), 2 Cr. App. Rep. 249, C. C. A.

#### C. When separate Trial Ordered.

**2100. Matter for discretion of court.]**—*R. v. RAM & RAM*, No. 630, *ante*.

**q. — Not reviewable on appeal.]**—Granting or refusing of an application for separate trial is entirely in the discretion of the presiding judge, & where such discretion has been exercised the Supreme Ct. has no power to interfere.—*R. v. LEO* (1914), T. P. D. 299.—**S. AF.**

**r. — Prejudice to one defendant.]**—Test for determining whether prisoners charged on joint presentment should be tried separately is whether prisoners, or either of them, would be prejudiced by a joint trial.—*R. v. HODGSON*, [1915] V. L. R. 119.—**AUS.**

**s. —.]**—The general rule is that persons jointly indicted should be jointly tried; but when in any particular instance this would work an injustice to any such joint defts. the judge should, on due cause being shown, permit a severance & allow separate trials. One ground for the exercise of this discretion is that evidence which is incompetent against one deft. is to be introduced against another, &



**Sect. 4.—Form of indictments: Sub-sect. 9, C.; sub-sect. 10, A. & B.]**

**2101.** —.]—It is within the discretion of the judge, at the trial whether defts. jointly indicted shall be tried severally, & unless one has been prejudiced by such joint trial, the ct. will not interfere, though it may hear appeals of such defts. separately.—*R. v. BYWATERS* (1922), 17 Cr. App. Rep. 66, C. C. A.

**2102. Reviewable by Court of Criminal Appeal.**—When prisoners are jointly indicted & application is made for them to be tried separately, the matter is one for the discretion of the judge, but such discretion must be exercised judicially. But even if it had been exercised judicially the conviction would be quashed if it appeared to the Ct. of Criminal Appeal that a miscarriage of justice had resulted from prisoners having been tried together.—*R. v. GIBBINS & PROCTOR* (1918), 82 J. P. 287; 13 Cr. App. Rep. 134, C. C. A.

**2103. Where one prisoner implicates another.**—Where several prisoners are jointly indicted, the judge will not allow a separate trial on the ground that the depositions disclose statements & confessions made by one prisoner implicating another, which are calculated to prejudice the jury, & that there is no legal evidence disclosed against the other prisoner.—*R. v. BLACKBURN, WALSH & MOORE* (1853), 6 Cox, C. C. 333.

*Annotation:—Mentd. R. v. Godinho* (1911), 76 J. P. 16.

**2104.** —.]—*R. v. JACKSON*, No. 560, *ante*.

**2105.** —.]—When it appears that the defence of each of two persons jointly indicted is incrimination of the other, the ct. favours a separate trial of each.—*R. v. LEE & PARKES* (1917), 13 Cr. App. Rep. 39, C. C. A.

**2106. When co-prisoner previously convicted of similar offence.**—(1) On an indictment of three persons jointly for publishing blasphemous libels in certain numbers of a newspaper, two of them, whose names were on it as editor & publisher, having already been convicted on a charge of publishing similar libels in another number of the paper:—*Held*: the third, whose case was that he

was not connected with the paper at all, ought to be, on his application, tried separately, as his trial with the others might possibly prejudice him in his defence, especially as he desired to call them as witnesses, while it did not appear that his separate trial could at all embarrass the case for the prosecution, as prosecutor would be entitled to give any evidence in his power to fix deft. with a joint liability for the acts of the others.

(2) An objection that, as there were fourteen counts founded on as many libels, contained in eight different numbers of the paper, prosecutors might be called upon to elect on which of them they would proceed, was overruled.

(3) Deft. objected that he was charged with having published, or caused to be published, a libel:—*Held*: the objection would be overruled.—*R. v. BRADLAUGH* (1883), 15 Cox, C. C. 217.

*Annotations:—Generally, Mentd. R. v. Kinghorn*, [1908] 2 K. B. 949. *Re Bowman, Secular Soc. v. Bowman*, [1916] 2 Ch. 447.

**2107. Where joint & several counts in indictment.**—*R. v. Cox*, No. 2085, *ante*.

**2108. On trial as habitual criminal.**—Prisoners jointly indicted must be tried separately on an allegation of being habitual criminals.—*R. v. BLAKE* (1910), 74 J. P. 336; 4 Cr. App. Rep. 275, C. C. A.

**2109.** —.]—It is not an absolute rule of law that only one prisoner can be tried at a time for being an habitual criminal.—*R. v. TAYLOR & CONEY* (1910), 5 Cr. App. Rep. 168, C. C. A.

**2110. To enable wife of one prisoner to give evidence for prosecution.**—*R. v. SHERIFF* (1900), 35 L. Jo. 604.

**SUB-SECT. 10.—JOINDER OF OFFENCES.**

**A. In General.**

*See, now, Indictments Act, 1915* (c. 90), ss. 4 & 5, & r. 3.

**2111. Counts in indictment—Each count equivalent to a separate indictment.**—*LATHAM v. R.* (1864),

that it would work prejudicially to the former with the jury.—*R. v. MURRAY & MAHONEY* (No. 2), [1917] 1 W. W. R. 404; 10 Alta. L. R. 275; 27 Can. Crim. Cas. 247; 33 D. L. R. 702.—**CAN.**

**t.** —.]—Separate trial of two prisoners jointly indicted allowed when there was possibility of both being prejudiced by admission of evidence admissible only against each respectively.—*R. v. BRANDE* (1912), S. R. 93.—**S. AF.**

**a.** —.]—Where two or more accused are indicted jointly, the question whether or not separate trials should be ordered must depend on whether the ends of justice would be best subserved by such course, & that must be judged from the special circumstances of the particular case.—*R. v. REYNOLDS & PETERSON* (1911), 30 N. Z. L. R. 801.—**N.Z.**

**2103 i. When one prisoner implicates another.**—Deft. & C. were tried jointly on a charge of murder. C. had made a statement in writing, with respect to the crime, before trial. The Crown did not offer it in evidence, but, in the cross-examination of C., who testified on his own behalf, counsel for the Crown asked him if he had made a statement, & he said that he had, but the contents of the statement were not disclosed. Counsel for deft. then cross-examined C. on the statement, & on re-examination, C.'s counsel put the statement in, after objection by counsel for the Crown, but without objection by counsel for deft., he

stating his reason for not objecting being that he did not wish to prejudice his client's case. There was nothing in the statement which had not already been brought out in the examination & cross-examination of C.:—*Held*: the trial judge properly exercised his discretion in refusing a separate trial.—*It. v. DAVIS* (1914), 19 B. C. R. 50.—**CAN.**

**2103 ii.** —.]—A. & B. were jointly indicted for the murder of C. The depositions disclosed statements made by A. in the absence of but incriminating B.:—*Held*: the proper course was to try the prisoners separately.—*R. v. TAYLOR & DALY* (1902), 37 L. T. 28.—**IR.**

**2107 i. Where joint & several counts in indictment.**—The panel submitted that he was not bound to plead or be tried upon a libel which charged him with three connected murders, committed each at a different time & place, but also combined his trial with that of another panel who was not alleged to have had any concern with two of the offences of which he was accused:—*Held*: indictment was relevant to infer the pains of law, but the charges ought to be separately proceeded in, & Lord Advocate could select which charge should be first brought to trial.—*BURKE & M'DOUGAL* (1828), Sh. Just. 203; Syme, 345.—**SCOT.**

**2107 ii.** —.]—Five persons were charged upon an indictment which contained eight charges of concealing property falling under bankruptcy,

with intent to defraud creditors. The charges related respectively to the bankruptcy of one or other of three persons. All the acts charged were of a similar kind, & were committed about the same time, & in the same neighbourhood. Two of the bankrupts were among the accused. One of the accused, not a bankrupt, was charged under one of the charges only. Each of the remaining accused was charged under two or more of the charges, but none of the accused was charged under all the charges. At the first dict the Sheriff granted a motion for separation of the trials in the case of the accused who was charged under one charge only, & refused the motion as regarded the remaining accused, three of whom were convicted. Suspension brought on the ground that the Sheriff had acted oppressively in refusing to separate the trials refused.—*SANGSTER v. H.M. ADVOCATE* (1896), 24 R. (Ct. of Sess.) 3.—**SCOT.**

**b. Joint conspiracy to steal.**—An application by one of two persons jointly indicted for theft for a separate trial refused where the charge amounted to one of a joint conspiracy to steal.—*It. v. GIBSON & HOLROYD* (1905), 24 N. Z. L. R. 799.—**N.Z.**

**PART VI. SECT. 4, SUB-SECT. 10.—A.**

**2111 i. Counts in indictment—Each count equivalent to a separate indictment.**—Each count is a separate indictment in itself.—*R. v. THORNTON* (1878), 2 P. & B. 140.—**CAN.**

**c. Joinder of felony &**

5 B. & S. 635; 4 New Rep. 329; 33 L. J. M. C. 197; 10 L. T. 571; 28 J. P. 727; 10 Jur. N. S. 1145; 12 W. R. 908; 9 Cox, C. C. 516; 122 E. R. 968.

*Annotation*.—*Reid*. *R. v. Paul* (1890), 25 Q. B. D. 202.

**2112. — Each count should be complete.—Should not be laid with reference to another count.]**

—In an indictment, charging prisoner with uttering false coin, & with having other counterfeit money in his possession, the fact of uttering should be distinctly charged in the count for the latter offence, & not with reference to another count.—*R. v. KELLY* (1799), 3 Esp. 28.

**2113. — Indictment good if one count good.]**—*R. v. BATHURST* (1755), Say. 225; 96 E. R. 860.

*Annotations*.—*Mentl*. *R. v. Storr* (1765), 3 Burr. 1698; *R. v. Wilson* (1799), 8 Term Rep. 357; *Hemmings v. Stoke Poges Golf Club* (1920), 1 K. B. 720.

**2114. — Counts should not be multiplied unnecessarily.]**—*R. v. KING*, No. 2151, *post*.

**2115. —**—Charges which can conveniently be joined in one indictment should be so joined.—*R. v. SMITH* (1923), 17 Cr. App. Rep. 181, C. C. A.

**2116. When charges are joined all the counts should be tried together.]**—Where charges are joined, under Indictments Act, 1915 (c. 90), r. 3, all the counts should be tried together.—*R. v. AILES* (1918), 13 Cr. App. Rep. 173, C. C. A.

**2117. No ground for objection to indictment.]**—It is no ground of objection to an indictment in arrest of judgment that it contains several counts for distinct felonies.—*R. v. HEYWOOD* (1864), Le. & Ca. 451; 4 New Rep. 155; 33 L. J. M. C. 133; 10 L. T. 464; 28 J. P. 375; 12 W. R. 764; 9 Cox, C. C. 479, C. C. R.

*Annotations*.—*Fold*. *R. v. Elliott* (1908), 99 L. T. 200. *Consd*. *R. v. Lockett, Grizzard, Gutwirth & Silverman*, [1914] 2 K. B. 720.

**2118. —**—*CASTRO v. R.*, No. 2150, *post*.

**2119. —**—On an appeal against a conviction of larceny, upon the ground that a count had been added to the indictment containing a separate felony:—*Held*: where more than one felony was included in the indictment the judge at the trial might either quash the indictment or make the prosecution elect upon which count they would proceed, & in this case the prosecution had elected, & therefore the indictment was good.—*R. v. ELLIOTT* (1908), as reported in 99 L. T. 200; 72 J. P. 285; 24 T. L. R. 645; 52 Sol. Jo. 535; 21 Cox, C. C. 666; 1 Cr. App. Rep. 15, C. C. A.

*meanour*.]—Applt., a British subject residing at Samos, who had with others determined at a public meeting to lynch certain persons then lying under a charge of murder & committed for trial to U.S.A., was tried with two others for murder, & also on a separate count for conspiracy to murder:—*Held*: applt. was rightly convicted, notwithstanding a count for felony, upon which he was acquitted, was charged in the same indictment as that on which he was convicted of misdemeanour, & even if objection lay to such indictment, it should have been taken at the trial.—*HUNT v. R.* (No. 1) (1878), Udal, 28.—**FJJ1**.

**d. —**—In an indictment for rape, a count may be inserted for an assault with intent to commit rape.—*R. v. MATTHEWS* (1891), 12 N. S. W. L. R. 64.—**AUS**.

**e. Evidence only applicable to one offence—Direction to jury.**—Where two counts are included in one presentment & evidence is given which is applicable to one count, but not to the other, the Full Ct. will not interfere if the trial judge in his summing up has directed the jury to apply the evidence to the

count to which it is not applicable.—*R. v. JOHANSEN*, [1917] V. L. R. 584.—**AUS**.

**f. Larceny—Uttering base coin.]**—An indictment for larceny of coin cannot be joined with an indictment for uttering base coin.—*R. v. ROPER* (1832), 1 *Craw. & D.* 185.—**IR**.

**g. Same offence charged in different ways in different counts.]**—*R. v. FALKNER* (1876), 7 R. L. O. S. 544.—**CAN**.

#### PART VI. SECT. 4, SUB-SECT. 10.—B.

**2120 i. Discretion of judge absolute.]**—It is within the discretion of the trial judge, where there are several counts, to direct whether they shall be tried together or not.—*R. v. CLARKE* (1908), 9 W. L. R. 243; 1 *Alta. L. R.* 358.—**CAN**.

**2120 ii. —**—Any number of charges of theft against one accused may be tried together, unless the ct. orders otherwise.—*R. v. KELLY* (1916), 35 W. L. R. 46; (1917) S. C. R. 220.—**CAN**.

**2120 iii. —**—Criminal Code Act, 1893, s. 373 (3), was intended to give

#### B. Discretion of Court.

**2120. Discretion of judge absolute.]**—If a receiver be indicted in one count as an accessory, & in another count for the substantive felony, under 7 & 8 Geo. 4, c. 29, s. 54, this is not a misjoinder which can be taken advantage of, either as a ground for quashing the indictment, or of demurrer. It is a matter quite in the discretion of the judge, & whenever it is clear that there is only one offence, & the joinder of the counts cannot prejudice prisoner, this objection ought not to prevail.—*R. v. AUSTIN* (1837), 7 C. & P. 796.

**2121. —**—It is in the discretion of the judge whether he will allow several felonies to be given in evidence under one indictment; where they are in fact so mixed as not to be separated without inconvenience, it will be allowed.

Upon an indictment against principal & receiver, where it appears that goods are found on the receiver's premises, which have been taken from prosecutor's premises, it is competent to prosecutor to give evidence of the finding of other goods at the house of the principal, notwithstanding there is no evidence to connect the receiver with them, & the judge will not, under such circumstances, put prosecutor to his election, either at the opening or close of his case.—*R. v. HINLEY* (1843), 2 *Mood. & R.* 524; 2 L. T. O. S. 287; 1 Cox, C. C. 12.

**2122. —**—The ct. will not quash an indictment containing counts for seditious words, unlawful assembly, & riot, or put the Crown to its election, unless it appear that the form of the indictment is likely to embarrass deft. in his defence.—*R. v. FUSSELL* (1848), 6 State, Tr. N. S. 723; 12 J. P. 537; 3 Cox, C. C. 291.

**2123. —**—There is no rule of law that an indictment may not contain several counts charging distinct felonies. It is for the judge presiding at the trial to decide, in his discretion, whether the joinder of counts will embarrass or prejudice accused.

Appls. were charged on an indictment containing several counts charging distinct felonies. The acts charged under the different counts were in substance the same, viz. larcenies & receivings:—*Held*: there was no ground for calling upon the prosecution to elect on which charges they would proceed, & the judge had exercised his discretion rightly.—*R. v. LOCKETT, GRIZZARD, GUTWIRTH & SILVERMAN*, [1914] 2 K. B. 720; 83 L. J. K. B.

the ct. an unrestricted discretion to order counts charging separate offences to be tried separately if for any reason whatever it should appear to the ct. that this course would be conducive to the ends of justice, subject as to the offences which come within sub-sect. 4, to the special provision therein contained. An order for a separate trial of each count ought to be made if it appears that there is a real danger that the evidence upon one count may wrongly be taken into consideration in dealing with another count, or that the prisoner will be seriously embarrassed in his defence. Where this is the case the question of increased expense ought not to be taken into serious consideration. An order made for the separate trial of each count where the indictment contained six separate charges of common assault, alleged to have been committed upon six different persons at different times, extending over a period of two years.—*R. v. SOLAN* (1900), 21 N. Z. L. R. 217.—**N.Z.**

**2120 iv. —**—H.M. ADVOCATE v. FRITCHARD (1865), 5 *Irv.* 88.—**SCOT**.

*Sect. 4.—Form of indictments: Sub-sect. 10, B., C. & D.]*

1193; 110 L. T. 398; 78 J. P. 196; 30 T. L. R. 233; 24 Cox, C. C. 114; 9 Cr. App. Rep. 268, C. C. A.

*Annotation:—Refd. R. v. Starkie, [1922] 2 K. B. 275.*

**2124. — Subject to Indictments Act, 1915 . 90.]—***R. v. HOOLEY, MACDONALD & WALLIS, o. 2086, ante.*

#### *C. Prosecution put to Election.*

**2125. Discretion of court.]—**The application for a prosecution to elect, is an application to the discretion of the judge, founded on the supposition that the case extends to more than one charge, & may therefore be likely to embarrass prisoner in his defence.

In a case of arson, the indictment contained five counts, each of which charged a firing of a house of a different owner. It was opened that the five houses were in a row, & that one fire burnt them all:—*Held*: prosecutor would not be put to elect, as it was all one transaction.—*R. v. TRUEMAN* (1839), 8 C. & P. 727.

**2126. —.]—**Indictment containing three counts for indecent assault. The ct. of trial has a discretion, from which there is no appeal, as to putting the prosecution to election when there is a multiplicity of counts.—*R. v. CURTIS* (1913), 29 T. L. R. 512; 9 Cr. App. Rep. 9, C. C. A.

*Annotation:—Refd. R. v. Seham Yousry* (1914), 84 L. J. K. B. 1272.

**2127. —.]—***R. v. LOCKETT, GRIZZARD, GUTWIRTH & SILVERMAN, No. 2123, ante.*

**2128. —.]—**When an indictment contains two counts, one charging libel & the other charging publication of the libel for the purpose of extorting money, it is for the judge at the trial in his discretion to decide whether the prosecution must proceed on one count of the indictment.—*R. v. SEHAM YOUSRY* (1914), 84 L. J. K. B. 1272; 112 L. T. 311; 31 T. L. R. 27; 24 Cox, C. C. 523; 11 Cr. App. Rep. 13, C. C. A.

*Annotation:—Refd. R. v. Gibbins & Proctor* (1918), 82 J. P. 287.

**2129. Whether prosecutor must elect—Receiving stolen goods at different times.]—**On an indictment against a receiver for receiving several articles, if it appear that they were received at different times, prosecutor may be put to his election.—*R. v. DUNN & SMITH* (1826), 1 Mood. C. C. 146, C. C. R.

#### **PART VI. SECT. 4, SUB-SECT. 10.—C.**

**2125 i. Discretion of court.]—**Prisoner in this case was indicted on two sets of counts, one charging him as a citizen of the United States, the other as a subject of H.M. The judge at the trial refused to put the Crown to an election between the two sets of counts, & the ct. upheld his ruling.—*R. v. SCHOOL* (1866), 26 U. C. R. 212.—**CAN.**

**2125 ii. —.]—**When, on a prosecution for larceny of two articles, the counsel for the prosecution stated that they were stolen at different times, the judge refused to put him to his election until he had seen from the evidence whether it was a case proper for election or not.—**SMART'S CASE** (1841), 1r. Cr. Rep. 15.—**IR.**

**2129 i. Whether prosecutor must elect—Receiving stolen goods at different times.]—***R. v. SUPPRANI* (1882), 13 R. L. O. S. 577.—**CAN.**

**h. — Counterfeiting coin & putting off counterfeit coin.]—**There were two indictments against the prisoner, one under 2 Will. IV. c. 34,

for counterfeiting coin; the other, under the same Act, for putting off counterfeit coin at a lower rate than by its denomination it imported:—*Held*: both such indictments should not be sent to the jury, but counsel for the Crown ought to elect upon which of the indictments they would proceed.—*R. v. HAYES* (1840), 1 Craw. & D. 440.—**IR.**

**k. — Larceny at common law & against the statute.]—**The Crown is not bound, on an indictment containing a count for embezzlement, one for larceny against the statute, & one for larceny at common law, to elect on which to rely.—**M'DONNELL'S CASE** (1841), 1r. Cr. Rep. 211.—**IR.**

**l. — Forcible entry & assault.]—**Prisoner was indicted for a forcible entry & for assault:—*Held*: the Crown could not be compelled to elect, both indictments being founded on the same transaction.—**FEARON'S CASE** (1841), 1r. Cr. Rep. 271.—**IR.**

**m. — Receiving, forging & uttering valuable security.]—**Prisoner was given in charge to the jury on three

**2130. — Obtaining money under false pretences—From different persons under different false pretences.]—**When an indictment for obtaining money under false pretences is in several counts, each of which charges prisoner with having obtained money from a different person under a different false pretence, counsel for the prosecution must elect on which count he will proceed.—*R. v. BASSETT* (1843), 1 L. T. O. S. 480; 1 Cox, C. C. 51.

*Annotation:—Refd. R. v. Welman* (1853), 6 Cox, C. C. 153.

**2131. — Sending separate threatening letters.]—***R. v. WARD* (1864), 10 Cox, C. C. 42.

**2132. — Two separate conspiracies to defraud.]—**Prisoners, wharfingers, & their servants, being indicted, in various counts, for conspiracy to defraud, by false statements as to goods deposited with them, & insured by the owners against fire; one set of counts being laid with reference to a fire occurring on June 7, 1864; & another set with reference to a fire occurring on Nov. 25, 1864:—*Held*: (1) the prosecution must elect on which of the two transactions, in the first instance, to rely; (2) evidence that false statements were knowingly sent in by the servants, which would be for the benefit of the masters; & that afterwards the servants took fraudulent means to conceal the falsehood of the statements, with evidence that the employers had the means of knowing of the falsehood, & knew of the devices used to conceal it, was no evidence to sustain the charge of a fraudulent conspiracy between the employers & servants.

A conspiracy means a combination. In order to make out a conspiracy there must be some concert. The parties must put their heads together to do it. It is not every dishonest act that is the subject-matter of conspiracy. A wrong act may not be an indictable offence if one person only commits it, but if two or more persons conspire, combine, & confederate together to do a wrongful act, it is indictable. In a civil case masters are responsible for the acts of their servants, but I am not aware that in a criminal case that can be done (**MARTIN, B.**).—*R. v. BARRY* (1865), 4 F. & F. 389.

**2133. — Principal & accessory after the fact.]—**It is no objection to an indictment on the face of it, that it charges the same debt. as a principal in the second degree in one count, & as an accessory after the fact in another. The prosecutor cannot be put to his election between these two counts.—*R. v. SMITH, BACON & MODLIN* (1843), 7 J. P. 293.

indictments, one for receiving promissory notes & a valuable security, knowing them to have been stolen, another for forging bank-post bills, & another for uttering forged bank-post bills:—*Held*: Crown was not bound to make election of indictments by giving up any two of the three indictments, & prisoner was not entitled as of right to an acquittal on any two of the indictments.—*R. v. TRENNITZ* (1841), 2 Craw. & D. 163; 1 Leg. Rep. 154.—**IR.**

**n. — Offence charged as committed on two different days.]—**The indictment contained two counts charging the offence to have been committed on different days:—*Held*: the Crown was bound to elect.—*R. v. MACLEAN* (1841), 2 Craw. & D. 350.—**IR.**

**o. — Treason.]—**On an indictment containing counts for feloniously compassing to depose the Queen & also counts for feloniously compassing to levy war against the Queen to force her to change her measures & counsels, the ct. will not put ti

**2134.** — — —.]—Where an indictment contains two counts, the first charging the accused person as principal in a felony, the second charging him as accessory after the fact to the same felony, the prosecution must elect upon which they will proceed.—*R. v. BRANNON* (1880), 14 Cox, C. C. 394.

*Annotation* :—*N.F. R. v. Tuffin & Stone* (1903), 19 T. L. R. 460.

**2135.** — — —.]—Two prisoners were jointly indicted for murder, & in different counts in the same indictment each of them was charged with being an accessory after the fact to the murder committed by the other :—*Held* : the prosecution was not bound to elect upon which counts they would proceed.—*R. v. TUFFIN & STONE* (1903), 19 T. L. R. 640.

**2136.** — — — *Principal & aider & abettor.*—*R. v. FOLKES*, No. 640, *ante*.

**2137.** — — — *Accessory before the fact & after the fact.*—A count charging a person with being accessory before the fact may be joined with a count charging him with being accessory after the fact to the same felony, & prosecutor cannot be required to elect upon which he will proceed, as the party may be found guilty on both.—*R. v. BLACKSON* (1837), 8 C. & P. 43.

*Annotations* :—*Folld. R. v. Smith, Bacon & Modlin* (1843), 7 J. P. 293; *R. v. Tuffin & Stone* (1903), 19 T. L. R. 640. *Consd. R. v. Lockett, Grizzard, Gutwirth & Silverman*, [1914] 2 K. B. 720. *Refd. R. v. Mitchel* (1848), 6 State Tr. N. S. 599.

**Election where two indictments for same offence.**—*See* Nos. 1905, 1909, 1912, *ante*.

#### *D. Joinder of different Felonies.*

**2138. Cases requiring separate trial—Charge of murder should not be joined to any other charge.**—An indictment for murder ought not to contain counts for other offences, such as robbery with violence.—*R. v. JONES*, [1918] 1 K. B. 416; 87 L. J. K. B. 448; 118 L. T. 657; 13 Cr. App. Rep. 86, C. C. A.

**2139.** — — — *Larceny of goods & receiving stolen goods.*—A count for stealing certain articles may not be joined with a count for receiving those & other articles knowing them to have been stolen.—*R. v. WARD* (1860), 2 F. & F. 19.

**2140.** — — — *Receiving goods at different times.*—*R. v. DUNN & SMITH*, No. 2129, *ante*.

**2141. Cases not requiring separate trial—Where acts form part of one transaction—Forgery of bill,**

Crown to its election, the two charges not being repugnant or likely to embarrass the prisoner in his defence.—*R. v. MITCHEL* (1848), 6 State Tr. N. S. 599.—*IR.*

**D. — — — Stealing & receiving stolen property.**—Prisoners were indicted for feloniously stealing £100 in money, one purse, etc., the property of G. There was a second count for receiving £35 in money, one purse, etc., the property of G., then lately feloniously stolen :—*Held* : it did not sufficiently appear that the last-mentioned property was part of, or the same as that contained in the first count, & consequently prisoners were not bound to plead to both counts, & the Crown should elect as to which count they would try the prisoners upon.—*R. v. SANSFIELD* (1852), 6 Cox, C. C. 12.—*IR.*

**g. — — — Indictment for one offence only—Other offences appearing in course of trial.**—Applt. was indicted & convicted of conspiring with S. & others to defraud a municipality by fraudulent means. The evidence showed that the municipality had been defrauded at three different places, & it believed

by jury, applt. could have been convicted of conspiracy with a different person in each place. There was no evidence to show that these persons were connected in any way or even knew one another :—*Held* : the prosecution would not be compelled to elect upon which charge to proceed for the reason that the indictment charged one offence only & the evidence disclosed three separate offences.—*RAPLEY v. R.* (1914), 17 W. A. L. R. 36.—*AUS.*

#### **PART VI. SECT. 4, SUB-SECT. 10.—D.**

**r. Cases requiring separate trial—Three separate murders.**—The panel submits that he is not bound to plead or be tried upon a libel which charges him with three connected murders, committed each at a different time & place, but also combines his trial with that of another panel who is not alleged to have had any concern with two of the offences of which he is accused :—*Held* : indictment is relevant to infer the pains of law, & the Lord Advocate can select which charge shall be first brought to trial.—*BURKE & M'DOUGAL* (1828), Sh. Just. 203; Syme, 345.—*SCOT.*

**s. Cases not requiring separate**

**acceptance & indorsement.**—*R. v. YOUNG* (1805), Russ. & Ry. 280, n.

*Annotation* :—*Mentd. Peacock's Case* (1814), Russ. & Ry. 278.

**2142.** — — — *Arson of several houses.*—*R. v. TRUEMAN*, No. 2125, *ante*.

**2143.** — — — *Separate felonious assaults on same person.*—On an indictment charging several men with shooting a revolver with intent to kill S., shooting a revolver at S. with intent to commit murder, shooting with intent to maim, shooting with intent to do some grievous bodily harm, & wounding with the intent to do S. some grievous bodily harm, the evidence showed that there was one affray in which all the prisoners took part, & that in the course of the affray one shot prosecutor with intent to murder him, & another struck him with intent to do him some grievous bodily harm :—*Held* : the verdict against the former prisoner might be on the first two counts, & the verdict against the latter might be on the last count only.—*R. v. CONNOR* (1913), 77 J. P. 247; 29 T. L. R. 212; 8 Cr. App. Rep. 152, C. C. A.

**2144.** — — — *Separate larcenies & receivings.*—*R. v. HINLEY*, No. 2121, *ante*.

**2145.** — — — —.]—*R. v. LOCKETT, GRIZZARD, GUTWIRTH & SILVERMAN*, No. 2123, *ante*.

**2146.** — — — *Similar acts—Separate acts of rape on same person.*—On an indictment for rape on a child under ten years of age, evidence was admitted of subsequent perpetrations of the same offence on different days previous to the complaint to the mother, it appearing that prisoner had threatened the child on the first occasion :—*Held* : virtually it was in such a case all one continuous offence.—*R. v. REARDEN* (1864), 4 F. & F. 76.

*Annotations* :—*Mentd. R. v. Harris* (1864), 4 F. & F. 342; *R. v. Bond*, [1906] 2 K. B. 389; *R. v. Stone* (1910), 6 Cr. App. Rep. 89; *R. v. Ball*, *R. v. Ball*, [1911] A. C. 47.

**2147.** — — — *Procuring abortion on different women.*—Where a doctor of medicine was charged on certain counts in an indictment with using instruments with intent to procure the miscarriage of three women & on certain other counts with administering & supplying poison or other noxious thing to a fourth woman with the like intent :—*Held* : the evidence in support of the counts alleging the use of instruments was admissible on the trial of the counts alleging the administering & supply of poison or other noxious thing to show

*trial—Murder & manslaughter.*—An indictment contained two counts, one charging murder, the other manslaughter of the same person, on the same day. Upon "a true bill" found, a motion to quash the indictment for misjoinder was refused, the prosecutor electing to proceed on the first count only, & the prisoner was found guilty of manslaughter :—*Held* : indictment was good, & that as the crime charged in the second count was involved in that charged by the first count, prisoner could not be prejudiced, & the trial had been regular.—*THEAL v. R.* (1832), 7 S. C. R. 397.—*CAN.*

**t. — — — Murder committed in three different ways.**—Upon an indictment for murder, containing three counts, charging the prisoner, with the commission of the offence in three different ways, —*Held* : there was no objection to the indictment or to a general finding by the jury.—*O'BRIEN v. R.* (1847), 10 I. L. R. 337.—*IR.*

**a. — — — Murder — Administering poison with intent to kill.**—The relevancy of an indictment, which sets forth a charge of murder, followed by two charges of administering poisonous

**Sect. 4.—Form of indictments: Sub-sect. 10, D, E.**

that prisoner administered & supplied certain pills not in the course of a proper exercise of his profession, but with the unlawful intent to procure the miscarriage of the fourth woman, & therefore, all the counts in the indictment could be tried together.—*R. v. STARKIE*, [1922] 2 K. B. 295; 91 L. J. K. B. 663; 86 J. P. 74; 66 Sol. Jo. 300; 16 Cr. App. Rep. 61, C. C. A.

**E. Joinder of different Misdemeanours.**

**2148. General rule.**—(1) Every crime which may be in its nature joint may be so laid (GROSE, J.).

(2) In misdemeanours it is no objection to an indictment that it contains several charges (BULLER, J.).—*YOUNG v. R.* (1789), 3 Term Rep. 98; 100 E. R. 475; *sub nom. R. v. YOUNG*, 1 Leach, 505; 2 East, P. C. 828.

**Annotations.**—*As to* (2) *Consd. O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *R. v. Mitchell* (1848), 6 State Tr. N. S. 599. *Refd. R. v. Darley* (1803), 4 East, 174; *R. v. Downing & Powys* (1845), 1 Cox, C. C. 156; *Campbell & Haynes v. R.* (1846), 1 Cox, C. C. 269; *Latham v. R.* (1864), 5 B. & S. 635; *R. v. Heywood* (1864), 9 Cox, C. C. 479; *Castro v. R.* (1881), 6 App. Cas. 229; *R. v. Lockett, Grizzard, Gutwirth & Silberman*, [1914] 2 K. B. 720. *Generally, Mentd. R. v. Parker* (1837), 7 C. & P. 825; *R. v. Caspar* (1839), 9 C. & P. 289; *Hamilton v. R.* (1846), 9 Q. B. 271; *R. v. Gray* (1891), 17 Cox, C. C. 299; *R. v. Brailsford*, [1905] 2 K. B. 730.

**2149.**—*There is no objection of any sort to trying a man on one indictment for several distinct misdemeanours of the same nature.*—*R. v. JONES* (1809), 2 Camp. 131; 31 State Tr. 251; *previous proceedings* (1806), 8 East, 31.

**Annotations.**—*Refd. R. v. Stubbs* (1855), 7 Cox, C. C. 48; *Castro v. R.* (1881), 6 App. Cas. 229. *Mentd. R. v. Rowton* (1865), Le. & Ca. 520; *R. v. Roberts* (1878), 38 L. T. 690; *R. v. Baskerville* (1916), 25 Cox, C. C. 524.

**2150.**—*An indictment for perjury contained two counts, charging perjury to have been committed by defts. on two different occasions, one in the progress of a trial, the other in an affidavit in Ch. Both acts of perjury had the same object in view:—Held: though the offences were in this way distinct, they might both be included in the same indictment, & a general finding of guilty on the charges contained in both counts was good.*

At common law there was no objection whatever, in point of law, to bringing a man who was charged with several offences, if those charges were all felonies, or were all misdemeanours, before one petty jury, & making him answer for the whole at one time. The challenges & the incidents of trial are not the same in felony & in misdemeanour, & therefore felony & misdemeanour could not be tried together, but any number of felonies or any number of misdemeanours might (LORD BLACKBURN).—*CASTRO v. R.* (1881), 6 App. Cas. 229; 50 L. J. Q. B. 497; 44 L. T. 350; 45 J. P. 452; 29 W. R. 669; 14 Cox, C. C. 546, H. L.; *affg. S. C. sub nom. R. v. CASTRO* (1880), 5 Q. B. D. 490, C. A.

**Annotations.**—*Refd. R. v. Thompson*, [1914] 2 K. B. 99. *Mentd. R. v. Cox & Railton* (1884), 1 T. L. R. 181; *Dixon v. Farrer* (1886), 17 Q. B. D. 658; *R. v. Poole Corp.* (1887), 19 Q. B. D. 602, 683.

**2151.**—*The counts in an indictment should be restricted to those only which are*

necessary to formulate the charge against deft. To multiply them is to embarrass deft. in his defence.

If the counts in an indictment are numerous it is reasonable to ask the ct. to try each count separately (HAWKINS, J.).—*R. v. KING*, [1897] 1 Q. B. 214; 66 L. J. Q. B. 87; 75 L. T. 392; 61 J. P. 329; 13 T. L. R. 27; 41 Sol. Jo. 49; 18 Cox, C. C. 447, C. C. R.

**Annotation.**—*Consd. R. v. Barron*, [1914] 2 K. B. 570.

**2152. Cases requiring separate trial.—Obtaining from different persons by different false pretences.**—*R. v. BASSETT*, No. 2130, *ante*.

**2153.**—**Two separate conspiracies to defraud.**—*R. v. BARRY*, No. 2132, *ante*.

**2154.**—**Obtaining by false pretences & obtaining by fraud.**—Where a prisoner is charged on an indictment containing several counts, some charging him with obtaining chattels, & some charging him with obtaining credit, on false pretences, the prosecution should be called on to proceed on one count at a time, & prisoner should not be tried upon all the counts at the same time.—*R. v. NORMAN*, [1915] 1 K. B. 341; 84 L. J. K. B. 440; 112 L. T. 784; 79 J. P. 221; 31 T. L. R. 173; 24 Cox, C. C. 681; 11 Cr. App. Rep. 58, C. C. A.

**Annotations.**—*Consd. R. v. Pickering* (1921), 15 Cr. App. Rep. 175. *Refd. R. v. Smith* (1915), 11 Cr. App. Rep. 81.

**2155.**—**Conspiracy to commit crime & committing same crime.**—It is very inexpedient to put into one indictment charges of conspiracy to commit a crime, followed in the same indictment by charges of the committing of the crime.—*R. v. CHARLESWORTH* (1910), 4 Cr. App. Rep. 167, C. C. A.

**2156. Cases not requiring separate trials.—Where acts form part of one transaction.—Night poaching & assaulting a gamekeeper.**—A count for night poaching may be joined with a count on Night Poaching Act, 1828 (c. 69), s. 2, for assaulting a gamekeeper authorised to apprehend, & with counts for assaulting a gamekeeper in the execution of his duty, & for a common assault.—*R. v. FINACANE & WILLIAMS* (1833), 5 C. & P. 551.

**2157.**—**Libel & publishing libel for purpose of extorting money.—Discretion of court.**—*R. v. SEHAM YOUSRY*, No. 2128, *ante*.

**2158.**—**Fraudulent conversion & obtaining credit by fraud.**—On a submission that there had been a miscarriage of justice by reason of the joinder in one indictment of counts for fraudulent conversion & obtaining credit by fraud:—*Held*: the point raised was a bad one, & the observations at the end of the judgment in *R. v. Norman*, No. 2154, *ante*, referred to the particular circumstances of that case & should not be taken as a precedent of general application.—*R. v. PICKERING* (1921), 15 Cr. App. Rep. 175, C. C. A.

**2159.**—**Sedition, unlawful assembly & riot.**—*R. v. FUSSELL*, No. 2122, *ante*.

**2160.**—**Similar acts.—Attempted rape on different persons on different days.**—On an indictment charging a misdemeanour for an assault in attempting to commit a rape on A., with a count for an assault of the same nature on a different day on B. it is competent to prosecutor, not only in law, but by ordinary practice, to give evidence

substances with intent to kill, sustained without objection; but intimidation by the presiding judge that, had prejudice to the panel been alleged, from this cumulation of charges he was prepared to have separated the cases & to have gone on with the trial for murder by itself.—*H.M. ADVOCATE v. THOMSON* (1857), 2 Irv. 747.—**SCOT.**

**PART VI. SECT. 4, SUB-SECT. 10.—E.**

**2148 i. General rule.**—*R. v. ABRAHAMS* (1880), 24 L. C. J. 325; Q. R. 1 Q. B. 126.—**CAN.**

**2148 ii.**—*Counts for riot & unlawful assembly being misdemeanours, may be joined in an indictment with a count for assault.*—*R. v. LONG*

(1885), 25 N. B. R. 208.—**CAN.**

**2148 iii.**—*Every separate count in an indictment for misdemeanour is treated as charging a distinct & separate offence, & any number of misdemeanours may be included in one indictment.*—*Ex p. STEPHENS* (1889), Crimes (Ireland) Act Cases, 300.—**IR.**

of both assaults.—*R. v. DAVIES* (1851), 5 Cox, C. C. 328.

**Separate indecent assaults.]—**

*R. v. CURTIS*, No. 2126, *ante*.

**2162. — Separate libels.]—***R. v. BRADLAUGH*, No. 2106, *ante*.

**2163. — Conspiracy to commit crime & committing same crime.]—**If five people are engaged in any unlawful combination & conspiracy, they can be charged in one indictment with a count for the conspiracy, & in other counts with separate acts which are connected with the general conspiracy as separate misdemeanours.—*R. v. WARREN* 1907, 71 J. P. 566.

**F. Joinder of Charges as Principal and Accessory.**

**2164. Principal in first & second degree.]—***R. v. TOWLE*, No. 639, *ante*.

**2165. —.]—***R. v. FOLKES*, No. 640, *ante*.

**2166. —.]—***R. v. GRAY*, No. 641, *ante*.

**2167. Principal & accessory.]—**An indictment charged in the first count that A. & B. killed a sheep, with intent to steal one of its hind legs, & in the second count, that C. received nine pounds' weight of mutton so stolen as aforesaid; & in the third count, that C. received the mutton "of a certain evil-disposed person," *scilicet*, etc.:—*Held*: on this form of indictment, all the three prisoners might be properly convicted.—*R. v. WHEELER* (1835), 7 C. & P. 170.

*Annotation:—Refd. R. v. Caspar* (1839), 9 C. & P. 289.

**2168. —.]—**A count, charging A. & B. with stealing, & C. with receiving part of the stolen property, & D. with receiving other part of the stolen property, may be joined with a count charging C. & D. with the substantive felony of jointly receiving the whole of the stolen property, & with counts charging C. & D. separately with the substantive felony of each receiving part of the stolen property; & it will be no objection at the trial that C. & D. each received part unconnectedly with each other.—*R. v. HARTALL* (1836), 7 C. & P. 475.

**2169. —.]—***R. v. AUSTIN*, No. 2120, *ante*.

**2170. —.]—**Three persons were charged with a larceny, & two others as accessories, in separately receiving portions of the stolen goods. The indictment also contained two other counts, one of them charging each of the receivers separately with a substantive felony in separately receiving a

portion of the stolen goods. The principals were acquitted:—*Held*: the receivers might be convicted on the last two counts of the indictment.—*R. v. PULHAM* (1840), 9 O. & P. 280.

**2171. Accessory before the fact & after the fact.]—***R. v. BLACKSON*, No. 2137, *ante*.

**2172. Principal & accessory after the fact.]—***R. v. SMITH, BACON & MODLIN*, No. 2133, *ante*.

**2173. —.]—***R. v. BRANNON*, No. 2134, *ante*.

**2174. —.]—***R. v. TUFFIN & STONE*, No. 2135, *ante*.

**SUB-SECT. 11.—DEFECTIVE AVERMENTS.**

**2175. When cured by verdict.]—**An indictment under Forgery Act, 1830 (c. 66), s. 19, for feloniously having in possession plates upon which were engraved a promissory note for payment of money of a foreign prince, inaccurately setting out the note in the foreign language & the translation, & with facsimiles of the note not engrossed in the indictment, but attached thereto on paper, is bad.

Counts under 2 & 3 Will. 4, c. 123, s. 3, stating the plates to have engraved on them, in the Polish language, a promissory note for payment of money, to wit, for the payment of five florins, purporting to be a promissory note for payment of money of a certain foreign prince, without stating the value, are good after verdict.—*R. v. HARRIS, BALLS & MOSES* (1836), 7 C. & P. 416, 429; *sub nom. R. v. WARSHANER (alias WARSHOWER, alias MOSES)*, 1 Mood. C. C. 466, C. C. R.

*Annotations:—Consd. Nash v. R.* (1864), 4 B. & S. 935. *Refd. R. v. Balls* (1836), 1 Mood. C. C. 470.

**2176. —.]—**An indictment which alleged that H., intending to defraud W., falsely pretended that he was a captain in the 5th Dragoons, by means of which false pretence he obtained from W. a valuable security, etc., whereas H. was not, at the time of the making such false pretence, a captain in the 5th Dragoons. On writ of error:—*Held*: the indictment was good after conviction & judgment.—*HAMILTON v. R.* (1846), 9 Q. B. 271; 16 L. J. M. C. 9; 7 L. T. O. S. 227; 2 Cox, C. C. 11; 10 J. P. Jo. 371; 115 E. R. 1277; *sub nom. R. v. HAMILTON*, 10 Jur. 1028, C. C. R.

*Annotations:—Refd. R. v. Woolley* (1850), T. & M. 279. *R. v. Oates* (1855), Dears. C. C. 459; *It. v. Burdon* (1856), 7 Cox, C. C. 131; *R. v. Gray* (1891), 17 Cox, C. C. 299; *R. v. Silverlock*, [1894] 2 Q. B. 766.

**PART VI. SECT. 4, SUB-SECT. 11.**

**2175 i. When cured by verdict.]—**Where the evidence proved an assault under circumstances not amounting to a felony, if the indictment does not charge a felony including an assault, prisoner cannot be convicted of an assault under 12 Vict. c. 29, s. 17.—*R. v. MAGEE* (1850), 2 All. 14.—**CAN.**

**2175 ii. —.]—***SPELMAN v. R.* (1868), 13 L. C. J. 154.—**CAN.**

**2175 iii. —.]—***R. v. DEERY* (1874), 26 L. C. J. 129.—**CAN.**

**2175 iv. —.]—***R. v. LYNCH* (1876), 20 L. C. J. 187.—**CAN.**

**2175 v. —.]—**The fact of three different offences being charged in the indictment, if objectionable at all, cannot be taken advantage of after verdict.—*R. v. QUINN* (1879), 13 N. S. R. (1 R. & G.) 139.—**CAN.**

**2175 vi. —.]—***R. v. BULMER* (1881), 33 L. C. J. 57; 5 L. N. 287.—**CAN.**

**2175 vii. —.]—**The indictment set out that being entrusted by H. with a power of attorney, he fraudulently sold certain bank shares belonging to H., & fraudulently converted the proceeds of the sale to a purpose other

than that for which he was entrusted with the power of attorney. After the conviction, deft. moved in arrest of judgment because it was not stated in the indictment that the power of attorney was for sale of any property, real or personal, as provided by Criminal Code, art. 309:—*Held*: the alleged omission was only a partial omission, & any defect resulting therefrom was cured by verdict.—*R. v. FULTON* (1900), Q. R. 10 K. B. 1.—**CAN.**

**2175 viii. —.]—**An indictment charging a crime defectively is aided by verdict.—*R. v. EAD* (1908), 43 N. S. R. 53.—**CAN.**

**2175 ix. —.]—**An indictment as presented by the grand jury was that prisoner did in a certain year, & at a certain place, "publish a seditious libel contrary to Criminal Code, s. 184." On Nov. 9, 1917, deft. pleaded "not guilty" to the indictment without making any objection. On Nov. 22, 1917, the case came on for trial, when deft. sought to demur to the indictment or to move to quash it, for defects apparent on the face. The judge refused leave to raise the question, as deft. had already pleaded. Particulars had been, without previous demand,

delivered by the Crown on Nov. 20, stating that deft. did "publish seditious libel by publishing the following pamphlets." The following paragraphs 1 to 7, mentioning respectively seven pamphlets, each bearing a different title to the others, except that the seventh was not stated to have any title, & the seditious character & the purpose of publishing each was stated separately in its own paragraph, but no reference was made to any particular part or passage of any of them. The publications mentioned had been before the grand jury when they found the indictment. In view of these facts, & of the Code, ss. 859, 880, as to the delivery of particulars, the trial judge amended the indictment by changing the figures "184" into "134"—Code, s. 134, being obviously intended, & by adding the words "to wit, the matters contained in the annexed particulars." The indictment was not sent back to the grand jury, nor was deft. called upon to plead again; the trial proceeded, & jury found deft. guilty on the amended indictment with regard to two of the publications mentioned in the particulars:—*Held*: the verdict did not make the indictment good.—*R. v. BAINBRIDGE* (1918), 42 O. L. R. 203;



## 1.—Form of indictments: Sub-sects. 11 &amp; 12.]

2177. —.]—*R. v. WATERS*, No. 1997, *ante*.

2178. —.]—The omission of the word "knowingly" in an indictment for false pretences is no objection in arrest of judgment, even if it would be on demurrer.—*R. v. BOWEN* (1849), 13 Q. B. 790; 4 New Sess. Cas. 62; 19 L. J. M. C. 65; 13 L. T. O. S. 282; 13 Jur. 1045; 3 Cox, C. C. 483; 13 J. P. Jo. 394; 116 E. R. 1465, C. C. R.

2179. —.]—Although an indictment be defective for want of certainty in the statement of number & value, yet where such indictment charges an offence in the words of the statute creating it, these defects are cured after verdict, & the indictment will be held sufficient by virtue of Criminal Law Act, 1826 (c. 64), s. 21.—*NASH v. R.* (1864), 4 B. & S. 935; 3 New Rep. 564; 33 L. J. M. C. 94; 9 L. T. 716; 28 J. P. 246; 10 Jur. N. S. 819; 12 W. R. 421; 9 Cox, C. C. 424; 122 E. R. 710, C. C. R.

*Annotations*:—*Refd.* *Heymann v. R.* (1873), L. R. 8 Q. B. 102; *R. v. Thompson*, [1914] 2 K. B. 99.

2180. —.]—Deft. & other persons were indicted for a conspiracy, contrary to the provisions of Debtors Act, 1869 (c. 62), & within four months next before the presentation of a bkpcy. petition against deft., fraudulently to remove part of his property to the value of £10 & upwards. The conspiracy was not alleged to be in contemplation of an adjudication in bkpcy. Deft. pleaded not guilty, & was convicted:—*Held*: the defective pleading in the indictment was cured by the verdict.—*HEYMANN v. R.* (1873), L. R. 8 Q. B. 102; 28 L. T. 162; 37 J. P. 565; 21 W. R. 357; 12 Cox, C. C. 383, C. C. R.

*Annotations*:—*Consd.* *R. v. Aspinall* (1876), 2 Q. B. D. 48; *White v. R.* (1876), 13 Cox, C. C. 318; *Bradlaugh v. R.* (1878), 3 Q. B. D. 607; *R. v. Silverlock*, [1894] 2 Q. B. 766. *Refd.* *R. v. Goldsmith* (1873), L. R. 2 C. C. R. 74; *R. v. Munslow*, [1895] 1 Q. B. 758.

2181. —.]—An indictment under Larceny Act, 1861 (c. 96), s. 95, for "unlawfully receiving goods which have been unlawfully & knowingly, & fraudulently obtained by false pretences with intent to defraud, well knowing that the goods had been obtained by false pretences with intent to defraud, as in this count before mentioned," omitted to set out what the particular false pre-

tences were:—*Held*: the objection, not having been taken before plea, was cured by the verdict of guilty.—*R. v. GOLDSMITH* (1873), L. R. 2 C. C. R. 74; 42 L. J. M. C. 94; 28 L. T. 881; 37 J. P. 790; 21 W. R. 791; 12 Cox, C. C. 479, C. C. R.

*Annotations*:—*Consd.* *Bradlaugh v. R.* (1878), 3 Q. B. D. 607. *Refd.* *R. v. Aspinall* (1876), 2 Q. B. D. 48; *R. v. Stroulger* (1886), 17 Q. B. D. 327; *Taylor v. R.*, [1895] 1 Q. B. 25.

2182. —.]—*R. v. ASPINALL*, No. 807, *ante*.

2183. —.]—Prisoner was tried & convicted upon an indictment which alleged that at an election for members of Parliament for the borough of I. holden on Nov. 25, 1885, he was guilty of corrupt practices against the form of the statute in that case made & provided. It was proved at the trial that he had promised money to two voters to induce them to vote. After verdict the objection was taken by prisoner's counsel that the indictment was bad, because it did not sufficiently describe the nature of the offence with which prisoner was charged:—*Held*: if the indictment were defective, the defect was cured after verdict; though on application before verdict, it might have been quashed.—*R. v. STROULGER* (1886), 17 Q. B. D. 327; 55 L. J. M. C. 137; 55 L. T. 122; 51 J. P. 278; 34 W. R. 719; 2 T. L. R. 731; 16 Cox, C. C. 85, C. C. R.

2184. —Defect in one count cured by reference to other counts.]—After verdict, defective averments in the second count of an indictment may be cured by reference to sufficient averments in the first count.—*R. v. WAVERTON (INHABITANTS)* (1851), 17 Q. B. 562; 2 Den. 340; 21 L. J. M. C. 7; 18 L. T. O. S. 136; 15 J. P. 817; 5 Cox, C. C. 400; 117 E. R. 1396, C. C. R.

## SUB-SECT. 12.—IMMATERIAL AVERMENTS.

2185. Do not vitiate indictment.]—Matter which may be rejected as surplusage shall not vitiate an indictment.—*BRICKET'S CASE* (1588), Cro. Eliz. 108; 78 E. R. 365.

2186. May be rejected as surplusage.]—If an indictment be in itself good, tautologous words shall

be rejected thereon:—*Held*: prisoner not having been misled or prejudiced by the amendment, it was properly made.—*R. v. PATTERSON* (1895), 26 O. R. 656.—*CAN.*

2186 v. —.]—An indictment charging the commission of an offence "on or about Aug. 8, 1920, & on & at divers other days & times, before that date" is clearly objectionable in that it charges the commission of more than one offence, & where the accused objected to the inclusion of the words quoted, & the trial judge, allowed the Crown to amend the indictment by striking out the words:—*Held*: he was not wrong in doing so.—*R. v. PARKIN*, [1922] 1 W. W. R. 732, 733, 734; 66 D. L. R. 175; 37 Can. Crim. Cas. 35; 31 Man. L. R. 438.—*CAN.*

2186 vi. —.]—In an indictment, a fact not necessary to be stated often becomes material by being stated. Where, therefore, in an indictment, a crime was alleged to have taken place "at A., in the county of B., within five hundred yards of the boundary of the county of D., to wit, at C., in the county of D.":—*Held*: the words "at A., in the county of B., within five hundred yards of the boundary of the county of D.," were surplusage; but that having been stated, they became material to be proved.—*M'KENNA'S CASE* (1842), Ir. Cir. Rep. 416.—*IR.*

2186 vii. —.]—When an indict-

13 O. W. N. 218; 28 Can. Crim. Cas. 444; 42 D. L. R. 493.—*CAN.*

b. Defect must be clear.]—An application to the ct. on the part of deft. to quash an indictment will be refused unless the defect is clear & obvious. Deft., by pleading to the indictment, will exclude himself from having his application entertained.—*R. v. WALLACE* (1868), 7 N. S. R. 382.—*CAN.*

c. Uncertainty.]—An indictment defective in not stating that the property obtained was the property of the person defrauded is defective for uncertainty, & must be objected to before the jury is sworn.—*R. v. WILLANS* (1862), 1 Mad. 31; 1 Ind. Jur. O. S. 94.—*IND.*

d. Redundant statement.]—*R. v. BATHGATE* (1869), 13 L. C. J. 303.—*CAN.*

## PART VI. SECT. 4, SUB-SECT. 12.

2185 i. Do not vitiate indictment.]—*R. v. PAQUET* (1879), 2 L. N. 140.—*CAN.*

2186 i. Maybe rejected as surplusage.]—In an indictment charging the prisoner with stealing bank bills, the words "of the moneys, goods, & chattels" may be rejected as surplusage.—*R. v. SAUNDERS* (1853), 10 U. C. R. 544.—*CAN.*

2186 ii. —.]—Indictment for offer-

ing the following instrument knowing it to be forged: "I. J. H., do agree to W. C., of W., the full rite & privilege of all the whiteoke & elm & hickory lying & standing on lot 26, south part, on the 3rd concession P., for the sum of \$30, now paid to H. by C., the receipt whereof is hear by me acknowledged." The jury having convicted prisoner:—*Held*: the instrument forged being set out *in haec verba* in the indictment, the description of its legal character would be surplusage, & was unnecessary.—*R. v. CARSON* (1864), 14 C. P. 309.—*CAN.*

2186 iii. —.]—Prisoner was found guilty on an indictment charging that he made an assault upon A., & him, A. did beat, wound & ill-treat." There was no evidence of any wounding:—*Held*: the indictment was substantially one for a common assault, & that the conviction was right.—*R. v. SHANNON* (1883), 23 N. B. R. 1.—*CAN.*

2186 iv. —.]—Prisoner had obtained cheques on the false pretence that "there were 2,680 bushels of beans" in his warehouse. He was indicted for obtaining the cheques on the false pretence "that there was then a large quantity of beans, to wit, 2,680 bushels," in his warehouse. During the trial the indictment was amended by striking out the words "a large quantity of beans, to wit," & prisoner



be rejected as surplusage.—*R. v. MORRIS* (1774), 1 Leach, 109, C. C. R.

*Annotations*:—*Fold*. *R. v. Radley* (1849), 2 Car. & Kir. 974. *Refd.* *R. v. Mid. Ry.* (1846), 8 Q. B. 587; *R. v. Crespin* (1848), 11 Q. B. 913; *R. v. Larkin* (1854), 6 Cox, C. C. 377.

**2187.** —[—]—Where prosecutor is not obliged to negative the exceptions in a statute, & negatives some of them only, that part of the information will be rejected as surplusage.—*R. v. HALL* (1786), 1 Term Rep. 320; 99 E. R. 1117.

*Annotations*:—*Refd.* *Doe d. Pa. ne v. Bristol & Exeter Ry.* (1840), 2 Ry. & Can. Cas. 75. *Mentd.* *Wilkins v. Wright* (1833), 2 Cr. & M. 191.

**2188.** —[—]—A bad indictment may be made good by rejecting, as insensible & useless, such words as obstruct the sense of it.—*R. v. REDMAN* (1787), 1 Leach, 477, C. C. R.

**2189.** —[—]—Immaterial averments in an indictment need not be proved.—*R. v. HOLT* (1793), 2 Leach, 593; 22 State Tr. 1189; 5 Term Rep. 436; 101 E. R. 245.

*Annotations*:—*Refd.* *R. v. Duffy* (1849), 4 Cox, C. C. 294. *Mentd.* *R. v. Teal* (1809), 11 East, 307; *Anon.* (1832), 1 L. J. Ex. 116; *Weston v. Foster* (1836), 5 L. J. C. P. 242; *Thomas v. Jones* (1838), 7 L. J. Ex. 205; *Pritchard v. Pritchard* (1884), 14 Q. B. D. 55.

**2190.** —[—]—An indictment charged that deft., a surgeon, knowingly & with intention to deceive, signed a certificate required by 9 Geo. 4, c. 41, without having visited & personally examined the patient, contrary to the statute. The jury negatived the intention to deceive, & found deft. guilty, subject to the opinion of the ct. upon the case:—*Held*: in the description of this offence, the averment of intention was surplusage, & such unnecessary matter might be rejected as well in an indictment on a penal statute as at common law.—*R. v. JONES* (1831), 2 B. & Ad. 611; 9 L. J. O. S. M. C. 98; 109 E. R. 1270.

**2191.** —[—]—An indictment which charges that A. stole two shillings "of the goods & chattels of F." is good, as the words "of the goods & chattels," may be rejected as surplusage.—*R. v. RADLEY* (1849), 2 Car. & Kir. 974; 1 Den. 450; T. & M. 144; 3 New Sess. Cas. 651; 18 L. J. M. C. 184; 13 L. T. O. S. 550; 13 J. P. 424; 13 Jur. 544; 3 Cox, C. C. 460, C. C. R.

**2192.** —[—]—The first count of the indictment

ment contains distinct averments, one material & another immaterial, the immaterial averment may be rejected as surplusage; but if the whole averment cannot be struck out without getting rid of a material part, the whole must be proved.—*R. v. OTWAY* (1849), 1 I. C. L. R. 69.—*IR.*

**2186 viii.** —[—]—Prisoner was indicted for shooting with intent to do grievous bodily harm, & the indictment alleged the offence to have been committed with "a revolver then loaded with gunpowder & divers leaden bullets." The jury found the prisoner "Guilty of shooting at prosecutor with some sort of firearm, with intent to do grievous bodily harm, but it was not proved to have been loaded with leaden bullets."—*Held*: as the statute defined the offence simply as shooting at any person with intent, it was not necessary to specify the weapon & the loading; & that the prosecution was not bound to prove an unnecessary averment.—*R. v. BELL*, 4 J. R. N. S. 42.—*N.Z.*

**2186 ix.** —[—]—The indictment charged the prisoner in the first count with "feloniously," unlawfully, & maliciously wounding B.; & in another count with "feloniously" inflicting grievous bodily harm on B. The jury found a general verdict of "Guilty." The conviction was quashed because the counts were not good for felony under Offences against

the Person Act, 1867, s. 15, & the jury had found that the acts were done feloniously. It was not competent for the judge to amend the indictment by striking out the word "feloniously" as surplusage.—*R. v. BENNETT* (1870), 1 C. A. 386.—*N.Z.*

forcible entry at common law may be rejected as surplusage.—*R. v. NIRA-MOANA* (1880), O. B. & F. 76.—*N.Z.*

**2186 xi.** —[—]—Where the indictment contained beside the allegation of perjury, a description of the offence defined in a statute, the ct. could treat the allegation of perjury as surplusage & hold the indictment sufficient under the statute.—*R. v. WILSON* (1912), 31 N. Z. L. R. 850.—*N.Z.*

**2186 xii.** —[—]—In an indictment charging the panel with having received on behalf of his master the sum of £15 8s. by a bill or promissory note, payable to his master two months after date, & having embezzled "the said bill or promissory note or the said sum of £15 8s.," the words "of the said sum of £15 8s." were directed by the ct. to be struck out.—*H.M. ADVOCATE v. MACKENZIE* (1846), Arkley, 97.—*SCOT.*

**2186 xiii.** —[—]—In charging the offence of culpable homicide through an explosion of dynamite in the custody of accused, which he had culpably, &

charged prisoner with stealing certain goods & chattels, the second count charged him with receiving "the goods & chattels of the value aforesaid so as aforesaid feloniously stolen." After objection that he could not be found to have feloniously received goods stolen by himself, the case went to the jury & prisoner was acquitted upon the first count & convicted upon the second:—*Held*: the conviction was good, as the ct., to support the indictment, would, on the second count, reject as irrelevant the averment implied from the words "so as aforesaid" that the goods were stolen by prisoner.—*R. v. HUNTLEY* (1860), Bell, C. C. 238; 29 L. J. M. C. 70; 1 L. T. 384; 24 J. P. 133; 6 Jur. N. S. 80; 8 W. R. 183; 8 Cox, C. C. 260, C. C. R.

**2193.** —[—]—An indictment charged prisoner with the offence of making a false declaration before a justice, that he had lost a pawnbroker's ticket, "whereas in truth & in fact he had not lost the said ticket, but had sold, lent, or deposited it, as a security to one C., etc."—*Held*: the allegation "but had sold, lent, or deposited, etc.," did not render the indictment ambiguous or uncertain, but was pure surplusage, which might be rejected, & need not be proved.—*R. v. PARKER* (1870), L. R. 1 C. C. R. 225; 39 L. J. M. C. 60; 21 L. T. 724; 34 J. P. 148; 18 W. R. 353; 11 Cox, C. C. 478, C. C. R.

**2194.** —[—]—To a criminal information by the A.-G. of New South Wales against a member of the Legislative Assembly of that Colony, for an assault on a member committed within the precincts of the House, while the Assembly was sitting, which information averred, that such assault was in contempt of the Assembly, a general demurrer was allowed by the Supreme Ct. On appeal:—*Held*: the information was good, as the alleged contempt of the Legislative Assembly was charged only as a matter of aggravation, & could be rejected as surplusage, & the information sustainable for an assault.—*A.-G. OF NEW SOUTH WALES v. MACPHERSON* (1870), L. R. 3 P. C. 268; 7 Moo. P. C. C. N. S. 49; 17 E. R. 19; *sub nom.* *R. v. MACPHERSON*, 39 L. J. P. C. 59; 23 L. T. 101; 18 W. R. 1053; 11 Cox, C. C. 604, P. C.

in violation of his duty, allowed to remain in an exposed place of common resort, the libel set forth that the dynamite "became ignited by means of a spark from the same smithy, or by being brought into contact with some other substance, or in some other manner to the prosecutor unknown, & then & there exploded." An objection was taken that the words in italics gave too great latitude to the prosecution:—*Held*: as these words were not to be held as introducing a third species *facti* different from or inconsistent with the two specifically mentioned, but only as a generalisation of these two specific modes, for the purpose of giving elasticity to the indictment, the indictment was relevant.—*H.M. ADVOCATE v. CLARK* (1877), 4 R. (Ct. of Sess.) 48; 14 Sc. L. L. 641.—*SCOT.*

**2186 xiv.** —[—]—The ct. has power at a pleading diet to allow words to be struck out of an indictment if the alteration does not vary the crime with which the panel is charged.—*H.M. ADVOCATE v. M'INTOSH* (1881), 8 R. (Ct. of Sess.) 13; 18 Sc. L. R. 290.—*SCOT.*

**2186 xv.** —[—]—Where certain allegations in an indictment are clear surplusage, they can be ignored, & it is not necessary to prove such allegations in order to obtain a conviction.—*R. v. KHAN* (1917), T. P. D. 234.—*S. AF.*

## 4.—Form of indictments: Sub-sects. 12 &amp; 13.]

**2195.** —.]—Upon the trial of an indictment for publishing a libel upon the directors of a co., it is not necessary to prove that prosecutors were the *de jure* directors of the co., & properly appointed as such, it being admitted that they were the acting directors, & the libel being published upon them as such acting directors, & the averment that they were directors is an immaterial averment.—*R. v. BOALER* (1892), 67 L. T. 354; 58 J. P. 792; 36 Sol. Jo. 753; 17 Cox, C. C. 569.

**2196.** Election of accused to be tried by a jury need not be averred.]—Where a prisoner who is charged with an offence punishable summarily with more than three months' imprisonment has exercised his right under Summary Jurisdiction Act, 1879 (c. 49), s. 17, & has claimed to be tried by a jury, it is not necessary that the indictment found against him should contain any averment of such a claim having been made.—*R. v. CHAMBERS* (1896), 65 L. J. M. C. 214; 75 L. T. 76; 60 J. P. 586; 12 T. L. R. 613; 40 Sol. Jo. 730; 18 Cox, C. C. 401, C. C. R.

## SUB-SECT. 13.—AMENDMENT.

See Indictments Act, 1915 (c. 90), s. 5.

**2197.** At court of trial.]—On the trial of an indictment charging deft. with obstructing a footway leading from A. to C. it appeared that there was a way leading from A. to C., but that it passed through an intermediate point B., & that the way was a coinage way from A. to B., & only a footway from B. to C. The obstruction was between B. & C.:—*Held*: assuming this to be a misdescription, the indictment might, under Criminal Procedure Act, 1851 (c. 100), s. 1, be amended at the trial by substituting a description of the way as a footway leading from B. to C.—*R. v. STURGE* (1854), 3 E. & B. 734; 23 L. J. M. C. 172; 23 L. T. O. S. 143; 18 J. P. 343; 18 Jur. 1052; 118 E. R. 1316.

*Annotations*.—*Consd.* *R. v. Frost* (1855), 6 Cox, C. C. 526. *Refd.* *R. v. Lee* (1875), 24 W. R. 550.

**2198.** —.]—*R. v. WESTLEY*, No. 2016, *ante*.

**2199.** —.]—A coroner's jury, on inquiring into the death of G. from a railway accident, found that the railway "directors did feloniously kill & slay G." without naming individuals. A *certiorari* to quash being moved:—*Held*: the verdict was bad for uncertainty, & the ct. had, under Coroners Act, 1887 (c. 71), s. 20, no power to amend, such power being confined to the ct. which tries the indictment.—*R. v. GREAT WESTERN RY. CO. (DIRECTORS)* (1888), 20 Q. B. D. 410; 57 L. J. M. C. 31; 58 L. T. 765; 52 J. P. 772; 36 W. R. 506; 16 Cox, C. C. 410, D. C.

*Annotation*.—*Mentd.* *R. v. Oxford Circuit Clerk of Assize*, [1897] 1 Q. B. 370.

**2200.** — Variation between indictment &

evidence—*Criminal Law Amendment Act*, 18 (c. 100), s. 1.]—B. was indicted for obtaining from one D. by the false pretence that she had made funeral arrangements with a certain undertaker & had paid him 5s. by way of deposit for the burial of S., a nurse child, who had died under her care. The evidence was that the false pretence was made as to the funeral arrangements for another such nurse child, D. It appeared that deft. had also made certain false statements to A. as to the funeral of S.:—*Held*: there was power to make the amendment under the above sect.—*R. v. BYERS* (1907), 71 J. P. 205.

**2201.** — Consent of court necessary.]—No count can be added to or amendment made in a indictment found by the grand jury without the consent of the ct. of trial.—*R. v. ERRINGTON* (1922), 16 Cr. App. Rep. 148, C. O. A.

**2202.** Discretionary power of court to allow.]—*R. v. FROST*, No. 1995, *ante*.

**2203.** —.]—*R. v. DAVISON & GORDON*, No. 2215, *post*.

**2204.** — Where voluntary bill preferred—Amendment not encouraged.]—Where the case has not been inquired into before a magistrate but the bill has been merely found by the grand jury, the ct. will not go out of its way to assist the prosecution by amending the indictment & inserting certain names, on objection taken that the charges therein set out are not specified with sufficient particularity.—*R. v. O'CALLAGHAN* (1880), 14 Cox, C. C. 499.

**2205.** Time for amendment—Before plea.]—*R. v. THOMPSON*, No. 2061, *ante*.

**2206.** — Before case goes to jury.]—*R. v. FROST*, No. 1995, *ante*.

**2207.** — At close of case for prosecution.]—As a general rule, a judge on the trial of an indictment will not allow an amendment to be made after counsel for the defence has addressed the jury. The proper course is for prosecutor's counsel to adduce all his evidence & ask for the amendment before he closes his case, & if the amendment is made, prisoner's counsel addresses the jury on the indictment as amended.—*R. v. RYMES* (1853), 3 Car. & Kir. 326.

**2208.** — After verdict.]—A count for receiving stolen goods the property of A., alleged that prisoner received the same, A. well knowing them to have been stolen. The error was discovered after verdict, & prisoner's counsel moved in arrest of judgment, on which the ct. amended the count by striking out A. & inserting the name of prisoner:—*Held*: the ct. had no power to amend after verdict.—*R. v. LARKIN* (1854), Dears. C. C. 365; 23 L. J. M. C. 125; 23 L. T. O. S. 180; 18 J. P. 376; 18 Jur. 539; 2 W. R. 496; 2 C. L. R. 775; 6 Cox, C. C. 377, C. C. R.

*Annotation*.—*Consd.* *R. v. Poole Corpn.* (1887), 19 Q. B. D. 602.

**2209.** — —.]—An indictment stated that A. & B. were adjudicated bkpts., & that A. & B.

## PART VI. SECT. 4. SUB-SECT. 13.

**2197 i.** At court of trial.]—Deft. was charged with having set fire to a building, the property of one H., "with intent to defraud." The case opened by the Crown was that the prisoner intended to defraud several insurance companies, but the legal proof of the policies was wanting, & an amendment was allowed by striking out the words "with intent to defraud":—*Held*: the amendment was authorised & proper.—*R. v. CROWN* (1875), 36 U. C. R. 342.—*CAN.*

**2197 ii.** —.]—*R. v. BISSONETTE* (1879), 2 L. N. 212; 23 L. C. J. 249.—*CAN.*

**2197 iii.** —.]—Where a bridge was wrongly described in an indictment as being in two townships:—*Held*: this could be amended at the trial.—*R. v. CARLETON COUNTY CORPN.* (1882), 1 O. R. 277.—*CAN.*

**2197 iv.** —.]—An amendment to the indictment changing the Christian name of the prosecutrix is proper to be allowed.—*R. v. FAULKNER* (1911), 16 B. C. R. 229.—*CAN.*

**2208 i.** Time for amendment—After verdict.]—Indictment cannot be amended on a motion to set aside verdict, or for new trial.—*R. v. CARLETON COUNTY CORPN.* (1882), 1 O. R. 277.—*CAN.*

**2208 ii.** — —.]—On a case stated as to the effect of a verdict; & for the amendment of the indictment:—*Held*: the indictment could be amended, but as the point in question had never really been in issue at the trial a new trial should be ordered on the amended indictment.—*R. v. STONE*, [1920] N. Z. L. R. 462.—*N.Z.*

**2208 iii.** — —.]—The indictment may be amended at any stage of the trial.—*R. v. WILLIAMS* (1862), 1 Ind. Jur. O. S. 94; 1 Mad. 31.—*IND.*

**e.** — End of opening by prosecution.]—In a case where three accused persons were indicted for "that they did amongst themselves conspire," the

afterwards, with intent to defraud their creditors, unlawfully, within four months next before the presentation of a bkpcy. petition against them, they being traders, did pawn, etc., certain property which they had obtained upon credit, & had not paid for. On objection after verdict:—*Held*: the indictment did not show substantially the offence under Debtors Act, 1869 (c. 62), s. 11 (15), & an amendment could not then be made.—*R. v. OLIVER & AUSTIN* (1877), 36 L. T. 114; 41 J. P. 310; 25 W. R. 323; 13 Cox, C. C. 588, C. C. R. Annotation:—*Distd. R. v. Knight* (1878), 37 L. T. 801.

2210. ———.]—*R. v. THOMPSON*, No. 2061, ante.

2211. ——— Where verdict conditional.]—*R. v. DOSSI*, No. 2009, ante.

2212. Where amendment too substantial.]—A prisoner was indicted for the misdemeanour of carnally knowing a girl between the ages of ten & twelve. The case was proved, but the girl was under ten:—*Held*: prisoner must be acquitted, & Criminal Procedure Act, 1851 (c. 100), s. 12, did not apply to this case.—*R. v. SHOTT* (1851), 3 Car. & Kir. 206.

2213. ———.]—In an indictment for obtaining money by false pretences, the pretence alleged was that deft. had been to B. on behalf of prosecutrix, & had served a certain order of affiliation on one J. & that he was entitled to receive for serving the said order the sum of 5s.:—*Held*: (1) this averment was not supported by proof that deft. said that he had been with the order to B. to serve J. & left it with the landlady where J. lodged, he being out, etc.; (2) this was not an amendable variance within the meaning of 14 & 15 Vict. c. 100, s. 1.—*R. v. BAILEY* (1852), 19 L. T. O. S. 11; 6 Cox, C. C. 29.

2214. ———.]—The ct. will not amend an indictment after plea, where, in its amended form, it

might be demurrable for generality.—*R. v. LALLEMENT* (1853), 6 Cox, C. C. 204.

2215. ———.]—Upon the trial of an indictment against bkpts. under 12 & 13 Vict., c. 106, s. 251, for embezzling part of their personal estate to the value of £10, to wit, bank notes & money:—*Held*: the description of the money embezzled, although laid under a *videlicet*, was a material averment, & such as the ct., in its discretion would decline to amend.—*R. v. DAVISON & GORDON* (1855), 7 Cox, C. C. 158.

Annotation:—*Mentd. R. v. Rogers* (1877), 3 Q. B. D. 28.

2216. ———.]—The ct. will not amend, under the Criminal Procedure Act, 1851 (c. 100), s. 1, an indictment by striking out the word "feloniously" & thereby convert the charge into a misdemeanour, where the document given in evidence to sustain a charge of forgery, made felony under Forgery Act, 1831, 11 Geo. 4 & 1 Will. 4 (c. 66), ss. 3, 10, will not sustain the charge of felony, although evidence of a common law misdemeanour.—*R. v. WRIGHT* (1860), 2 F. & F. 320.

2217. ———.]—*R. v. JAMES*, No. 2038, ante.

2218. ———.]—There is no power to amend an indictment containing a count which charges prisoner, under Debtors Act, 1869 (c. 62), s. 13 (1), that in incurring a debt he obtained credit by false pretences, by striking out the allegations of false pretences from the count, & inserting therein an allegation that prisoner incurred the debt by means of fraud.—*R. v. BENSON*, [1908] 2 K. B. 270; 77 L. J. K. B. 644; 98 L. T. 933; 72 J. P. 286; 24 T. L. R. 557; 52 Sol. Jo. 516; 21 Cox, C. C. 631, C. C. R.

2219. ———.]—An indictment for obtaining money by false pretences was amended by striking out a statement of a false pretence that certain articles were worth a certain sum of money:—*Held*: the amendment ought not to have been

judge on the completion of the prosecutor's opening speech, & before any evidence was given, allowed the indictment to be amended by adding the words "& with another person whose name to the prosecutor is unknown":—*Held*: the judge had no power to make the amendment.—*R. v. HILL* (1909), 9 S. R. N. S. W. 563.—*AUS.*

f. ——— After close of defence.]—Where stolen property has been laid in a wrong person, the indictment may be amended, even after the counsel for prisoner has addressed the jury & closed.—*R. v. FULLARTON & CROOKS* (1853), 6 Cox, C. C. 194.—*IR.*

g. Where amendment too substantial.—No evidence to support amendment.]—Prisoner was indicted for stealing the cattle of M. At the trial M. gave evidence that he was nineteen years of age: that his father was dead, & the goods were bought with the proceeds of his father's estate; that his mother was administratrix, & that the witness managed the property, & bought the cattle in question. On objection taken the indictment was amended, by stating the goods to be the property of the mother, & no further evidence of her administrative character was given, the judge holding the evidence of M. sufficient, & not leaving any question as to the property to the jury:—*Held*: the judge had power to amend under C. S. C., c. 99, s. 78; but the conviction on the amended indictment could not be sustained, there being no evidence of the mother's representative character.—*R. v. JACKSON* (1869), 19 C. P. 280.—*CAN.*

h. ———.]—*R. v. CARR* (1872), 26 L. C. J. 61.—*CAN.*

k. ———.]—On the trial of the prisoner on an indictment charging

him with receiving property which one M. had feloniously stolen, etc., the evidence showed that he had stolen the property, & that the prisoner was guilty of receiving the same, knowing it to have been stolen. For the defence it was proved that M. had been previously tried on a charge of stealing the same property & acquitted. The prosecution then applied to strike out of the indictment the allegation that M. had stolen the property, & to insert the words "some evil-disposed person," which the judge allowed:—*Held*: the amendment was improperly allowed.—*R. v. FRITHSON* (1876), 20 N. B. R. 259.—*CAN.*

l. Where accused not prejudiced.]—Prisoner was indicted for indecent exposure "in a certain public place in the presence of divers persons."

The evidence showed the act to have been committed on the verandah of a private house & where it could not be seen from the public road, in the presence of several young girls:—*Held*: judge was right, under Criminal Law Amendment Act, s. 313, in amending the indictment according to the proof by striking out the word "public" as immaterial, the prisoner not being thereby prejudiced in his defence on the merits.—*R. v. MADERCINE* (1899), 20 N. S. W. L. R. 36.—*AUS.*

m. ———.]—A judge has power under Crimes Act, 1900, No. 40, s. 305, to amend a material variance if satisfied that the accused will not thereby be prejudiced in his defence or suffer any substantial wrong.—*R. v. JACKSON* (1904), 4 S. R. N. S. W. 732; 21 N. S. W. W. N. 241.—*AUS.*

n. Description of place where offence committed.]—*Semble*: (1) an indictment may be amended by supplying an allegation of the place where the

offence was committed; (2) an indictment is not incapable of amendment merely because, as it stands, it does not show jurisdiction on its face.—*R. v. HINDE* (1902), 22 N. Z. L. R. 436.—*N.Z.*

o. Description of intent.]—An indictment that "A. attempted to kill & murder D." sufficiently discloses an indictable offence, & the ct. has the power to allow it to be amended so as to read that "A. with intent to commit murder, shot at D."—*R. v. MOONEY* (1905), Q. R. 15 K. B. 57.—*CAN.*

p. Description of offence.—Offence different in character from that originally charged.]—An indictment charged deft. with knowingly & fraudulently by false pretences obtaining \$500 from the N. Bank, after the evidence had partially been taken, the ct. allowed an amendment of the indictment to charge that deft. did in incurring a debt or liability to the N. Bank obtain credit under false pretences. Upon such amendment the jury found deft. guilty:—*Held*: Criminal Code, s. 889, allowing amendments to indictments when there is a variance between the evidence given & the charge did not permit of amendments charging an offence different in character from that originally charged.—*R. v. COHEN* (1912), 22 O. W. R. 456; 3 O. W. N. 1409; 26 O. L. R. 497; 5 D. L. R. 437.—*CAN.*

q. ———.]—*R. v. WALLACE* (1915), 8 W. W. R. 671; 24 D. L. R. 825; 8 Alta. L. R. 472.—*CAN.*

r. ———.]—The ct. has power to allow words to be struck out of an indictment if the alteration does not vary the crime with which the panel is charged.—*H.M. ADVOCATE v. M'INTOSH* (1881), 8 R. (Ct. of Sess.) 13; 18 Sc. L. R. 290.—*SCOT.*

s. ——— Second offence included

*Sec. 4.—Form of indictments: Sub-sects. 13 & 14.*  
*Sec. 5: Sub-sect. 1.]*

made.—*R. v. COHEN* (1909), 3 Cr. App. Rep. 180, C. C. R.

*Annotation:—Refd. R. v. Thompson*, [1914] 2 K. B. 99.

**2220. Indictment as amended stands.]**—If it is contended that we cannot alter the verdict upon an amended indictment to a verdict upon the indictment before it was amended, I should say that that was so (*BLACKBURN, J.*).—*R. v. PRITCHARD* (1861), Le. & Ca. 34; 30 L. J. M. C. 169; 4 L. T. 340; 25 J. P. 484; 7 Jur. N. S. 557; 9 W. R. 579; 8 Cox, C. C. 461, C. C. R.

*Annotation:—Refd. R. v. Webster* (1861), Le. & Ca. 77.

**2221. —.]**—When an indictment is amended at the ct. of trial, the Ct. of Crown Cases Reserved cannot consider it as it originally stood, but only in its amended form.—*R. v. WEBSTER* (1861), Le. & Ca. 77; 31 L. J. M. C. 17; 5 L. T. 327; 26 J. P. 212; 7 Jur. N. S. 1208; 10 W. R. 20; 9 Cox, C. C. 13, C. C. R.

*Annotation:—Refd. R. v. Lowrie* (1867), 36 L. J. M. C. 24.

**2222. —.]**—Prisoner worked at a mill in the same room with three fellow-workmen, & was sent by them on pay-night for the wages of the four from the cashier of the works. The cashier gave the money for the four in a lump to prisoner, who then went away & never gave any of it to his fellow-workmen. He was indicted for the larceny, & the indictment laid the property in the money in the workmen. At the trial, the indictment was amended by alleging the property to be in the proprietors of the works, instead of the workmen:—*Held*: the property was rightly laid as at first, in the men, & not in the masters, & as the conviction had taken place on the amended indictment, which was wrong, the conviction must be quashed.—*R. v. BARNES* (1866), L. R. 1 C. C. R. 45; 35 L. J. M. C. 204; 14 L. T. 601; 30 J. P. 420; 12 Jur. N. S. 549; 14 W. R. 805; 10 Cox, C. C. 255, C. C. R.

#### SUB-SECT. 14.—ORDER FOR PARTICULARS.

**2223. When granted—Conspiracy.]**—An indictment for conspiracy “to defraud W. of divers goods & in pursuance of the conspiracy defrauding him of divers goods, to wit of the value of £100,” cannot be quashed for not specifying the particular goods of which the prosecutor has been defrauded.

*Semle*: the ct. in such a case will not call upon prosecutor to deliver to deft. a particular of the goods referred to in the indictment.—*R. v.* (1819), 1 Chit. 698.

*Annotations:—Mentd. R. v. Parker* (1842), 3 Q. B. 292; *R. v. Blake* (1844), 6 Q. B. 126.

*in first.]*—Deft. was indicted for that he “unlawfully did cause to be taken by B. certain poison . . . with intent thereby to endanger the life of B.” The trial of deft. upon this indictment was begun; but at the conclusion of the case for the Crown the judge, being of opinion that there was no evidence to support the charge, amended the indictment so that it read, “did cause to be administered to or taken by B. certain poison . . . with intent thereby to injure, aggrieve, or annoy B.” The original charge was probably intended to be laid under Criminal Code, s. 277, though it did not follow the language of that sect., the amended charge was laid under sect. 278:—*Held*: an act of one person which is intended to endanger the life of another person includes an act to injure, aggrieve, or annoy such other person; & therefore, if not proved guilty of the offence charged in the

original indictment, deft. might, without any amendment, have been convicted of the offence of administering poison with intent to injure, aggrieve, or annoy; & as the grand jury assented to the indictment for the major offence, they must be found to have approved of an indictment for the minor offence.—*R. v. VOLL* (1920), 48 O. L. R. 437; 57 D. L. R. 440; 19 O. W. N. 270.—CAN.

*t. — Conformable to statute.]*—A defective indictment is amendable under 32 & 33 Vict. c. 20, s. 32.—*R. v. FLYNN* (1878), 2 P. & B. 321.—CAN.

*a. —.]*—Deft. was indicted & convicted for a criminal assault committed upon the person of W., “a girl under the age of fourteen years, to wit, of the age of eight years.” It was not alleged in the indictment that the person upon whom the offence

**2224. —.]**—If the counts of an indictment for a conspiracy be framed in a general form a judge will order that prosecutor shall furnish defts. with a particular of the charges, & that particular should give the same information as the counts. That would be given by a special count. But the judge will not compel prosecutor to state in his particular the specific acts with which the defts. are charged, & the times & places at which those acts are alleged to have occurred.—*R. HAMILTON* (1836), 7 C. & P. 448.

*Annotation:—Refd. R. v. O’Connell* (1844), 5 State Tr. N. S.

**2225. —.]**—*R. v. WARD* (1844), L. T. O. S. 352.

**2226. —.]**—Where an indictment for conspiracy is in general terms, & does not set out the overt acts, the ct. will, on the application of deft., direct prosecutor to furnish a particular of the overt acts.—*R. v. RIX & SENIOR* (1850), New Mag. Cas. 41; 14 L. T. O. S. 379; 14 J. P. Jo. 255.

**2227. —.]**—On an indictment against several defts. for a conspiracy, it appeared that there were eight counts, setting out particular charges, & one count charging defts. in general terms with a conspiracy to defraud by diverse subtle means & contrivances:—*Held*: defts. were entitled to have particulars given them of the specific charge intended to be relied on in support of the general count.—*R. v. ALLEYNE* (1851), 11 L. T. O. S. 99, 111; 15 J. P. 835.

**2228. —.]**—*R. v. PROBERT, HAMP & WATKINS* (1852), Dears. C. C. 32, n.

**2229. —.]**—Where an indictment for conspiracy charges the offence in general terms deft. is entitled to particulars of the charge although there has been a previous committal by a magistrate.

Where an indictment contained counts charging a conspiracy to cheat tradesmen of goods, without mentioning any specific case, or name, time, or place:—*Held*: deft. was entitled to such particulars.—*R. v. RYCROFT* (1852), 6 Cox, C. C. 76.

**2230. —.]**—*R. v. MELLERSH* (1852), 18 L. T. O. S. 241; 16 J. P. Jo. 53.

**2231. —.]**—On a general count for conspiracy, deft. is entitled to particulars of the acts relied upon in support of the charge, but on a special count alleging the overt acts, the ct. will not order particulars to be furnished, in the absence of an affidavit on the part of deft., that he has no knowledge of the overt acts charged, & does not possess sufficient information to enable him to meet them.

*Qu.*: whether with such an affidavit, deft. would be entitled to particulars.—*R. v. ESDALE*,

was committed was not the wife of prisoner:—*Held*: the expression in the Code, s. 266, “not being his wife,” is an exception, & if required to be stated in the indictment & negatived, the defect could have been remedied by the judge by an amendment. Under sect. 723 (2).—*R. v. WRIGHT* (1906), 39 N. S. R. 103.—CAN.

*b. Amendment allowed as terms of granting application to withdraw plea.]*—An indictment, framed under Insolvent Act of 1869, s. 147, omitted the words “with intent to defraud his creditors.” Deft. pleaded to the indictment, but afterwards applied for leave to withdraw his plea & demur, the judge decided that, if he allowed this he should also permit the prosecutor to amend the indictment by inserting those words:—*Held*: his decision was right.—*R. v. McLEAN* (1877), 1 P. & B. 377.—CAN.

*R. v. BROWN, R. v. STAPLETON* (1857), 6 W. R. 60; 8 Cox, C. C. 69; 21 J. P. Jo. 772.

**2232.** ———.]—An indictment charged defts. with conspiring with divers other persons to obtain by false pretences certain property from prosecutor. The ct. made an order for particulars of the name or names of the divers other persons to be given to defts.

Where the names are unknown that must be stated in the indictment.—*R. v. PERRIN & BURST* (1908), 72 J. P. 144, 24 T. L. R. 487.

**2233.** ——— **Embezzlement.**]—If a prisoner, indicted for embezzlement, does not know the specific acts of embezzlement intended to be charged against him, he should apply to prosecutor for a particular of the charges, & if it be refused, the judge will, on motion, supported by proper affidavits, grant an order for such particular to be given, & postpone the trial, if necessary. Such particular ought, at least, to state the names of the persons from whom the money is alleged to have been received.—*R. v. HODGSON* (1828), 3 C. & P. 422.

*Annotation:—Mentd. R. v. Lister* (1856), 26 L. J. M. C. 26.

**2234.** ———.]—Where a party is charged with embezzlement, the judge, before the indictment is found, will order prosecutor to furnish prisoner with a particular of the charges, if prisoner makes an affidavit that he does not know what the charges are, & that he has applied to prosecutor for a particular, & it has been refused.—*R. v. BOOTYMAN* (1832), 5 C. & P. 300.

*Annotation:—Refd. R. v. Haslam* (1855), 26 L. T. O. S. 108.

**2235.** ———.]—The ct. will not order particulars of a charge to be delivered to a deft. upon an indictment not before the ct.—*R. v. HASLAM* (1855), 26 L. T. O. S. 108; 1 Jur. N. S. 1139; 4 W. R. 122; 19 J. P. Jo. 756.

**2236.** ——— **Nuisance.**]—An indictment for a nuisance contained twelve counts, describing the nuisance in different ways, & charging it to have been committed in different parishes & counties within the jurisdiction of the Central Criminal Court. This ct., on reading the indictment only, which had been removed by *certiorari*, & without affidavit, ordered prosecutor to give deft. a note of the several acts of nuisance which he intended to prove.—*R. v. CURWOOD* (1835), 3 Ad. & El. 815; 1 Har. & W. 310; 5 Nev. & M. K. B. 369; 3 Nev. & M. M. C. 293; 111 E. R. 623.

*Annotation:—Refd. R. v. Brown, R. v. Esdaille, R. v. Stapleton* (1857), 21 J. P. Jo. 772.

**2237.** ———.]—*R. v. DOWNSHIRE (MARQUIS)* (1836), 4 Ad. & El. 698; 6 Nev. & M. K. B. 92; 3 Nev. & M. M. C. 539; 111 E. R. 950.

*Annotations:—Mentd. R. v. Milverton* (1836), 5 Ad. & El. 841; *R. v. Jones* (1840), 12 Ad. & El. 684; *R. v. Cricklade St. Mary* (1850), 15 L. T. O. S. 296; *Gwyn v. Hardwicke* (1856), 1 H. & N. 49; *Bailey v. Jamieson* (1876), 1 C. P. D. 329; *R. v. Kent JJ.* (1904), 73 L. J. K. B. 858.

#### PART VI. SECT. 4, SUB-SECT. 14.

**22331. When granted—Embezzlement.]**—*Semble*: in case of embezzlement the ct. will order the accused to be furnished with a full bill of particulars.—*R. v. HUGHES* (1850), 4 Cox, C. C. 447.—*IR.*

**c. — False pretences.]**—In an indictment for obtaining money by false pretences prisoner is entitled to be informed what the false pretences were; & where the information is insufficient particulars will be ordered.—*R. v. KINGSTON* (1904), 24 N. Z. L. R. 201.—*N.Z.*

**d. — Discretion of court.]**—It is within the discretion of the trial judge to order particulars or not.—*R. v. CLARKE* (1908), 9 W. L. R. 243; 1 *Alta. L. R.* 358.—*CAN.*

**2238. — Barratry.]**—On indictment for barratry, deft. must have a copy of the articles.—*R. v. WARD* (1701), 12 Mod. Rep. 516; 88 E. R. 1488.

**2239. — —.]**—*GODDARD v. SMITH*, No. 2337, *post*.

**2240. — —.]**—In an indictment of barratry, deft. is entitled to a copy of the articles, which are to be insisted on against him at the trial.

In an indictment for keeping a common bawdy house or gaming house, though the charge is general, yet particular facts may be given in evidence.—*CLARKE v. PERIAM* (1742), 2 Atk. 333, 337; 9 Mod. Rep. 340; 26 E. R. 603; *sub nom. CLARK v. PERIAM, PERIAM v. CLARK*, 1 Coop. temp. Cott. 541, L. C.

**2241. Application must be made to court of trial.]**—*R. v. HASLAM*, No. 2235, *ante*.

*See, now, Indictments Act, 1915 (c. 90), s. 3, sched. I., r. 4.*

#### SECT. 5.—FINDING OF AN INDICTMENT BY A GRAND JURY.

##### SUB-SECT. 1.—IN GENERAL.

**2242. Must be found by twelve.]**—The caption of an indictment must show that it was taken on the oath of twelve men.—*CLYNARD'S CASE* (1599), Cro. Eliz. 654; 78 E. R. 893.

**2243. —.]**—*AYLETT v. R.*, No. 2322, *post*.

**2244. Number of grand jury—Whether more than twenty-three.]**—A grand jury must not consist of more than 23. If more than 23 have been sworn & have found a bill, the ct. will not, on that account, quash the indictment after deft. has removed it by *certiorari*, gone to trial, & been convicted.

The caption of the indictment on which deft. had been convicted as above stated the presentment to be made by the oaths of A., B., C., D., etc., naming 12 grand jurors, & others, good & lawful men, etc. A rule was obtained, with a view to a writ of error, calling on the clerk of the peace to show cause why the caption should not be amended by inserting the true names & number of the grand jury sworn.—*Held*: (1) the caption was not incorrect in omitting to state the number & all the names of the grand jury & under the circumstances, no amendment could be made in it; (2) the ct. would refuse to receive an affidavit from a grand jurymen as to the number of grand jurors or what passed in the grand jury room.—*R. v. MARSH* (1837), 6 Ad. & El. 236; Will. Woll. & Dav. 150; 6 L. J. M. C. 153; 1 Jur. 38; 112 E. R. 89; *sub nom. R. v. MARCH*, 1 J. P. 245.

*Annotations:—Generally, Mentd. O'Brien v. R.* (1849), 3 Cox, C. C. 360; *R. v. Yates* (1883), 48 J. P. 102.

#### PART VI. SECT. 5, SUB-SECT. 1.

**a. Number of grand jury.]**—The sheriff having erroneously chosen 24 grand jurors in place of 12, & the first 12 alone having been called, & one of them finding himself ill, 11 only were sworn, who brought in a true bill for murder against the person.—*Held*: their report was valid, the law not requiring the agreement of more than 7 grand jurors in all the provinces where the number does not exceed 13.—*R. v. POIRIER* (1898), Q. R. 7 Q. B. 483.—*CAN.*

**1. Objection to constitution of grand jury.]**—A person committed to trial cannot object to the constitution of the grand jury after they have dealt with the indictment.—*R. v. ROBERTS* (1923), 39 Can. Crim. Cas. 324.—*CAN.*

**g. Swearing of grand jury—Whether accused need be present.]**—*R. v. MATHURIN* (1903), Q. R. 12 K. B. 494.—*CAN.*

**h. Disqualification—Prosecutor.]**—Where one of the grand jurors, by whom an indictment for forcible entry & detainer was found was the prosecutor, the indictment was quashed, though after plea.—*R. v. CUNARD* (1838), Ber. 500.—*CAN.*

**k. —.]**—Appl. was indicted for perjury. Complainant had been summoned to act as a grand juror for the assizes at which the trial took place. Complainant was present with the grand jury when it was charged & when the presentment of a true bill was made. While the bill was under consideration by the grand jury one of the jurymen to whom the complainant had stated that it was a

**Sect. 5.—Finding of an indictment by a grand jury:**  
*Sub-sects. 1 & 2.]*

**2245.** ————*—Qu.*: whether the number of jurors sworn upon the grand inquest is necessarily limited to 23.—**STAFFORDSHIRE GRAND JURY** (1848), 3 Cox, C. C. 433.

**2246. Peer may not serve—Irish peer member of House of Commons.]**—An Irish peer ought not to serve upon a grand jury unless he is a member of the House of Commons.—**IRISH PEER CASE** (1806), Russ. & Ry. 117, C. C. R.

**2247. Right to challenge.]**—*R. v. LEWIS* (1679), 7 State Tr. 250.

**2248. Admission of counsel to grand jury room—Former practice.]**—**REGICIDES' CASE** (1660), 5 State Tr. 947; Kel. 7; 84 E. R. 1056.

*Annotations:—Mentd. R. v. Kinloch* (1746), Fost. 16, 25; *Crosthwaite v. Gardner* (1852), 18 Q. B. 640.

**2249.** ————*—R. v. SHAFTESBURY (EARL)* (1681), 8 State Tr. 759.

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**2250. Admission of solicitor to grand jury room—Whether allowed.]**—*R. v. WEBB* (1737), 2 Stra. 1068; 93 E. R. 1037.

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**2251. No liability in respect of discharge of duty.]**—When a grand inquest indicts one of murder or felony, & after the party is acquitted, no writ of conspiracy lies for him against the indictors.—**FLOYD v. BARKER** (1607), 12 Co. Rep. 23; 77 E. R. 1305.

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**2252.** ————*—MACCLESFIELD (EARL) v. STARKEY* (1685), 10 State Tr. 1329.

**2253. Misconduct of grand jury—Indictment for non-repair of highway—Interest of members of grand jury.]**—The Ct. of Q. B. granted an information against the inhabitants of a parish for non-repair of a road, where it was deposed that a bill of indictment had been preferred at the assizes but thrown out by the grand jury; that two of the grand jurors were proprietors of land in the parish; that one of them who had acted on behalf of the parish at an earlier stage of the dispute had stated to the foreman that the road was useless; & that such statements were given in opposing the finding of the indictment; such depositions being

deplorable case, but it had come to the pass that either he or the accused would have to leave the town, repeated this statement to other grand jurors:—*Held*: neither the fact of the presence of the complainant as a member of the grand jury nor the statement made by him constituted a well-founded objection to the constitution of the grand jury which had passed upon the indictment, which therefore could not be quashed under Criminal Code, s. 899.—**VERONNEAU v. R.** (1917), 64 S. C. R. 7; 27 Can. Crim. Cas. 211; 270 W. R. 276; 33 D. L. R. 68.—**CAN.**

**1. —Agent of prosecutor.]**—Deft. was indicted for conspiracy to prevent C. from recovering his rents. W., agent of C., was on the grand jury, which found the bill:—*Held*: W. was incompetent, & the indictment must be quashed.—*R. v. GORBET* (1866), 1 P. E. I. 262.—**CAN.**

**m. —Member of grand jury foreman of coroner's jury.]**—Prisoner had been found guilty of murder. W., one of the grand jury, which found the bill against him, had previously acted

as foreman of the coroner's jury, which had returned a verdict of murder against prisoner. The objection had been taken before the jury were sworn:—*Held*: as the objection did not affect the justice of the proceeding the appln. must be refused.—*R. v. DOWNEY* (1869), 1 P. E. I. 291.—**CAN.**

**n. —Affinity to prisoner.]**—A true bill being found against deft., deft. moved to have same quashed on three grounds: (1) one of the grand jurors who found the bill was of affinity to deft. in the seventh degree; (2) the names of two persons on the jury were not the same as those contained in the panel annexed to the venire facias; (3) that one of the grand jurors had previously to the finding of the indictment expressed an opinion as to deft.'s guilt, was hostile to deft.:—*Held*: the first ground alleged was not sufficient to quash an indictment, & from the evidence the second & third grounds were also insufficient.—*R. v. LAWSON* (1888), 2 P. E. I. 398.—**CAN.**

**o. Presence of other jurors necessary at time foreman sworn.]**—It is

contradicted only by general statements that two had taken no undue or active part in opposing the finding.—*R. v. UPTON ST. LEONARD'S (INH. TANTS)* (1847), 10 Q. B. 827; 2 New Mag. 166; 2 New Sess. Cas. 582; 16 L. J. M. C. 8 L. T. O. S. 514; 11 J. P. 327; 11 Jur. 3 2 Cox, C. C. 258; 116 E. R. 313.

*Annotation:—Mentd. Bailey v. Macaulay* (1849), 19 L. J. C. 73.

**2254. Whether presentment necessary—Second trial after repeal of Grand Juries (Suspension) Act, 1917 (c. 4)—Effect of Interpretation Act, 1917 (c. 63), s. 38 (2).]**—When an indictment was tried during the operation of Grand Juries (Suspension) Act, 1917 (c. 4), & the trial adjourned the jury having disagreed, a second trial after repeal of that statute was within Interpretation Act, 1889 (c. 63), s. 38 (2), so that no presentment by a grand jury was necessary.—*R. v. BARR* (1922), 91 L. J. K. B. 562; 126 L. 642; 86 J. P. 135; 38 T. L. R. 393; 66 Sol. 474; 27 Cox, C. C. 185; 16 Cr. App. Rep. 1 109, C. C. A.

**SUB-SECT. 2.—EVIDENCE BEFORE GRAND JURY**

**2255. Attendance of witnesses—All witnesses bound over.]**—All the witnesses bound over give evidence should go before the grand jury.—*R. v. CARPENTER* (1844), 1 Cox, C. C. 72.

**2256. Witnesses should be sworn—Effect witness not being sworn.]**—If witnesses go before the grand jury without being sworn, & the bill found & prisoner tried & convicted, it is proper to recommend him for a free pardon.—*R. DICKINSON* (1819), Russ. & Ry. 401, C. C. R.

**2257. —Presentment of a constable must on oath.]**—The presentment of a constable for an offence, whether at assizes or quarter session must be made upon oath, before the grand jury.

A constable may present upon his own knowledge; but his presentment must be made upon oath. Every such presentment ought to be made upon oath before the grand jury, & to be regularly returned by them, in order to its having any force or validity. No man ought to be put upon trial except upon an indictment found on oath (LORD TENTERDEN, C.J.).—*R. v. SOMERSETSHIRE JJ.* (1827), 1 Man. & Ry. K. B. 272; 1 Man. Ry. M. C. 81.

**2258. —Improper mode of swearing will vitiate indictment.]**—When the grand jury has

essential that, at the time the form of the grand jury is sworn the other jurors be present & hear the oath taken by their foreman.—*BELANG v. R.* (1904), Q. R. 12 K. B. 69.—**CA.**  
**p. Right of amendment of bill before finding.]**—A bill of indictment for a misdemeanour was sent up to the grand jury:—*Held*: until the grand jury had found it to be a true bill, the proceedings in relation to the form of the bill were *ex parte*, & A. was at liberty to amend.—*R. O'CONNELL* (1843), 3 Craw. & D. 151. **IR.**

**q. Presentment to grand jury adjoining county—Notices not served Effect of.]**—When a bill of indictment was preferred to the grand jury of adjoining county, for an offence committed in the county of a city, and the provisions of the 9 Geo. 4, c. 1 & found there, but no notices were served, nor the information removed from the custody of the clerk of the peace for the county of the city:—*Held*: a new indictment might be preferred in the county of the city.—*R. v. DUFFY* (1849), 1 Ir. Jur. 81.—**I.**



found a bill, the judges before whom the case comes to be tried, ought not to inquire whether the witnesses were properly sworn previously to their going before the grand jury. *Semble*: an improper mode of swearing them will not vitiate the indictment, as the grand jury are at liberty to find a bill upon their own knowledge merely.—*R. v. RUSSELL* (1842), Car. & M. 247.

**2259.** ———.]—The witnesses against a prisoner charged with larceny were, previously to their examination before the grand jury, sworn in open ct. by the clerk of the ct.:—*Held*: they were properly sworn.—*R. v. TEW* (1855), Dears. C. C. 429; 24 L. J. M. C. 62; 24 L. T. O. S. 279; 3 W. R. 178; 19 J. P. Jo. 56, C. C. R.

**2260. Duty of foreman to initial names of witnesses examined—Indictment quashed for omission to do so.**—*R. v. BRESLAUER* (1904), 68 J. P. Jo. 341.

**2261. Accomplice may give evidence.**—An accomplice may give evidence before a grand jury to support an indictment against a *particeps criminis*, & a bill so found is good, although the accomplice be not previously admitted a witness for the Crown & was carried from the prison before the grand jury by means of surreptitious & illegal order.—*R. v. DODD* (1777), 1 Leach, 155, C. C. R.

**2262.** ———.]—*R. v. PERCEVAL* (1833), 1 Lew. C. C. 155.

*Annotation.*—*Refd.* *R. v. O'Connor* (1843), 4 State Tr. N. S. 935.

**2263.** ———.]—Where A. was committed for feloniously inciting B. to commit a felony, & B. for committing the said felony, the judge, on the application of counsel for the prosecution, permitted B. to go before the grand jury & be examined as a witness against A.—*R. v. SHARP* (1846), 10 J. P. 220.

**2264. Accused cannot give evidence.**—A person charged with an offence has no right to give evidence on his own behalf before the grand jury.—*R. v. SAUNDERS* (1898), 63 J. P. 24; 15 T. L. R. 104, C. C. R.

*Annotation.*—*Mentd.* *R. v. Yeldham* (1922), 128 L. T. 28.

**2265.** ———.]—Criminal Evidence Act, 1898 (c. 36) does not confer on a prisoner the right of giving evidence on his own behalf before the grand jury.—*R. v. RHODES*, [1899] 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360; 62 J. P. 774; 47 W. R. 121; 15 T. L. R. 37; 43 Sol. Jo. 45; 19 Cox, C. C. 182, C. C. R.

*Annotations.*—*Fold.* *R. v. Saunders* (1898), 63 J. P. 24. *Mentd.* *R. v. Ollis*, [1900] 2 Q. B. 758; *R. v. Wyatt*, [1904]

#### PART VI. SECT. 5, SUB-SECT. 2.

**2260 i. Duty of foreman to initial names of witnesses examined—Whether indictment quashed for omission to do so.**—*Held*: the directions in Criminal Code, 1892, s. 645, are of a mandatory character, & failure to affix the initials, etc., as directed, will not constitute sufficient ground for quashing an indictment.—*R. v. TOWNSEND & WHITING* (1896), 28 N. S. R. 468.—*CAN.*

**2260 ii.** ———.]—The foreman's omission to put his initials opposite the names of the Crown witnesses on the back of an indictment does not nullify the proceedings.—*R. v. BUCHANAN* (1898), 12 Man. L. R. 190.—*CAN.*

**2260 iii.** ———.]—*R. v. HOLMES* (1902), 9 B. C. R. 294; 22 C. L. T. 437.—*CAN.*

**2260 iv.** ———.]—The omission by the foreman to initial the names of the witnesses examined before the grand jury, as required by law, is a fatal defect, & has the effect of annulling the indictment.—*BELANGER v. R.* (1904), Q. R. 12 K. B. 69.—*CAN.*

*r. Grand jury decide what evidence they will hear.*—The grand jury have the right to decide for themselves upon what evidence they will find a bill, & the ct. have no power to inquire into the proceedings before them, or as to the nature of the evidence which they took into consideration.—*R. v. CHETWYND* (1891), 23 N. S. R. 332.—*CAN.*

*s. Affidavits taken at preliminary investigation.*—Affidavits taken at a preliminary investigation before a magistrate, but not in presence of the accused, cannot be used as evidence before the grand jury, in the absence of the witnesses.—*R. v. CARBRAY* (1887), 13 Q. L. R. 100.—*CAN.*

*t. Witnesses may be examined in any order.*—*R. v. MATHURIN* (1903), Q. R. 12 K. B. 494.—*CAN.*

*a. When depositions may be read—Whether proof of illness or absence necessary.*—Upon a bill of indictment being presented, the grand jury reported that without the evidence of an absent witness they had no materials to find a bill.—*Held*: they were entitled to peruse the depositions

1 K. B. 188; *R. v. Smith* (1905), 92 L. T. 208; *R. v. Bond*, [1906] 2 K. B. 389; *R. v. Charlesworth* (1910), 4 Cr. App. Rep. 167; *R. v. Stone* (1910), 6 Cr. App. Rep. 89; *R. v. Boyle & Merchant*, [1914] 3 K. B. 339; *R. v. Mason* (1914), 111 L. T. 336.

**2266. When depositions may be read—Not on suspicion that witness has been tampered with.**—A grand jury cannot, on a suspicion that the witness has been tampered with by prisoner, receive in evidence his written examination in lieu of his parol testimony, for the purpose of finding a bill.—*DENBY'S CASE* (1789), 1 Leach, 514.

**2267.** ———.]—Not where witness refuses to give evidence.—A material witness refused to give any evidence whatever to the grand jury:—*Held*: the grand jury could not read the deposition of such witness as evidence to enable them to find a bill.—*R. v. RENDLE* (1861), 11 Cox, C. C. 209.

**2268.** ———.]—Where witness too ill to attend.—Under Indictable Offences Act, 1848 (c. 42), s. 17, the deposition of a witness, who is so ill as not to be able to travel, may be read in evidence before the grand jury.—*R. v. CLEMENTS* (1851), 2 Den. 251; T. & M. 579; 4 New Sess. Cas. 623; 20 L. J. M. C. 193; 17 L. T. O. S. 136; 15 J. P. 338; 15 Jur. 407; 5 Cox, C. C. 191, C. C. R.

**2269.** ———.]—Proof of illness.—Depositions of an absent witness are not admissible before the grand jury without medical evidence of his illness.—*R. v. PHILLIPS* (1858), 1 F. & F. 105.

*Annotation.*—*Mentd.* *R. v. Cohen* (1907), 71 J. P. 190.

**2270.** ———.]—Upon a bill of indictment being presented, the grand jury made an application for the deposition of an absent witness:—*Held*: they were entitled to peruse the deposition without formal proof that the witness was too ill to travel.

The grand jury were not bound by any rules of evidence. They were a secret tribunal & might lay by the heels in jail the most powerful man in the country by finding a bill against him, & for that purpose might even read a paragraph from a newspaper (BYLES, J.).—*R. v. BULLARD* (1872), 12 Cox, C. C. 353.

**2271.** ———.]—& of due taking of deposition.—The deposition of a witness in a criminal prosecution who has travelled to the assize town, but is too ill to attend ct. for examination, may be read before the grand jury, after the illness of the witness & the due taking of the deposition had been proved to the satisfaction of the judge.—*R. v. WILSON* (1874), 12 Cox, C. C. 622.

**2272.** ———.]—When a witness

without proof that the witness was too ill to travel or absent from Canada.—*R. v. HOWES* (1886), 1 B. C. R. pt. 11, 307.—*CAN.*

*hearings before magistrate—Depositions of first hearing only read to grand jury.*—Accused charged with theft after preliminary inquiry was discharged on the ground that no sufficient case was made out to put the accused on his trial. Subsequently another information on the same charge was laid against him, & after a preliminary inquiry he was committed for trial. Depositions laid before grand jury & on which indictment was founded only included those taken at first hearing, not the second:—*Held*: all proceedings were regular & no ground for quashing the indictment.—*R. v. HANNAY* (1905), 2 W. L. R. 543.—*CAN.*

*e. Examination of exhibits.*—The submission of a record to the grand jury, in order that they may examine certain exhibits & verify certain statements made by witnesses examined before them, is not a fatal irregularity, where it is proved that



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**SUB-SECT. 2.—EVIDENCE BEFORE GRAND JURY**

**2255. Attendance of witnesses—All witnesses bound over.]**—All the witnesses bound over give evidence should go before the grand jury *R. v. CARPENTER* (1844), 1 Cox, C. C. 72.

**2256. Witnesses should be sworn—Effect witness not being sworn.]**—If witnesses go before the grand jury without being sworn, & the bill found & prisoner tried & convicted, it is proper to recommend him for a free pardon.—*R. DICKINSON* (1819), Russ. & Ry. 401, C. C. R.

**2257. Presentment of a constable must on oath.]**—The presentment of a constable for an offence, whether at assizes or quarter session must be made upon oath, before the grand jury.

A constable may present upon his own knowledge; but his presentment must be made upon oath. Every such presentment ought to be made upon oath before the grand jury, & to be regularly returned by them, in order to its having any force or validity. No man ought to be put upon trial except upon an indictment found on oath (LORD TENTERDEN, C.J.).—*R. v. SOMERSETSHIRE JJ.* (1827), 1 Man. & Ry. K. B. 272; 1 Man. Ry. M. C. 81.

**2258. Improper mode of swearing will vitiate indictment.]**—When the grand jury has

essential that, at the time the foreman of the grand jury is sworn the other jurors be present & hear the oath taken by their foreman.—*R. v. R.* (1904), Q. R. 12 K. B. 69.—**CAN.**

p. *Right of amendment of bill before finding.]*—A bill of indictment for a misdemeanour was sent up to the grand jury:—*Held*: until the grand jury had found it to be a true bill, the proceedings in relation to the form of the bill were *ex parte*, & A. was at liberty to amend.—*R. O'CONNELL* (1843), 3 Craw. & D. 151. **IR.**

q. *Presentment to grand jury adjoining county—Notices not served—Effect of.]*—When a bill of indictment was preferred to the grand jury of the adjoining county, for an offence committed in the county of a city, and the provisions of the 9 Geo. 4, c. 1 & found there, but no notices were served, nor the information removed from the custody of the clerk of the peace for the county of the city:—*Held*: a new indictment might be preferred in the county of the city.—*R. v. DUFFY* (1849), 1 Ir. Jur. 81.—**IR.**

found a bill, the judges before whom the case comes to be tried, ought not to inquire whether the witnesses were properly sworn previously to their going before the grand jury. *Semble*: an improper mode of swearing them will not vitiate the indictment, as the grand jury are at liberty to find a bill upon their own knowledge merely.—*R. v. RUSSELL* (1842), *Car. & M.* 247.

**2259.** ———.]—The witnesses against a prisoner charged with larceny were, previously to their examination before the grand jury, sworn in open ct. by the crier of the ct.:—*Held*: they were properly sworn.—*R. v. TEW* (1855), *Dears. C. C.* 429; *24 L. J. M. C.* 62; *24 L. T. O. S.* 279; *3 W. R.* 178; *19 J. P. Jo.* 56, *C. C. R.*

**2260. Duty of foreman to initial names of witnesses examined—Indictment quashed for omission to do so.**—*R. v. BRESLAUER* (1904), *68 J. P. Jo.* 341.

**2261. Accomplice may give evidence.**—An accomplice may give evidence before a grand jury to support an indictment against a *particeps criminis*, & a bill so found is good, although the accomplice be not previously admitted a witness for the Crown & was carried from the prison before the grand jury by means of surreptitious & illegal order.—*R. v. DODD* (1777), *1 Leach*, 155, *C. C. R.*

**2262.** ———.]—*R. v. PERCEVAL* (1833), *1 Lew. C. C.* 155.

*Annotation.*—*Refd.* *R. v. O'Connor* (1843), *4 State Tr. N. S.* 935.

**2263.** ———.]—Where A. was committed for feloniously inciting B. to commit a felony, & B. for committing the said felony, the judge, on the application of counsel for the prosecution, permitted B. to go before the grand jury & be examined as a witness against A.—*R. v. SHARP* (1846), *10 J. P.* 220.

**2264. Accused cannot give evidence.**—A person charged with an offence has no right to give evidence on his own behalf before the grand jury.—*R. v. SAUNDERS* (1898), *63 J. P.* 24; *15 T. L. R.* 104, *C. C. R.*

*Annotation.*—*Mentd.* *R. v. Yeldham* (1922), *128 L. T.* 28.

**2265.** ———.]—Criminal Evidence Act, 1898 (c. 36) does not confer on a prisoner the right of giving evidence on his own behalf before the grand jury.—*R. v. RHODES*, [1899] *1 Q. B.* 77; *68 L. J. Q. B.* 83; *79 L. T.* 360; *62 J. P.* 774; *47 W. R.* 121; *15 T. L. R.* 37; *43 Sol. Jo.* 45; *19 Cox, C. C.* 182, *C. C. R.*

*Annotations.*—*Fold.* *R. v. Saunders* (1898), *63 J. P.* 24. *Mentd.* *R. v. Ollis*, [1900] *2 Q. B.* 758; *R. v. Wyatt*, [1904]

*1 K. B.* 188; *R. v. Smith* (1905), *92 L. T.* 208; *R. v. Bond*, [1906] *2 K. B.* 389; *R. v. Charlesworth* (1910), *4 Cr. App. Rep.* 167; *R. v. Stone* (1910), *6 Cr. App. Rep.* 89; *R. v. Boyle & Merchant*, [1914] *3 K. B.* 339; *R. v. Mason* (1914), *111 L. T.* 336.

**2266. When depositions may be read—Not on suspicion that witness has been tampered with.**—A grand jury cannot, on a suspicion that the witness has been tampered with by prisoner, receive in evidence his written examination in lieu of his parol testimony, for the purpose of finding a bill.—*DENBY'S CASE* (1789), *1 Leach*, 514.

**2267.** ———.]—Not where witness refuses to give evidence.]—A material witness refused to give any evidence whatever to the grand jury:—*Held*: the grand jury could not read the deposition of such witness as evidence to enable them to find a bill.—*R. v. RENDLE* (1861), *11 Cox, C. C.* 209.

**2268.** ———.]—Where witness too ill to attend.]—Under Indictable Offences Act, 1848 (c. 42), s. 17, the deposition of a witness, who is so ill as not to be able to travel, may be read in evidence before the grand jury.—*R. v. CLEMENTS* (1851), *2 Den.* 251; *T. & M.* 579; *4 New Sess. Cas.* 623; *20 L. J. M. C.* 193; *17 L. T. O. S.* 136; *15 J. P.* 338; *15 Jur.* 407; *5 Cox, C. C.* 191, *C. C. R.*

**2269.** ———.]—Proof of illness.]—Depositions of an absent witness are not admissible before the grand jury without medical evidence of his illness.—*R. v. PHILIPS* (1858), *1 F. & F.* 105.

*Annotation.*—*Mentd.* *R. v. Cohen* (1907), *71 J. P.* 190.

**2270.** ———.]—Upon a bill of indictment being presented, the grand jury made an application for the deposition of an absent witness:—*Held*: they were entitled to peruse the deposition without formal proof that the witness was too ill to travel.

The grand jury were not bound by any rules of evidence. They were a secret tribunal & might lay by the heels in jail the most powerful man in the country by finding a bill against him, & for that purpose might even read a paragraph from a newspaper (*BYLES, J.*).—*R. v. BULLARD* (1872), *12 Cox, C. C.* 353.

**2271.** ———.]—& of due taking of deposition.]—The deposition of a witness in a criminal prosecution who has travelled to the assize town, but is too ill to attend ct. for examination, may be read before the grand jury, after the illness of the witness & the due taking of the deposition had been proved to the satisfaction of the judge.—*R. v. WILSON* (1874), *12 Cox, C. C.* 622.

**2272.** ———.]—When a witness

without proof that the witness was too ill to travel or absent from Canada.—*R. v. HOWES* (1886), *1 B. C. R. pt.* 11, *307.*—*CAN.*

**b. Two hearings before magistrate—Depositions of first hearing only read to grand jury.**—Accused charged with theft after preliminary inquiry was discharged on the ground that no sufficient case was made out to put the accused on his trial. Subsequently another information on the same charge was laid against him, & after a preliminary inquiry he was committed for trial. Depositions laid before grand jury & on which indictment was founded only included those taken at first hearing, not the second:—*Held*: all proceedings were regular & no ground for quashing the indictment.—*R. v. HANNAY* (1905), *2 W. L. R.* 543.—*CAN.*

**c. Examination of exhibits.**—The submission of a record to the grand jury, in order that they may examine certain exhibits & verify certain statements made by witnesses examined before them, is not a fatal irregularity, where it is proved that

#### PART VI. SECT. 5, SUB-SECT. 2.

**2260 i. Duty of foreman to initial names of witnesses examined—Whether indictment quashed for omission to do so.**

—*Held*: the directions in Criminal Code, 1892, s. 645, are of a mandatory character, & failure to affix the initials, etc., as directed, will not constitute sufficient ground for quashing an indictment.—*R. v. TOWNSEND & WHITING* (1896), *28 N. S. R.* 468.—*CAN.*

**2260 ii.** ———.]—The foreman's omission to put his initials opposite the names of the Crown witnesses on the back of an indictment does not nullify the proceedings.—*R. v. BUCHANAN* (1898), *12 Man. L. R.* 190.—*CAN.*

**2260 iii.** ———.]—*R. v. HOLMES* (1902), *9 B. C. R.* 294; *22 C. L. T.* 437.—*CAN.*

**2260 iv.** ———.]—The omission by the foreman to initial the names of the witnesses examined before the grand jury, as required by law, is a fatal defect, & has the effect of annulling the indictment.—*BELANGER v. R.* (1904), *Q. R.* 12 *K. B.* 69.—*CAN.*

**r. Grand jury decide what evidence they will hear.**—The grand jury have the right to decide for themselves upon what evidence they will find a bill, & the ct. have no power to inquire into the proceedings before them, or as to the nature of the evidence which they took into consideration.—*R. v. CHETWYND* (1891), *23 N. S. R.* 332.—*CAN.*

**s. Affidavits taken at preliminary investigation.**—Affidavits taken at a preliminary investigation before a magistrate, but not in presence of the accused, cannot be used as evidence before the grand jury, in the absence of the witnesses.—*R. v. CARBRAY* (1887), *13 Q. L. R.* 100.—*CAN.*

**t. Witnesses may be examined in any order.**—*R. v. MATHURIN* (1903), *Q. R.* 12 *K. B.* 494.—*CAN.*

**u. When depositions may be read—Whether proof of illness or absence necessary.**—Upon a bill of indictment being presented, the grand jury reported that without the evidence of an absent witness they had no materials to find a bill:—*Held*: they were entitled to peruse the depositions

**Sect. 5.—Finding of an indictment by a grand jury:**  
**Sub-sects. 2, 3 & 4.]**

is unable to attend a trial through illness, his deposition may be presented to the grand jury without any preliminary proof that the witness is ill & that such deposition was regularly taken.—*R. v. GERRANS* (1876), 34 L. T. 145; 13 Cox, C. C. 158.

**2273.** — — — — —.]—*R. v. LYNCH* (1902), Archbold's, Criminal Pleading, Evidence & Practice, 26th ed., p. 76.

**2274.** — — — — —.]—**Order of judge—After evidence in presence of accused.]**—Before the deposition of a witness who is too ill to travel can be given in evidence before the grand jury, the judge who presides must, by evidence at the presence of the accused, satisfy himself of the existence of the facts which under Indictable Offences Act, 1848 (c. 42), s. 17, make such deposition evidence.—*R. v. BEAVER & SHORE* (1866), 10 Cox, C. C. 274.

See, also, Part IV., Sect. 2, sub-sect. 2, E., ante.

**2275. Refusal to give evidence before grand jury—Punishable as contempt.]**—Refusing to give evidence to the grand jury, is a contempt fineable.—*R. v. PRESTON* (LORD) (1691), 1 Salk. 278; 91 E. R. 243.

**2276. Grand juror cannot disclose what passed in grand jury room.]**—*R. v. MARSH*, No. 2244, ante.

**2277.** — — — — —.]—**Perjury before grand jury.]**—A person may be indicted for perjury who gives false evidence before a grand jury when examined as a witness before them upon a bill of indictment, & another witness on the same indictment, who is in the grand jury room while such person is under examination, is competent to prove what such a witness swore before the grand jury & so is a police officer who was stationed within the grand jury room, these persons not being sworn to secrecy though the grand jury are.—*R. v. HUGHES* (1844), 1 Car. & Kir. 519.

Annotation:—*Mentd.* *Jorden v. Money* (1854), 5 H. L. Cas. 185.

**2278. Accused brought before grand jury for identification.]**—In a case of rape against five, prosecutrix, when before the grand jury, did not know the names of the different prisoners, but could identify the persons:—*Held*: the grand jury might call in another witness, who was before the examining magistrate, & there saw the prisoners, & let prosecutrix describe the different prisoners, & the other witness give their names, & if prisoners could not be identified by this mode, they might be brought before the grand jury.—*R. v. JENKINS* (1844), 1 Car. & Kir. 536.

**SUB-SECT. 3.—FINDING THE BILL.**

**2279. Duty of grand jury—To inquire & not to convict.]**—*R. v. WINDHAM* (1667), 2 Keb. 180; 84 E. R. 113.

**2280.** — — — — —.]—**To find bill in case of suspicion.]**—

the decision of the grand jury was arrived at without reference to the depositions contained in such record.—*BÉLANGER v. R.* (1904), Q. R. 12 K. B. 69.—**CAN.**

**d. Returning bill without taking evidence—Depositions read.]**—A grand jury having returned a true bill without calling any of the witnesses named on the indictment, but upon reading depositions taken at the preliminary hearing, which had not been legally submitted to them, the judge sent them back with instructions to take the evidence of the witnesses whose names were on the back of the indictment & determine upon such evidence

whether they would bring in a true bill, which they did:—*Held*: the judge had properly exercised his discretion, & was right in dismissing a motion to set aside a conviction had in a trial upon such true bill.—*R. v. THURSTAN* (1911), 16 B. C. R. 326.—**CAN.**

**e. Original documents to be laid before grand jury.]**—The original affidavit ought to be laid before the grand jury, in order to find bills of indictment for perjury; the office copy is not sufficient.—*KEENAN v. BOYLAN* (1803), 1 Sch. & Lef. 232.—**IR.**

**f. Application by Crown for further evidence to be heard.]**—A bill had

It is not necessary that the case for prosecution should be completed previously to going before the grand jury; it is enough if a case for suspicion be shown. To require all the evidence to be produced before the grand jury would, in many cases, put prosecution to a very needless expense (*POLLOCK, C.B.*).—*R. v. MOBBS* (1860), 2 F. & F. 18, N. P.

**2281.** — — — — —.]—**May use their own knowledge.]**—*R. v. RUSSELL*, No. 2258, ante.

**2282.** — — — — —.]—Where a witness is too ill to attend before the grand jury, but prisoner has communicated his intention to plead guilty, the grand jury may act upon their knowledge of that fact & find a true bill.—*R. v. TONG* (1847), 9 L. T. O. S. 497; 2 Cox, C. C. 290.

**2283.** — — — — —.]—*R. v. BULLARD*, No. 2270, ante.

**2284. Conditional or partial finding void.]**—*ANON.* (1584), 1 Leon. 287; 74 E. R. 261.

**2285.** — — — — —.]—*CROMWELL'S (LORD) CASE* (1602), Yelv. 15; 80 E. R. 11.

**2286.** — — — — —.]—*R. v. FORD* (1607), Yelv. 99; 80 E. R. 68; *sub nom.* *FORD'S CASE*, Cro. Jac. 151.

Annotations:—*Reffd.* *R. v. Sadler* (1663), 1 Sid. 99; *R. v. Leighton* (1708), Fortes. Rep. 173.

**2287.** — — — — —.]—*POWLE'S CASE* (1618), 2 Roll. Rep. 52; 81 E. R. 654.

Annotation:—*Mentd.* *R. v. Cotton* (1751), 2 Ves. Sen. 288.

**2288.** — — — — —.]—A grand jury cannot find a bill partly true & partly not.—*R. v. SERJANT* (1669), 1 Sid. 414; 82 E. R. 1188.

**2289. Bill containing two or more counts—True bill may be found as to one only.]**—An indictment consisted of two counts, one for a riot indorsed by the jury *ignoramus*; the other for an assault which was returned "*billā vera*":—*Held*: the latter was a true bill & good.—*R. v. FIELDHOUSE* (1775), 1 Cowp. 325; 98 E. R. 1111.

**2290. Bill against two persons—True bill may be found as to one only.]**—An indictment against two that they *insultum fecerunt*, is good, although the grand jury find *ignoramus* as to one of them.—*CHOLMLEY'S CASE* (1636), Cro. Car. 464; 79 E. R. 1002.

**2291. Effect of incomplete finding.]**—*R. v. CARLILE* (1821), 8 C. & P. 584, n.

**2292.** — — — — —.]—The grand jury returned a bill of indictment which contained ten counts for forging & uttering the acceptance of a bill of exchange with an indorsement "A true bill on both counts," & prisoner pleaded to the whole ten counts. After the case for prosecution had concluded, prisoner's counsel pointed this out. The grand jury being already discharged the judge would not allow one of the grand jurors to be called as a witness to explain their finding.—*R. v. COOKE* (1838), 8 C. & P. 582.

Annotation:—*Mentd.* *R. v. Ion* (1852), 2 Den. 475.

**2293. Bill for murder—True bill for manslaughter cannot be found.]**—*R. v. BROWN, PAINE, ETC.* (1664), 1 Sid. 229; 82 E. R. 1075.

been ignored by the grand jury. An appln., on the part of the Crown, for liberty to send the bill back for the purpose of examining a witness who, through mistake, had not been examined by the grand jury, refused.—*R. v. HUNTER* (1841), Ir. Cir. Rep. 260.—**IR.**

**PART VI. SECT. 5, SUB-SECT. 3.**

**g. Duty of grand jury—When doubt as to guilt.]**—It is the duty of the grand jury, when in doubt as to whether the traverser is legally guilty, or can be convicted for the crime for which bills are sent up to them, if they believe him morally guilty, to find the bills,

**2294. Bill for murder against two—Found as murder against one—As manslaughter against the other—Fresh bill necessary.]—***R. v. CARY* (1616), 3 Bulst. 206; 81 E. R. 173.

**2295. ————.]—**If, upon a bill for murder against B. & C. the grand jury returns "a true bill against B. for murder" & "a true bill against C. for manslaughter," the finding is good against B. & a nullity as respects C. & a fresh indictment for manslaughter should be preferred against the latter.—*R. v. BUBB, R. v. HOOK* (1850), 14 J. P. 562; 4 Cox, C. C. 455.

*Annotation:—**Refd. R. v. Gibbins* (1918), 82 J. P. 287.

**2296. Bill cannot be ignored on ground of insanity of accused.]—**A grand jury has no authority by law to ignore a bill for murder, on the ground of insanity, though it appear clearly from the testimony of the witnesses as examined by them on the part of prosecution that accused was in fact insane; but if they believe the acts done, if they had been done by a person of sound mind, would have amounted to murder, it is their duty to find the bill, otherwise the ct. cannot order the detention of the party during the pleasure of the Crown, as it can, either on arraignment or trial, under Criminal Lunatics Act, 1800 (c. 94), ss. 1 & 2.—*R. v. HODGES* (1838), 8 C. & P. 195.

**2297. Finding bill after discharge of grand jury—Recall of grand jury before separation of jurors.]—**The grand jury had come into ct. & had been discharged & had left the ct., but had neither left the building nor separated. The judges directed them to be sent for back into ct., & directed another bill of indictment, the witnesses on which were going abroad, to be sent before them.—*R. v. HOLLOWAY* (1839), 9 C. & P. 43.

**2298. Finding second bill after first bill ignored—May be done at same sessions.]—**Where a grand jury has ignored a bill against a prisoner, a second bill may be preferred before them for the same offence at the same sessions.—*R. v. SIMMONSTON (or SIMMONITE)* (1843), 1 Carr & Kir. 164; 1 L. T. O. S. 527; 1 Cox, C. C. 30; *sub nom. R. v. NEWTON*, 2 Mood. & R. 503.

*Annotations:—**Mentd. R. v. Yeomans* (1860), 1 L. T. 369; *R. v. Savage* (1876), 13 Cox, C. C. 178; *R. v. Lindsay* (1902), 66 J. P. 505; *R. v. Naguib*, [1917] 1 K. B. 359.

**2299. ———— May not be done at same sessions.]—**If the grand jury have ignored a bill, they cannot find another bill against the same person for the same offence at the same assizes or sessions, & if such other bill be sent before them, they should take no notice of it.—*R. v. HUMPHREYS* (1842), Car. & M. 601.

*Annotation:—**N.F. R. v. Newton* (1843), 2 Mood. & R. 503.

**2300. ————.]—**A second bill for the same matter should not be sent up to the grand jury when a bill has been previously ignored at the same sessions.—*R. v. AUSTIN* (1850), 14 J. P. 178; 4 Cox, C. C. 385.

**2301. ———— May be done at subsequent sessions.]**

& give the ct. an opportunity of deciding the point.—*R. v. COPELAND* (1851), 5 Cox, C. C. 299.—*IR.*

**h. Twelve grand jurors may find bill in absence of foreman—All must sign.]—**Any twelve of the grand jury may, in the unavoidable absence of the foreman, find or ignore a bill of indictment; but each of such grand jurors must sign his name thereupon; the foreman alone having the privilege of signing for self & fellows.—*RE DOWN COUNTY, GRAND JURY* (1845), 3 Craw. & D. 395.—*IR.*

**k. Bill found in wrong name.]—**A bill having been found against a person by a wrong Christian name, & the grand jury having been discharged

before the mistake was discovered, prisoner is entitled to be discharged.—*R. v. M'DONNELL* (1842), 1r. Cir. Rep. 419.—*IR.*

**l. Bill for felony—True bill for attempt cannot be found.]—**A grand jury does not possess the power of petty juries to find a true bill for an attempt to commit felony on an indictment for felony.—*R. v. FRIEDLANDER*, 2 J. R. N. S. 192.—*N.Z.*

#### PART VI. SECT. 5, SUB-SECT. 4.

**m. Indorsement of words "a true bill."—**In this case the indictment was indorsed, on the back thereof, with the name of the cause, & the name of the foreman of the grand jury, & over

**—Qu.: whether the preferring of an indictment against a party for night poaching, which is ignored, is a commencement of prosecution within Night Poaching Act, 1828 (c. 69), s. 4, so as to warrant the conviction of the party on another indictment preferred four years after the offence.—***R. v. KILLMINSTER* (1835), 7 C. & P. 228; 3 Nev. & M. M. C. 413.

**2302. Whether finding of bill can be postponed—Possibility of other charges being preferred.]—**Upon a charge of murder, by poison, the presentation of a bill to the grand jury cannot be postponed to the next assizes on the ground that other & like charges may, before that time, be preferred against prisoner, & if no bill is so presented prisoner is entitled to be discharged.—*R. v. HEESON* (1878), 14 Cox, C. C. 40.

**2303. ———— To give notice of charge under Prevention of Crime Act, 1908 (c. 59).]—***R. v. LAWRENCE* (1914), 78 J. P. Jo. 196.

#### SUB-SECT. 4.—AFTER BILL FOUND.

**2304. Bill of indictment—Becomes indictment after true bill found.]—***R. v. BROWN* (1700), 1 Salk. 376; 1 Ld. Raym. 592; 91 E. R. 328.

**2305. Need not be signed by foreman.]—**A bill of indictment need not be signed by the foreman of the jury.—*R. v. SIDOLI* (1833), 1 Lew. C. C. 55.

**2306. Indictment when found must be brought into court—Before grand jury discharged—Effect of delay.]—**Where a bill of indictment was sent before the grand jury, found & indorsed by them as a true bill, but accidentally mislaid & not brought into ct. until the grand jury had been discharged:—*Held:* there was no sufficient finding.—*R. v. THOMPSON* (1846), 1 Cox, C. C. 268.

**2307. Evidence by grand jurors explaining their finding not receivable.]—***R. v. MARSH*, No. 2244, *ante*.

**2308. ————.]—***R. v. COOKE*, No. 2292, *ante*.

**2309. Indictment found at quarter sessions—May be transmitted to assizes for trial—Accused ought not to be discharged.]—**Indictments were found against a prisoner at the quarter sessions for N. & transmitted to assizes by the justices at session:—*Held:* although the indictments were not removed by *certiorari*, the judges of assize should have tried the prisoner on these indictments, & he was improperly discharged by proclamation without such trial.—*R. v. WETHERELL* (1819), Russ. & Ry. 381, C. C. R.

*Annotation:—**Refd. Re Armstrong* (1861), 9 Cox, C. C. 342.

**2310. ———— Not transmitted to assizes—Judge of assize has no power to compel transmission—Fresh bill may be found at assizes.]—***R. v. WILDMAN*, No. 1910, *ante*.

**2311. ———— Offence not triable at quarter sessions—Indictment void.]—**A judge at *nisi*

the name of the foreman, the words, "Indictment for an assault on a peace officer, & for resisting & preventing apprehension & detainer." The words "a true bill" did not appear:—*Held:* under the provisions of the Code, s. 760, the signature of the foreman of the grand jury, on the back of the indictment, could only signify a true bill; & that, in view of the provisions of the above sect., the reason for the English practice did not apply, & the words "a true bill" were not necessary.—*R. v. TOWNSEND & WHITING* (1896), 23 N. S. R. 468.—*CAN.*

**n. Irregularities before magistrate cured.]—**When an indictment has been presented & a true bill found, the trial

**Sect. 5.—Finding of an indictment by a grand jury:**  
*Sub-sects. 4 & 5. Sect. 6.]*

*prius* has no jurisdiction to try an indictment for perjury at common law found at quarter sessions, & removed by *certiorari* into the K. B., an indictment so found being void.—*R. v. HAYNES* (1825), Ry. & M. 298, N. P.

*Annotation:—*Refd. *R. v. Bartlett* (1843), 12 L. J. M. C. 127.

**2312. — Removable by certiorari into King's Bench Division.]—***R. v. ATKINSON* (1784), 1 Wms. Saund. 249, n.; 4 East, 175, n.; 85 E. R. 293; *subsequent proceedings, sub nom. ATKINSON v. R.* (1785), 3 Bro. Parl. Cas. 517, H. L.

*Annotations:—*Refd. *R. v. O'Connell* (1844), 5 State Tr. N. S. 1; *R. v. Gregory* (1847), 16 L. J. Q. B. 281; *R. v. Smith O'Brien* (1849), 7 State Tr. N. S. 1. **Mentd.** *R. v. Holt* (1793), 5 Term Rep. 436; *R. v. Crossley* (1797), 7 Term Rep. 315; *R. v. Teal* (1809), 11 East, 307; *R. v. Carlile* (1831), 2 State Tr. N. S. 459.

**2313. — — — — —.]—**Where an indictment for libel had been granted at sessions for an offence, which, by Quarter Sessions Act, 1842 (c. 38), the sessions is incompetent to inquire into, a *certiorari* to remove the indictment into the Central Criminal Ct., & a *habeas corpus* to bring up the deft. from the Queen's prison to take his trial, were granted by order of the ct.—*R. v. PHILLIPS* (1846), 8 L. T. O. S. 4; 2 Cox, C. C. 114.

**2314. — — — — —.]—***R. v. STURT* (1846), 10 J. P. Jo. 788.

**2315. — — — — — May be transmitted to assizes for trial.]—**The grand jury at quarter sessions may find a true bill for rape, although persons charged with such an offence are not now triable at quarter sessions. The person against whom an indictment is so returned may be tried upon that indictment at assizes.—*R. v. ALLUM* (1846), 7 L. T. O. S. 388; 2 Cox, C. C. 62.

*Annotation:—*Refd. *R. v. Norman* (1922), 17 Cr. App. Rep. 29.

**2316. — — — — —.]—**Where objection was made to the adding of a count to another good count under Criminal Law Amendment Act, 1835 (c. 35), on the ground the first count was not triable at quarter sessions:—*Held*: the count was one on which the grand jury at quarter sessions could lawfully find a true bill even though the offence could not be tried in that ct.—*R. v. NORMAN* (1922), 17 Cr. App. Rep. 29, C. C. A.

**SUB-SECT. 5.—CAPTION OF INDICTMENT.**

**2317. Contents of caption—Must show before whom indictment taken.]—**LUDLOW'S CASE (1600), Cro. Eliz. 738; 78 E. R. 971.

**2318. — Stating indictment as taken at general sessions sufficient—Names of justices need not be inserted.]—**The caption of an indictment, stating

of the accused upon the indictment can then proceed, notwithstanding any irregularities in the proceedings before the magistrate.—*R. v. NYCZYK*, [1919] 2 W. W. R. 661.—**CAN.**

**o. Finding of "no bill"—Termination of prosecution.]—**Where a bill of indictment laid before the grand jury was returned by them into ct. with an indorsement "The Grand Jury recommend no bill," & no further proceedings are taken against the party, it is a termination of the prosecution.—*ALWARD v. SHARP* (1866), 1 Han. 286.—**CAN.**

**p. No second bill of like nature in same term.]—**Where a grand jury has ignored a bill the ct. will not permit a second bill of a like nature to be presented to them at the same term.—*R. v. BURTON* (1871), 5 Nfld. L. R. 411.—**NFLD.**

it as taken at a general sessions, is good, without naming any of the justices of the quorum.—**ANON.** (1688), 3 Mod. Rep. 152; 87 E. R. 97.

**2319. — Must show court had jurisdiction.]—**A caption representing a presentment to have been made at a ct. capable of taking, is good, though it states that such ct. was held with a ct. incapable.—*R. v. EVERARD* (1701), 1 Ld. Raym. 638; 1 Salk. 195; Holt, K. B. 173; 91 E. R. 1327.

**2320. — — — — —.]—**The caption of an indictment must show that the ct. where it was found had jurisdiction.—*R. v. FEARNLEY* (1786), 1 Leach, 425; 1 Term Rep. 316; 99 E. R. 1115.

*Annotations:—*Refd. *R. v. Marsh* (1837), 6 Ad. & El. 236 **Mentd.** *R. v. Bidwell* (1845), 10 J. P. 264.

**2321. — Must state indictment found on o of twelve men.]—**CLYNARD'S CASE, No. 224a. *ante.*

**2322. — Sufficient to state requisite number of jurors—Names of jurors need not be stated.]—**

(1) It is not necessary to specify the names of the grand jury in the record of the caption; it is enough to aver that the indictment was found by twelve good & lawful men, for party indicted has an opportunity of resorting to the original caption, where the names of the jurors appear. (2) Where it is material, the time of the offence must be stated.—*AYLETT v. R.* (1786), 3 Bro. Parl. Cas. 529; 4 East, 176, n.; 1 E. R. 1479, H. L.; *previous proceedings, sub nom. R. v. AYLETT* (1785), 1 Term Rep. 63.

*Annotations:—*As to (1) Refd. *R. v. Marsh* (1837), 6 Ad. & El. 236. As to (2) Refd. *Overton v. R.* (1843), 3 Gal. & Dav. 133; *R. v. Waverton* (1851), 2 Den. 340.

**2323. — — — — —.]—**(1) In the *nisi prius* record of an indictment, removed by *certiorari*, the names of the grand jurors who found the indictment need not be inserted in the caption.

(2) The caption of an indictment may be amended.—*R. v. DAVIS* (1824), 1 C. & P. 470.

**2324. — — — — —.]—***R. v. MARSH*, No. 2244, *ante.*

**2325. — Jurors should be stated as "good & lawful men of the country."—**OILY'S CASE (1623), Cro. Jac. 635; 79 E. R. 547.

**2326. — Omission of county.]—**A record of conviction at Y. assizes set forth an indictment found by B., C., etc., grand jurors, giving to each, except in one instance, the addition of his residence, but not stating them to be good, lawful men within the county of Y., nor making any mention of the county:—*Semble*: this objection was fatal.—*WHITEHEAD v. R.* (1845), 7 Q. B. 582; 14 L. J. M. C. 165; 5 L. T. O. S. 196; 9 Jur. 594; 1 Cox, C. C. 199; 9 J. P. Jo. 357; 115 E. R. 608.

*Annotation:—*Refd. *Mansell v. R.* (1857), 8 E. & B. 54.

**2327. — Must state that bill found on oath—**

**PART VI. SECT. 5, SUB-SECT. 5.**

**q. Contents of caption.]—**The caption is a statement of the proceedings, & should describe the ct. where the indictment was found, & the jurors by whom it was found with sufficient certainty. If it appear that the finding was on oath, it is sufficient, though the words "sworn & charged" be omitted.—*R. v. MARTIN* (1848), 6 State Tr. N. S. 925.—**IR.**

**2318 i. — Stating indictment found at special sessions sufficient—Names of justices need not be inserted.]—**A caption setting forth that an indictment was found at a special sessions of Oyer & Terminer & General Gaol Delivery before three judges "nominated & appointed" to inquire into, hear, etc., by virtue of a commission under letters patent directed to them " & others in the said letters named," was not bad

for not showing that the commission was joint & several. The ct. has power to amend a formal error made by the officer of the ct. in drawing up the caption.—*R. v. SMITH O'BRIEN* (1848), 7 State Tr. N. S. 1.—**IR.**

**r. — Description of justices' commission—Sufficiency of.]—**The caption having described the judges as "justices & comrs. of our lord the King, assigned & constituted to inquire":—*Held*: it sufficiently appeared that the commission was granted by letters patent.—*R. v. HINCHY* (1826), Batt. 509.—**IR.**

**s. — Sufficient if it appear requisite number of jurors.]—**It is not necessary to state that the bill had been found by twelve men, it appearing on the record that more than twelve are present.—*MARTIN v. R.* (1848), 12

**Need not state time & place.]**—The caption of an indictment need not state that the jury were sworn at the time when, & the place where they presented it.—*R. v. PHEASANT* (1699), 1 *Ld. Raym.* 548; 91 *E. R.* 1266.

**2328. — Need not state that jurors, sworn & charged.]**—If the caption of an indictment shows that the jury found the bill upon their oaths, it need not state that they were sworn & charged.—*R. v. MORGAN* (1701), 1 *Ld. Raym.* 710; 91 *E. R.* 1373.

**Annotation:—***Refd. R. v. Martin* (1848), 6 *State Tr. N. S.* 925.

**2329. — What is a fatal omission.]**—Indictment, for maintaining a cottage, without four acres of ground, quashed because it did not state it was presented "on the oaths of twelve good & lawful men" & for not stating an actual occupation.—*R. v. BURKETT* (1738), *Andr.* 230; 95 *E. R.* 375.

**2330. — "Sworn & affirmed sufficient.]"**—*MULCAHY v. R.*, No. 810, *ante*.

**2331. Caption may be amended.]**—A mistake of the clerk in certifying the caption of an indictment removed into the *K. B.* by *certiorari* may be amended in the same term in which it is certified but not in another term.—*FAULKNER'S CASE* (1669), 1 *Wms. Saund.* 248; 85 *E. R.* 291.

**Annotations:—***Refd. R. v. Harris* (1699), 12 *Mod. Rep.* 268; *R. v. Atkinson* (1784), 1 *Wms. Saund.* 249, n. **Mentd. R. v. Armagh Archbp.** (1729), 1 *Barn. K. B.* 285.

**2332. —***R. v. ATKINSON* (1784), 1 *Wms. Saund.* 249, n.; 4 *East*, 175, n.; 85 *E. R.* 293; *subsequent proceedings, sub nom. ATKINSON v. R.* (1785), 3 *Bro. Parl. Cas.* 517, *H. L.*

**Annotations:—***Refd. R. v. O'Connell* (1844), 5 *State Tr. N. S.* 1; *R. v. Gregory* (1847), 16 *L. J. Q. B.* 281; *R. v. Smith O'Brien* (1849), 7 *State Tr. N. S.* 1. **Mentd. R. v. Holt** (1793), 5 *Term Rep.* 436; *R. v. Crossley* (1797), 7 *Term Rep.* 315; *R. v. Teal* (1809), 11 *East*, 307; *R. v. Carille* (1831), 2 *State Tr. N. S.* 459.

**2333. —***R. v. DARLEY* (1803), 4 *East*, 174; 102 *E. R.* 796.

**Annotation:—***Refd. R. v. Marsh* (1837), 6 *Ad. & El.* 236.

**2334. —***R. v. DAVIS*, No. 2323, *ante*.

**2335. —***R. v. MARSH*, No. 2244, *ante*.

**2336. —***It never has been doubted that a formal error in the caption of an indictment, for any other crime except treason, would be amended. It has been suggested that the ct. has no such power in cases of treason alone. But that is an argument which cannot be for a moment*

*I. L. R.* 399; 1 *Ir. Jur.* 30; 6 *State Tr. N. S.* 925; 3 *Cox*, *C. C.* 318.—*IR.*

**t. — Names of jurors need not be stated.]**—Where a prisoner was not supplied with a copy of the indictment & before judgment it was discovered that the caption omitted the names of the grand jurors:—*Held*: the objection had not been waived by pleading.—*R. v. JACKSON* (1795), 25 *State Tr.* 783, 886.—*IR.*

**a. — Names of twenty-three jurors inserted.]**—The caption having stated that the indictment was found "upon the oath of twelve good & lawful men, etc., whose names here follow," then set out the names of twenty-three grand jurors:—*Held*: that this was sufficient, as the prosecutor could not know which of the twenty-three found the bill, & as the twelve who found it must be included among those twenty-three persons.—*R. v. HINCHY* (1826), *Batt.* 509.—*IR.*

**b. — Need not state which jurors affirmed—Or right to do so.]**—It is no objection to the caption of an indictment that it does not state who of the grand jurors who found the indictment were sworn & who affirmed, or that those who so affirmed had a

right to do so.—*R. v. O'CONNELL* (1844), 7 *I. L. R.* 261.—*IR.*

**c. No part of indictment.]**—The caption is no part of the indictment.—*MARTIN v. R.* (1848), 12 *I. L. R.* 399; 1 *Ir. Jur.* 30; 6 *State Tr. N. S.* 925; 3 *Cox*, *C. C.* 318.—*IR.*

**d. Detached from indictment.]**—The caption when brought in appeared to be on paper & detached from the indictment, whereupon a motion was made to quash the indictment for want of a caption. The objection was overruled.—*R. v. WELDON* (1795), 26 *State Tr.* 225.—*IR.*

## PART VI. SECT. 6.

**2338 i. Effect of entering—Only affects proceedings in respect of which entered.]**

—Prisoner was convicted of receiving stolen goods, on an indictment containing two counts, one for stealing the goods & the other for receiving them, knowing them to have been stolen. Prisoner had, on a former day, in the same circuit, been indicted for stealing the same goods as those which he was charged with stealing by the first count of the present indictment. A jury was impanelled, & trial begun,

accessed to (*CRAMPTON, J.*).—*R. v. SMITH O'BRIEN* (1849), 7 *State Tr. N. S.* 1; *sub nom. O'BRIEN v. R.*, 3 *Cox*, *C. C.* 360; *affd. sub nom. O'BRIEN v. R.*, 2 *H. L. Cas.* 465, *H. L.*

**Annotations:—***Mentd. R. v. Duffy* (1849), 7 *State Tr. N. S.* 795; *O'Neill v. R.* (1854), 24 *L. T. O. S.* 35; *R. v. Burke* (1867), 10 *Cox*, *C. C.* 519; *Mulcahy v. R.* (1868), *L. R.* 3 *H. L.* 306.

## SECT. 6.—NOLLE PROSEQUI.

**2337. Effect of entering—Proceedings on indictment ended.]**—(1) *Nolle prosequi* is no discharge of the crime, but of the indictment.

(2) In barratry the particulars must be given.—*GODDARD v. SMITH* (1704), 6 *Mod. Rep.* 261; 11 *Mod. Rep.* 56; 1 *Salk.* 21; 3 *Salk.* 245; *Holt*, *K. B.* 497; 87 *E. R.* 1107.

**Annotations:—***As to* (1) *Refd. R. v. Allen* (1862), 1 *B. & S.* 850. *Generally, Mentd. Reynolds v. Kennedy* (1748), 1 *Wils.* 232.

**2338. — Only affects proceedings in respect of which entered.]**—If a person being apprehended for a libel & brought up by *habeas corpus* enter into recognisances to appear in the *Ct.* of *K. B.* on the first day of term *ad respondendum*, etc., & an information *ex officio* is exhibited against him on that day & a *nolle prosequi* is entered thereon, & on the last day of term a new information filed, the recognisance is not discharged by his appearance to the first information or by the *nolle prosequi*, but obliges him to appear to the second information.—*R. v. RIDPATH* (1713), 10 *Mod. Rep.* 152; *Fortes. Rep.* 358; 88 *E. R.* 670.

**Annotations:—***Expld. R. v. Allen* (1862), 1 *B. & S.* 850. **Mentd. R. v. Gibson (1734), *Sess. Cas. K. B.* 124.**

**2339. — Court will not interfere.]**—The *A.-G.* has power to enter a *nolle prosequi* without calling upon prosecutor to show cause why it should not be done, & where he has done so this *ct.* will not interfere.

**Qu.:** whether the *nolle prosequi* has the effect of putting an end to prosecution altogether.—*R. v. ALLEN* (1862), 1 *B. & S.* 850; 31 *L. J. M. C.* 129; 5 *L. T.* 636; 26 *J. P.* 341; 8 *Jur. N. S.* 230; 9 *Cox*, *C. C.* 120; 121 *E. R.* 929.

**2340. — Comparable to acquittal.]**—*R. v. O'CONNOR*, No. 809, *ante*.

**2341. Applicable to proceedings on information.]**—*R. v. RIDPATH*, No. 2338, *ante*.

**2342. —***RUCK v. A.-G.*, No. 2360, *post*.

but in consequence of it appearing from the testimony that prisoner could not be convicted for larceny, the Clerk of the Crown, who was conducting the prosecution by direction of the *A.-G.*, entered a *nolle prosequi*, & then sent another bill before the grand jury, containing a count for receiving, the indictment on which the conviction took place, & that on the trial he consented, that the prisoner should be acquitted of the charge accordingly:—*Held*: a *nolle prosequi* being entered, prisoner could be again indicted for the same offence.—*R. v. THORNTON* (1878), 2 *P. & B.* 140.—*CAN.*

**2338 ii. —***R. v. HINCHY* (1826), *Batt.* 509.—*IR.* Two indictments had been found against a traverser, on which the *A.-G.* entered a *nolle prosequi*, & thereupon filed *ex officio* information:—*Held*: a plea of an indictment pending was no bar to an information for the same matter, & even if the plea of a former prosecution pending could be pleaded, the entry of a *nolle prosequi* would be an answer to it.—*R. v. MITCHELL* (1848), 12 *I. L. R.* 217; 1 *Ir. Jur.* 4.—*IR.*

**e. Time for entering—Any time before verdict.]**—A *nolle prosequi* may



3.—*Nolle prosequi. Sect. 7. Part VII. Sects. 2, 3 & 4. Nolle prosequi, &c.*

2343. —.]—*R. v. LEATHAM* (1861), 3 E. & E. 658 30 L. J. Q. B. 205; 3 L. T. 777; 25 J. P. 468 7 Jur. N. S. 674; 9 W. R. 334; 8 Cox, C. C. 498, 121 E. R. 589.

*Annotation* :—*Mentd. Taylor v. Vergetto* (1861), 30 L. J. Ex. 400.

2344. **Must be entered by leave of Attorney-General.**—The Clerk of the Crown cannot enter a *nolle prosequi* without leave from A.-G.—*R. v. CRANMER* (1702), 1 Ld. Raym. 721; 12 Mod. Rep. 647; 91 E. R. 1381.

2345. —.]—A.-G., by sign manual, may confess the plea of not guilty in high treason.—*R. v. OGLETHORPE (LADY)* (1707), 11 Mod. Rep. 114; 88 E. R. 935.

2346. —.]—*R. v. EVELYN* (1820), cited 1 B. & S. 852.

*Annotation* :—*Reid. R. v. Allen* (1862), 8 Jur. N. S. 230.

2347. —.]—Agreement to discontinue an indictment, even supposing such an agreement to be legal, can only be effected by A.-G. entering up a *nolle prosequi*.—*ELWORTHY v. BIRD* (1824), 2 Bing. 258; 9 Moore, C. P. 430; 3 L. J. O. S. C. P. 260; 130 E. R. 305.

2348. —.]—A *nolle prosequi* can only be entered by the authority of A.-G.—*R. v. DUNN* (1843), 1 Car. & Kir. 730.

*Annotation* :—*Mentd. Stroud v. Watts* (1846), 2 C. B. 929.

2349. —.]—In an indictment against a township for the non-repair of a highway the prosecution cannot withdraw the record of an indictment that has been removed by *certiorari*, nor enter a *nolle prosequi* without leave of A.-G.—*R. v. COLLING* (1847), 9 L. T. O. S. 180; 2 Cox, C. C. 184.

2350. — **Process entered by Solicitor-General.**—*R. v. LEATHAM*, No. 2343, *ante*.

2351. — **Attorney-General may act independently of prosecutor.**—*R. v. ALLEN*, No. 2339, *ante*.

2352. — **Power of Attorney-General unfettered.**—Another case in which A.-G. is pre-eminent is the power to enter a *nolle prosequi* in a criminal case. I do not say that when a case is before a judge a prosecutor may not ask the judge to allow the case to be withdrawn, & the judge may do so if he is satisfied there is no case; but A.-G. alone has power to enter a *nolle prosequi* & that power is not subject to any control (A. L. SMITH, L.J.).—*R. v. COMPTROLLER-GENERAL OF PATENTS*, [1899] 1 Q. B. 909; 68 L. J. Q. B. 568; 80 L. T. 777; 47 W. R. 567; 15 T. L. R. 310; 16 R. P. C. 233, C. A.

*Annotations* :—*Mentd. Re A. & B.'s Appln. for a Patent* (1910), 28 R. P. C. 454; *R. v. Patents Comptroller-General*, *Ex p. Muntz* (1922), 38 T. L. R. 652.

2353. **Reasons for entering—Where indictment improper remedy.**—A *nolle prosequi* may be granted upon an indictment against a surgeon for refusing to be a constable, because a surgeon being not liable to perform such a duty is non-indictable.—*R. v. POND* (1718), 1 Com. 312; 92 E. R. 1088.

be entered at any time before the verdict is recorded.—*R. v. ROPER* (1832), 1 Crav. & D. 185.—*IR.*

f. —.]—*CAMPBELL'S CASE* (1843), 3 Crav. & D. 33.—*IR.*

g. —.]—*R. v. CAMPBELL* (No. 1) (1887), 6 N. Z. L. R. 50.—*N.Z.*

h. **May be entered by the Clerk of the Crown.**—The Clerk of the Crown has authority to enter a *nolle prosequi*.

—*R. v. THORNTON* (1878), 2 P. & B. 140.—*CAN.*

k. **Directed to be entered by court—Prolonged postponements.**—The ct. will exercise a discretionary power in allowing the Crown to postpone trials, when bills have been found a considerable time, & the trial more than once postponed. Therefore, where indictments were pending against the

2354. — **Where procedure to be stayed vexatious.**—*R. v. GUERCHY* (1765), 1 Wm. Bl. 545; 96 E. R. 315.

2355. — **Where prosecutor also pursues civil remedy.**—*R. v. FIELDING* (1759), 2 Burr. 719; 2 Keny. 386; 97 E. R. 531.

*Annotation* :—*Reid. Caddy v. Barlow* (1827), 1 Man. & Ry. K. B. 275.

2356. —.]—In proceedings against deft. by action & indictment for the same assault, the ct. will not compel him to make his election, but deft. may apply to A.-G. for a *nolle prosequi* if there is anything vexatious in the proceeding by indictment.—*JONES v. CLAY* (1798), 1 Bos. & P. 191; 126 E. R. 853.

2357. **Where more than one defendant—Nolle prosequi as to some defendants only.**—On the indictment against two, if they are found guilty separately, upon a pardon or *nolle prosequi* as to the one who stands second upon the verdict, judgment may be given against the other.—*R. v. HEMPSTEAD & HUDSON* (1818), Russ. & Ry. 344, C. C. R.

*Annotations* :—*Reid. O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *Latham v. R.* (1864), 5 B. & S. 635.

2358. —.]—*R. v. BUTTERWORTH, BRAITHWAITE & MOSS* (1823), Russ. & Ry. 520, C. C. R.

2359. —.]—*R. v. ROWLANDS*, No. 844, *ante*.

2360. —.]—An information was filed against several defts., who were all found guilty, but the Crown entered a *nolle prosequi*, as to all the counts except the fourth. That count charged the offence against eight defts., & the Crown, upon that count, entered up judgment against six of them severally :—*Held*: the judgment was good; under the above circumstances it was competent for the A.-G. to enter a *nolle prosequi*; & the acquittal of two of the defts. did not operate to discharge the others.—*RUCK v. A.-G.* (1858), 3 H. & N. 208; 4 Jur. N. S. 167; *sub nom. BUCK v. A.-G.*, 27 L. J. Ex. 313; *sub nom. A.-G. v. RUCK*, 30 L. T. O. S. 335; 22 J. P. 241; 6 W. R. 283, Ex. Ch.; *affg. S. C. sub nom. A.-G. v. RUCK* (1856), 11 Exch. 763.

2361. **Where more than one charge—Nolle prosequi as to some charges only.**—*R. v. BUTTERWORTH, BRAITHWAITE & MOSS*, No. 2358, *ante*.

2362. —.]—*R. v. ROWLANDS*, No. 844, *ante*.

2363. —.]—*R. v. LEATHAM*, No. 2343, *ante*.

2364. **Time for entering—After indictment found.**—A *nolle prosequi* signed before the presentment of an indictment is bad.—*R. v. WYLIE, HOWE & MCGUIRE* (1919), 83 J. P. 295.

## SECT. 7.—REMOVAL OF INDICTMENT BY CERTIORARI.

See CROWN PRACTICE, Vol. XVI., pp. 451 *et seq.*

prisoner for three years, & the counsel for the Crown alleged no reason for not proceeding to trial, except that they were not ready, the ct. refused to postpone the trial, & directed a *nolle prosequi* to be entered.—*BYRNE'S & GILMORE'S CASE* (1841), Ir. Cir. Rep. 68.—*IR.*

i. **No appeal from entry.**—*R. v. LALANNE* (1879), 3 L. N. 16.—*CAN.*



## Part VII.—Trial of Indictments.

### SECT. 1.—IN GENERAL.

**2365. Separate indictments—Cannot be tried jointly.]**—Applt. was indicted for receiving goods knowing them to be stolen, & another man was charged in a separate indictment with stealing the goods. The two prisoners were tried together & convicted:—*Held*: (LORD FINLAY *diss.*) the proceedings were a nullity, & the Ct. of Criminal Appeal, in quashing the conviction, had power, under Criminal Appeal Act, 1907 (c. 23), to order applt. to be tried according to law.—*CRANE v. PUBLIC PROSECUTIONS DIRECTOR*, [1921] 2 A. C. 299; 90 L. J. K. B. 1160; 125 L. T. 642; 85 J. P. 245; 65 Sol. Jo. 642; 27 Cox, O. C. 43; *sub nom.* *R. v. CRANE*, 37 T. L. R. 788; 15 Cr. App. Rep. 183, H. L.; *affg.* S. C. *sub nom.* *R. v. CRANE*, [1920] 3 K. B. 236, O. C. A.

*Annotation*:—*Distd. R. v. Hammer*, [1923] 2 K. B. 786. *Refd. R. v. Morton* (1920), 15 Cr. App. Rep. 30.

**Joinder of defendants.]**—*See* Part VI., Sect. 4, sub-sect. 9, *ante*.

**Joinder of offences.]**—*See* Part VI., Sect. 4, sub-sect. 10, *ante*.

### SECT. 2.—REMOVAL OF INDICTMENTS BY CERTIORARI.

*See* CROWN PRACTICE, Vol. XVI., pp. 405–412, Nos. 2510–2708.

### SECT. 3.—TRIAL AT BAR.

**Right of Crown.]**—*See* CONSTITUTIONAL LAW, Vol. XI., p. 528, Nos. 318–324.

**On application of Attorney-General.]**—*See* CONSTITUTIONAL LAW, Vol. XI., p. 528, Nos. 318–324; & CROWN PRACTICE, Vol. XVI., pp. 402, 484, Nos. 2477, 3677.

**2366. What court may grant—King's Bench.]**—In felony after an indictment found & removed, the Ct. of K. B. may order a trial at bar.—*R. v. THOMSON* (1699), 12 Mod. Rep. 331; Holt, K. B. 702; 88 E. R. 1359.

*Annotation*:—*Mentd. R. v. Haddock* (1737), Andr. 137.

**2367. When granted—General rule.]**—Trial at bar was granted upon consideration of the consequences of a conviction upon an information.—*R. v. FOLEY & HARLEY* (1717), 1 Stra. 52; 93 E. R. 379.

**2368. — Discretion of court.]**—A trial at bar ought not to be granted upon a general allegation of difficulty in the cause.

The granting of a trial at bar is entirely in the discretion of the ct., & such a trial ought not to be granted without good reason, because it is very expensive to the parties & the business of the other

suitors is thereby delayed (*per* CUR.).—*R. v. CAERMARTHEN BURGESSES* (1753), Say. 79; 96 E. R. 809.

**2369. — —.]**—Upon an application for a trial at bar, the ct. will in every case exercise its own discretion upon the peculiar circumstances thereof. Where a fair trial cannot be had in the county where the matter arises, the trial will be awarded in the next English county where the King's writ of *venire* runs.—*R. v. AMERY* (1786), 1 Term Rep. 363; 99 E. R. 1141.

*Annotation*:—*Mentd. R. v. St. Mary-on-the-Hill*, Chester (1798), 7 Term Rep. 735.

### SECT. 4.—PROCEEDINGS BEFORE PLEA.

#### SUB-SECT. 1.—APPEARANCE.

##### A. Appearance of Prosecutor.

**2370. No notice of trial need be given to prosecutor.]**—Where deft. is under recognisances to appear & take his trial at a particular sessions of the Central Criminal Ct., no notice of trial to prosecutor is requisite, & he is bound to be prepared to try at that session.—*R. v. PARKER* (1849), 13 J. P. 460; 3 Cox, C. C. 299.

**2371. Failure to prosecute—Recognisances not discharged.]**—The ct., on default of prosecution, can only respite & not discharge, a recognisance.—*ANON.* (1702), 7 Mod. Rep. 97; 87 E. R. 1119.

**2372. — —.]**—The Ct. at the Old Bailey refused to discharge, without the preferment of any bill, the recognisances of prosecutors being members of a society for promoting religious knowledge among the poor, who had caused a servant to be committed for embezzlement, the application not being made on the ground of any defect in the evidence, but on the ground that they, prosecutors, thought that the reformation of the offender would be best promoted by such a course.—*R. v. PAUL* (1834), 6 C. & P. 323.

**2373. — — Penalty may be mitigated.]**—Where the ct. refuse to discharge a recognisance on failure to prosecute they have power to mitigate the penalty.—*Re HOOPER* (1824), M'Cle. 578; 148 E. R. 241.

**2374. — —.]**—A prosecutor who has required the magistrates to take his recognisances to prosecute, on a charge within Vexatious Indictments Act, 1859 (c. 17), s. 2, when the magistrates have refused to commit the person charged, must either go on with the prosecution or have his recognisances forfeited, as it would defeat the object of the statute if he were allowed to move to have his recognisances discharged.—*R. v. HARGREAVES* (1861), 2 F. & F. 790, N. P.

**2375. — Recognisances withdrawn.]**—*R. v. ADAMS* (1834), 6 C. & P. 324, n.

at bar is his right. If the prosecution is not the King's, then there must be grounds laid before the ct. to induce them to grant such a trial.

In criminal cases of great difficulty, the ct. will grant a trial at bar.—*R. v. HAYES* (1801), Rowe, 565.—*IR.*

**c. Power of court to proceed—Absence of judge.]**—*Semble*: a trial at bar may be proceeded with, notwithstanding the absence of one of the judges who sat during a portion of the trial.—*It. v. O'CONNELL* (1844), 1 Cox, C. C. 397.—*IR.*

### PART VII. SECT. 1.

**a. Whether by jury.]**—The power of the Commonwealth Parliament conferred by 63 & 64 Vict. c. 12, s. 122, to make laws for the govt. of a territory, whether that power is exercised directly or through a subordinate legislature, is not restricted by the provision in sect. 80 of above Act, that the trial on indictment of any offence against any law of the Commonwealth shall be by jury. By Ordinance No. 7 of 1907 of Papua, it was provided that the trial of persons of European descent charged with a crime punishable by death

should be held before a jury of four persons, but that "save as aforesaid the trials of all issues, both civil & criminal, shall as heretofore be held without a jury":—*Held*: a person of European descent who was charged in Papua with an assault occasioning bodily harm, to which he pleaded not guilty, was properly tried without a jury.—*R. v. BERNASCONI* (1915), 19 C. L. R. 629.—*AUS.*

### PART VII. SECT. 3.

**b. When granted.]**—If the King prosecutes in his royal person, a trial

*Sect. 4.—Proceedings before plea: Sub-sect. 1, A. & B. (a) & (b).]*

**2376. — Recognisances cannot be enlarged after discharge of grand jury.]**—When a prosecutor has entered into a recognisance under the provisions of Vexatious Indictments Act, 1859 (c. 17), s. 2, to prosecute a charge, but fails to prefer his bill of indictment before the grand jury, the ct. cannot, after the grand jury have been discharged, entertain an application by him to enlarge his recognisance to the next session.—*R. v. EAYRES* (1900), 64 J. P. 217.

**2377. — Effect of mistrial.]**—*R. v. TRACY* (1704), Holt, K. B. 706; 6 Mod. Rep. 178; 90 E. R. 1290.

*Annotations:—Mentd. Linford v. Fitzroy* (1849), 13 Q. B. 240; *Walters v. Green*, [1899] 2 Ch. 696.

**2378. — Opinion of Attorney-General as to propriety of prosecution.]**—Where a prisoner has been committed for trial at the assizes, & parties bound over by a magistrate, to prosecute & give evidence, the judge will not discharge the recognisances on an intimation that the A.-G. does not think it a proper case for prosecution.

*Semble: the proper course is for the A.-G. to enter a nolle prosequi.*—*R. v. FREAKLEY* (1852), 6 Cox, C. C. 75.

**2379. Bound over to the "next assizes"—Whether special commission of assize included.]**—Where a witness is bound over to appear at the "next assizes & general gaol delivery," that means the ordinary assizes & general gaol delivery, & does not apply to a special commission of gaol delivery. Upon his not appearing the judge will not estreat the recognisances.—*R. v. WALKER* (1843), 2 L. T. O. S. 288; 1 Cox, C. C. 14.

**2380. Where prosecution has not instructed counsel—Practice.]**—Where no counsel is engaged for the prosecution, & the depositions are handed, by direction of the ct., to a gentleman at the bar, he should consider himself as counsel for the Crown, & act in all respects as he would if he had been instructed by prosecutor. He should not consider himself merely as acting in assistance of the judge, by examining the witnesses.—*R. v. LITTLETON* (1840), 9 C. & P. 671.

**2381. — ]**—A judge should not be put to prosecute. Therefore, if prosecutor has omitted to instruct counsel, the ct. will direct the depositions, with the fee indorsed, to be delivered to the junior counsel present, to conduct the prosecution.—*R. v. —* (1843), 1 L. T. O. S. 458; 1 Cox, C. C. 48.

*Annotation:—Refd. R. v. Farrell & Moore* (1848), 3 Cox, C. C. 139.

**2382. — ]**—The judge ought not to act as prosecutor, as counsel for the prosecution, & as judge. Where a prosecution is not prepared by an attorney, the ct. will hand the depositions to counsel. But every prosecution ought to be conducted by counsel & attorney.—*ANON.* (1851), 17 L. T. O. S. 260.

**2383. Prosecutor cannot appear in formâ pauperis.]**—*R. v. CLARKE* (1762), 3 Burr. 1308; 97 E. R. 847.

### B. Appearance o.

#### (a) In General.

**2384. Failure to appear when on bail—Recognisance not discharged—Effect of estreat may be suspended.]**—If a party indicted at the assizes

enter into a recognisance, with the condition of which he afterwards fails to comply, whereby it becomes estreated, although the ct. cannot discharge the recognisance, they will, if they see proper cause, suspend the effect of the estreat.—*Ex p. STOWMAN* (1838), 2 J. P. 345; *sub nom. Ex p. SLOEMAN*, 2 Jur. 821.

**2385. — Recognisance of prosecutor enlarged till arrest of accused.]**—Where a prisoner on bail has made default, the recognisance of prosecutor may be enlarged till the apprehension of prisoner.—*Re YOUNG* (1847), 9 L. T. O. S. 394; 2 Cox, C. C. 280.

**2386. Accused must surrender at the opening of the session.]**—A prisoner who has been admitted to bail, & who surrenders after the opening of the commission, is not in custody "at the time of the holding of the assizes" within the meaning of Winter Assizes Acts, 1876 (c. 57), & 1877 (c. 46), & cannot therefore be tried. In order to entitle himself to be tried he should surrender before the opening of the commission.—*R. v. STAFFORD* (1879), 14 Cox, C. C. 353.

**2387. Securing appearance by bench warrant—When bench warrant issued.]**—Bench warrants will not be granted unless it is necessary that the party charged should be at once taken into custody, or unless shown that the party charged with the offence is about to quit the country.—*R. v. WHITTAKER* (1859), 2 F. & F. 1.

**2388. — Practice at Central Criminal Court.]**—The practice of the Central Criminal Ct. as to the time when a bench warrant should issue, & as to the form such bench warrant should take, ought not to be altered without the authority generally of the comrs. of that ct.—*R. v. NICHOLS* (1900), 64 J. P. 217.

**2389. — Form of warrant.]**—*R. v. FREEMAN* (1731), 2 Barn. K. B. 28; 94 E. R. 334.

**2390. — ]**—A bench warrant under 43 Geo. III., c. 56, s. 1, must state the amount of bail & before whom prisoner is to be brought to be bound over.—*R. v. DOWNEY* (1845), 7 Q. B. 281; 15 L. J. M. C. 29; 9 Jur. 1073; 115 E. R. 495; *sub nom. Re DOWNEY*, 5 L. T. O. S. 125; 9 J. P. Jo. 293.

*Annotation:—Mentd. Campbell v. R.* (1847), 12 Jur. 117.

**2391. — Duration of warrant.]**—A warrant issued to arrest a person on a bill found for a misdemeanour, & to have him at the next session, is not *functus officio* after the session expires, but the party may be taken up at any time.—*MAYHEW v. HILL* (1798), 2 Esp. 683, N. P.

**2392. When accused has been removed to lunatic asylum since committal—Recognisances enlarged—Trial postponed.]**—*R. v. DWERRYHOUSE* (1847), 9 L. T. O. S. 454; 2 Cox, C. C. 291; *subsequent proceedings*, 2 Cox, C. C. 446.

**2393. — Recognisances respited sine die.]**—A prisoner committed for trial upon a charge of murder having become insane was removed to a lunatic asylum, by virtue of a warrant under the hand of a Principal Secretary of State. The grand jury, at the assizes at which he would in due course have been tried, found a true bill against him:—*Held: the proper course was to respite the recognisances sine die.*—*R. v. BLACKWELL* (1857), 7 Cox, C. C. 353.

**2394. — Power of judge of assize to issue habeas corpus.]**—Where a prisoner was committed for trial by the magistrates to the assizes, but,

### PART VII. SECT. 4, SUB-SECT. 1.—B. (a).

*d. Appearance in prison garb.]*—The Gaol Regulations direct that no prisoner shall be placed on his trial or

give evidence in ct. in prison garb. A hard labour prisoner, charged as such with assault on a fellow prisoner, was tried in prison clothes & convicted:—*Held: the breach of the Gaol*

Regulations did not invalidate the proceedings, & as prisoner had not been prejudiced the sentence should not be quashed.—*FENNESSEY v. R.* (1907), T. S. 74.—S. AF.

after committal, was removed by them to the County Lunatic Asylum, the judge of assize has power to issue a *habeas corpus* to bring prisoner up for his trial.—*R. v. PEACOCK* (1870), 12 Cox, C. C. 21.

*Annotation*.—*Mentd. R. v. Shurmer* (1886), 2 T. L. R. 737.

**2395. — Order for removal must be signed by Secretary of State—Criminal Lunatics Act, 1884 (c. 64).**—*R. v. MARSHALL* (1885), 49 J. P. Jo. 105.

**2396. Presence of accused in dock to plead—May be dispensed with in misdemeanour.**—*R. v. BACON* (1864), 1 Lev. 146; 83 E. R. 341.

**2397. —**—*R. v. HADDOCK* (1738), 2 Stra. 1100; 93 E. R. 1057.

**Appearance of corporation.**—*See CROWN PRACTICE*, Vol. XVI., pp. 405, 406, Nos. 2521–2524.

(b) *Representation by Counsel.*

**2398. Defence by counsel—Prisoners jointly charged & represented cannot be separately represented after plea.**—Prisoners were indicted for the murder & manslaughter of A. (*inter alia*) by a series of beatings & assaults. At the trial, certain assaults were put in evidence, & relied upon by the Crown as being the cause of death, but the surgeon who made a post-mortem examination being of opinion that the death was occasioned, not by the assaults so proved & relied upon, but by a blow upon the head, of the cause of which there was no evidence whatever, the judge directed the jury that prisoners were entitled to an acquittal:—*Held*: (1) the judge had rightly so directed the jury; (2) under 7 Will. 4, & 1 Vict. c. 85, s. 11, prisoners could not have been lawfully convicted of assault under the circumstances above named, inasmuch as the assault contemplated by the statute must be such as was a part of the very act & transaction prosecuted, & also conduced to the death.

Prisoners, having been subsequently indicted for those assaults with intent to wound, & with intent by such wounding to do A. grievous bodily harm, pleaded *autrefois acquit*, & the judge having directed the jury, upon the trial of this plea, to the effect that if they were satisfied there were several distinct & independent assaults, some or any of which did not in any way conduce to the death of deceased, it would be their duty to find a verdict for the Crown:—*Held*: (3) (LORD CAMPBELL, C.J., JERVIS, C.J., PARKE, B., ALDERSON, B., MAULE, J., PATTESON, J., WIGHTMAN, J., & MARTIN, B.) such direction was not strictly right, inasmuch as the issue raised by the plea was, whether prisoners had been before tried for the same offence; (4) (LORD CAMPBELL, C.J., JERVIS, C.J., PARKE, B., ALDERSON, B., MAULE, J., & MARTIN, B.) the conviction was also bad by reason of the misdirection; (5) (POLLOCK, C.B., PATTESON, J., COLERIDGE, WIGHTMAN, CRESSWELL, ERLE, WILLIAMS, & TALFOURD, JJ.) the conviction would be affirmed.

(6) Where prisoners had joined in their plea at the trial & were represented by counsel appearing for them jointly, & not separately, according to the practice of the Ct. of Criminal Appeal, they are not entitled to appear by separate counsel at the hearing of the appeal.—*R. v. BIRD* (1851), 2 Den. 94; T. & M. 437; 20 L. J. M. C. 70; 16 L. T. O. S.

556; 15 J. P. 173; 15 Jur. 193; 5 Cox, C. C. 20, C. C. R.

*Annotations*.—*As to* (2) *Reid. R. v. Miles* (1890), 24 Q. B. D. 423. *Generally, Mentd. Girdlestone v. Brighton Aquarium Co.* (1878), 3 Ex. D. 137.

**2399. — Accused must consent to representation.**—On a trial for murder, the ct. refused to allow counsel to appear for a prisoner without his expressed assent.—*R. v. YSCUADO* (1854), 6 Cox, C. C. 386.

**2400. — Accused must not interfere.**—(1) On a trial for murder, prisoner objecting to be defended by counsel, but in the result allowing counsel to act for him, he was not afterwards allowed to raise any objection to the proceeding.

(2) Prisoner being arraigned on two indictments & having with apparent intelligence, pleaded to one & declined to plead to the other, the plea of not guilty was entered for him by statute, with the assent of counsel who appeared for him. The case being then opened, & the first witness examined, & it being then set up by his counsel in the course of the case that he was insane now, or not in a fit state to be tried:—*Held*: the proper time for making that suggestion was before prisoner pleaded, & had it been so made, a jury should have been empanelled to try the question whether he was sane now & in a fit state to be tried.—*R. v. SOUTHEY* (1865), 4 F. & F. 864.

**2401. — Advisable in rape & similar offences.**—On a trial for rape or a similar offence, it is desirable that prisoner should be defended by counsel.—*R. v. GILLINGHAM* (1910), 5 Cr. App. Rep. 187; 74 J. P. Jo. 424, C. C. A.

**2402. — To prepare special plea.**—The ct. will not reject a plea of *autrefois convict*, on account of the informal manner in which it is handed in by prisoner, but will assign counsel to put it into a formal shape, & postpone the trial to give time for its preparation.—*R. v. CHAMBERLAIN* (1833), 6 C. & P. 93.

**2403. — King's counsel must have permission of Sovereign to appear.**—*R. v. JONES* (1840), 9 C. & P. 401.

**2404. —**—On the trial of a criminal information a Queen's Counsel ought not to be counsel for deft. without a licence from the Queen or at the least a letter from the Secretary of State, & it is not enough that an application for a licence has been sent to the Secretary of State from an assize town in the county to which no answer has been received at the time of the case being tried.—*R. v. BARTLETT* (1847), 2 Car. & Kir. 321; 2 Cox, C. C. 245.

**2405. Appearance in form *pauperis*.**—*Semble*: if a deft. in an indictment for a misdemeanour swears that he is not worth £5 in the world, beyond his necessary wearing apparel & tools of trade, he may be admitted to sue in *forma pauperis*, although the indictment was removed from the sessions at his instance.—*R. v. NICHOLSON* (1840), 8 Dowl. 489; *sub nom. Ex p. NICHOLSON*, 4 Jur. 506.

**2406. Poor Persons Defence Act, 1903 (c. 38)—Defence must be set up before magistrate—Counsel & solicitor must both be appointed—Ascertaining defendant's means.**—Legal aid under the above Act can only be afforded to poor prisoners who set up a defence, either by way of evidence given or

PART VII. SECT. 4, SUB-SECT. 1.—  
B. (b).

**e. Defence by counsel—Felony.**—Persons on trial for felony may make full defence by two counsel & no more.—*R. v. DAQUEST* (1865), 9 L. C. J. 85.—*OAN.*

**f. Appearance in form *pauperis*—Conduct of defence.**—Prisoner, being put on his trial for murder, stated his inability to employ counsel, & had counsel assigned him by ct. Counsel thus assigned was permitted, the Crown assenting, to examine witnesses

for the defence previously to addressing the jury, & without prejudice to his right in that behalf.—*R. v. BRYAN* (1840), 1 Craw. & D. 559.—*IR.*

**g. Attorney—Right to address jury.**—*ANON.* (1844), 3 L. T. O. S. 167.—*IR.*

*Sect. 4.—Proceedings before plea: Sub-sect. 1, B. (b); sub-sect. 2, A. & B.]*

statement made by them, before the committing magistrate. If a deft. does not say anything at the police ct., or reserves his defence, there is no power under this Act to give him any assistance. There is no power under the Act to appoint a counsel only, without a solr., to defend a poor prisoner. The Act does not contain any provisions showing how the judge is to satisfy himself that prisoner's means are insufficient for him to obtain legal aid.—*R. v. CALIENDO (NUNZIO) (1904)*, 68 J. P. 47.

**2407.** — Court can assign counsel without solicitor.]—The ct. can assign counsel to defend a poor prisoner under the above Act, without assigning a solr.—*R. v. HART (1904)*, 68 J. P. 72.

**2408.** — Counsel should be instructed on the hearing of a case stated.]—When a prisoner is defended under the above Act, & a case is reserved for the consideration of the ct. for Crown Cases Reserved, counsel ought to be instructed to appear for prisoner there.—*R. v. PAYNE (1905)*, 69 J. P. 440.

**2409.** — Justices have no power to impose limitations on order.]—*R. v. PRENDEVILLE, BROOKS & TUCKER (1908)*, 72 J. P. Jo. 521.

**2410.** Hearing by court of counsel as *amicus curiæ*—On point of law only.]—We ought & shall permit you other counsel, if matter of law, upon the proof of the fact, do arise; but for any other counsel to be assigned you before that appear, is not by law warranted (*JERMIN, J.*).

The calling the party to hold up his hand at the bar is no more but for the special notice that the party is the man inquired for or called on (*per CUR.*).—*LILBURNE'S CASE (1649)*, 4 State Tr. 1270.

*Annotation:—Mentd. Bowman v. Secular Soc. (1917)*, 86 L. J. Ch. 568.

**2411.** — —.]—The ct. will hear any one as *amicus curiæ* on prisoner's behalf on a point of law.—*RATCLIFFE'S CASE (1746)*, as reported in *Fost. 40*; 18 State Tr. 429.

*Annotations:—Mentd. R. v. D'Eon (1764)*, 1 Wm. Bl. 510; *R. v. Rogers (1765)*, 3 Burr. 1809; *Duberly v. Gunning (1791)*, Peake, 132; *R. v. Garside (1834)*, 2 Ad. & El. 266; *R. v. Antrobus (1835)*, 2 Ad. & El. 788; *Gray v. R. (1844)*, 11 Cl. & Fin. 427; *R. v. Dowling (1848)*, 3 Cox, C. C. 509.

**2412.** — —.]—Prisoner was indicted at quarter sessions for attempting to commit larceny, & a subsequent count in the indictment charged a previous conviction. He was arraigned upon & pleaded to both counts. Objection was taken to the arraignment as contravening the provisions of Larceny Act, 1861 (c. 96), s. 116, which require that upon an indictment for an offence shall in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence, & that until he be found guilty of that offence he shall not be called upon to plead to the charge of the previous conviction. The recorder accordingly adjourned the trial to the next sessions. At that sessions prisoner was tried. There was no fresh arraignment, but his former pleas were treated as standing. He was, however, given in charge to the jury upon the first count only, & was found guilty on that count:—*Held*: although the arraignment did not take place at the sessions at which prisoner was tried, & although the fact of his previous conviction was not disclosed to the

jury by whom he was convicted, either by the manner of giving him into their charge or otherwise, the fact that the arraignment did not comply with the provisions of the sect. was such a substantial defect as could not be cured by verdict & the conviction must be quashed.

Upon the argument in error no counsel appeared for prisoner but the ct. allowed Mr. T., who had defended him at the sessions, to appear as *amicus curiæ* & state the points upon prisoner's behalf.—*FAULKNER v. R.*, [1905] 2 K. B. 76; 74 L. J. K. B. 562; 92 L. T. 769; 69 J. P. 241; 53 W. R. 665; 21 T. L. R. 417; 49 Sol. Jo. 460; 20 Cox, C. C. 838, D. C.

**2413.** — In addition to the counsel assigned by court in case of treason.]—*R. v. CASEMENT, No. 1002, ante.*

*See, also, 7 & 8 Will. 3 (c. 3), s. 1.*

*See, further, BARRISTERS, Vol. III., pp. 328 et seq.*

SUB-SECT. 2.—ARRAIGNMENT.

A. In General.

**2414.** Holding up hand is mere ceremony.]—*LILBURNE'S CASE, No. 2410, ante.*

**2415.** —.]—It is no essential part of any trial that prisoner should hold up his hand at the bar; there is no record made of it when it is done; the only use of it is to show the ct. who prisoner is, & when that is apparent the ct. does often proceed against him though he refuse to hold up his hand at the bar; therefore the omission of that ceremony in this case, is no legal exception (*LORD FINCH, C.*).—*STAFFORD'S (LORD) CASE (1680)*, 7 State Tr. 1217.

*Annotations:—Mentd. R. v. Walcott (1694)*, 4 Mod. Rep. 395; *A.-G. v. Hitchcock (1847)*, 1 Exch. 91; *Moriarty v. L. C. & D. Ry. (1870)*, L. R. 5 Q. B. 314; *R. v. Watt (1905)*, 70 J. P. 29.

**2416.** Accused should stand free.]—*R. v. BRAZIER (1899)*, Archbold's Criminal Pleading, Evidence & Practice, 26th ed. 168.

**2417.** Accused may be placed under restraint if necessary.]—(1) The ct. will not order a prisoner indicted for high treason to be unfettered at the time of his arraignment, but during his trial his irons ought to be taken off, unless there be danger of a rescue or escape.

(2) Unpublished writings cannot be laid as an overt act of treason, but, if they tend to prove an overt act, they may be given in evidence for that purpose.

(3) During the examination of prisoner before the Privy Council a witness took notes of the evidence, which were not read over or signed by prisoner:—*Held*: the witness might refresh his memory by looking at them; but that the notes themselves were not admissible in evidence.—*R. v. LAYER (1722)*, 8 Mod. Rep. 82; 16 State Tr. 94; 88 E. R. 64.

*Annotations:—Generally, Mentd. R. v. Orrery (1722)*, 8 Mod. Rep. 96; *R. v. Lambe (1791)*, 2 Leach, 552; *R. v. O'Connell (1844)*, 5 State Tr. N. S. 1; *R. v. Duffy (1849)*, 7 State Tr. N. S. 795; *Mulcahy v. R. (1867)*, 15 W. R. 446.

**2418.** —.]—*R. v. ROGERS (1765)*, 3 Burr. 1809; 97 E. R. 1112.

*Annotation:—Mentd. R. v. Garside (1834)*, 2 Ad. & El. 266.

**2419.** —.]—*R. v. BRAZIER, No. 2416, ante.*

PART VII. SECT. 4, SUB-SECT. 2.—A.

*h. Not part of trial.]—Arraignment is not part of the trial.—Re WALSH (1914)*, 14 E. L. R. 216.—*CAN.*

*k. Charge should be explicit.]—When arraigning an accused, & before receiving his plea, the ct. should be careful to ensure the explanation of the charge in a manner sufficiently explicit*

to enable the accused to understand thoroughly the nature of the charge to which he is called upon to plead.—*R. v. VIMBLEE (1880)*, 1 L. R. 5 Calc. 826.—*IND.*

*B. Accused standing Mute.*

**2420. Jury empanelled to try if mute of malice or by visitation of God.]**—If a person indicted for felony stand mute upon his arraignment, the ct. may direct the sheriff to return a jury *instantly* to try whether he stand mute obstinately, or by the visitation of God; & if they find that he stand obstinately mute, sentence may be passed without further inquiry.—*R. v. MERCIER* (1777), 1 Leach, 183.

**2421. —.]**—A prisoner *mutus et surdus à nativitate*, who is found by a jury sworn for the purpose, mute by the visitation of God, may be arraigned for a capital offence, if intelligence can be conveyed to him by signs or symbols.—*R. v. JONES* (1773), 1 Leach, 102.

**2422. —.]**—A prisoner upon being arraigned stated that he was deaf, & when the indictment was read over to him, apparently did not hear. The judge directed a jury to be empanelled to try whether he stood mute by the act of God, or out of malice.—*R. v. HALTON* (1824), Ry. & M. 78.

**2423. —.]**—*R. v. THOMPSON* (1827), 2 Lew. C. C. 137.

**2424. —.]**—*R. v. DYSON* (1831), 1 Lew. C. C. 64; 7 C. & P. 305, n.

*Annotations:—Folld. R. v. Pritchard* (1836), 7 C. & P. 303; *R. v. Berry* (1876), 1 Q. B. D. 447; *R. v. Stafford Prison, Ex p. Emery*, [1909] 2 K. B. 81.

**2425. —.]**—A person, deaf & dumb, was to be tried for a capital felony. The judge ordered a jury to be empanelled, to try whether he was mute by the visitation of God & the jury found that he was so. The jury were then sworn to try whether he was able to plead, which they found in the affirmative, & prisoner, by a sign, pleaded—Not Guilty. The judge then ordered the jury to be sworn to try whether prisoner was “now sane or not”; & on this question, his Lordship directed the jury to consider whether prisoner had sufficient intellect to comprehend the course of the proceedings, so as to make a proper defence, to challenge any juror he might wish to object to, & to comprehend the details of the evidence; & that if they thought he had not, they should find him not of sane mind.—*R. v. PRITCHARD* (1836), 7 C. & P. 303.

*Annotations:—Folld. R. v. Berry* (1876), 1 Q. B. D. 447. *Consd. R. v. Harris* (1897), 61 J. P. 792. *Folld. R. v. Stafford Prison, Ex p. Emery*, [1909] 2 K. B. 81. *Refd. R. v. Lee Kun*, [1916] 1 K. B. 337.

**2426. —.]—Semble:** where a prisoner on being called upon to plead remains mute, the ct. cannot hear evidence to prove that he does so through malice, & then enter a plea of not guilty under Criminal Law Act, 1827 (c. 28), s. 2, but a jury must be empanelled to try the question of malice, & it is upon their finding that the ct. is authorised to enter the plea.—*R. v. ISRAEL* (1847), 2 Cox, C. C. 263.

**2427. —.]**—A person deaf & dumb was to be tried for a misdemeanour. A jury was empanelled to try whether he was mute by the visitation of God, & on their finding that he was so, they were sworn to try if he was of sound mind, & on their finding that he was so, his counsel pleaded not guilty for him, & the trial proceeded in the usual manner, & the evidence was not interpreted to deft.—*R. v. WHITEFIELD* (1850), 3 Car. & Kir. 121.

**2428. —.]**—A prisoner when called upon to

plead to an indictment, stood mute. A jury was empanelled, & sworn to try whether he was mute of malice or by the visitation of God. A verdict of mute of malice having been returned, the ct. ordered a plea of not guilty to be entered on the record.—*R. v. SCHLETER* (1866), 31 J. P. 119; 10 Cox, C. C. 409.

**2429. —.]**—A person deaf & dumb from four years of age was indicted for larceny from the person, & not answering when called upon to plead, the jury found prisoner “mute by the visitation of God.” The ct. then ordered a plea of not guilty to be entered, & the trial to proceed. A relation, who could in some degree communicate with prisoner by means of signs, was sworn to interpret the nature of the proceedings & the evidence, & the ct. assigned counsel to prisoner. At the conclusion of the case, after the summing up of the presiding judge, the jury found prisoner guilty, but in answer to a question left to them in the summing up, found that prisoner “was not capable of understanding, & as a fact had not understood, the nature of the proceedings”:—*Held:* the above finding showed that prisoner was at the time of the trial of non-sane mind, therefore the ct. ought to have discharged the jury, & ordered prisoner to be detained during Her Majesty’s pleasure, under Criminal Lunatics Act, 1800 (c. 94), s. 2; & the conviction was quashed.—*R. v. BERRY* (1876), 1 Q. B. D. 447; 45 L. J. M. C. 123; 34 L. T. 590; 40 J. P. 484; 13 Cox, C. C. 189, C. C. R.

*Annotation:—Folld. R. v. Stafford Prison, Ex p. Emery*, [1909] 2 K. B. 81.

**2430. —.]**—A prisoner who was totally deaf & could neither read nor write was arraigned for a felony. Upon being arraigned he stood mute, & a jury duly empanelled & sworn for the purpose found that he was mute by the visitation of God. The jury were sworn again to try whether he was capable of pleading to the indictment & they found that he was incapable of pleading to & taking his trial upon the indictment & of understanding & following the proceedings by reason of his inability to communicate with & be communicated with by others. Upon this finding the judge, acting under Criminal Lunatics Act, 1800 (c. 94), s. 2, ordered him to be kept in custody until His Majesty’s pleasure should be known:—*Held:* the finding amounted to a finding that prisoner was insane within the meaning of the Act, & the order was properly made.—*R. v. STAFFORD PRISON (GOVERNOR), Ex p. EMERY*, [1909] 2 K. B. 81; 78 L. J. K. B. 629; 100 L. T. 993; 73 J. P. 284; 25 T. L. R. 440; 22 Cox, C. C. 143, D. C.

*Annotation:—Refd. R. v. Lee Kun*, [1916] 1 K. B. 337.

**2431. — Right of counsel for accused to address jury & to call witnesses.]**—*R. v. ROBERTS* (1816), Carrington’s Criminal Law, 57.

**2432. Accused if mute of malice may be tried.]**—*R. v. MERCIER*, No. 2420, *ante*.

**2433. Accused if mute by visitation of God may be tried.]**—*R. v. JONES*, No. 2421, *ante*.

**2434. —.]**—A prisoner mute by the visitation of God may be arraigned, tried, sentenced, & transported.—*R. v. STEEL* (1787), 1 Leach, 451.

*Annotations:—Folld. R. v. Halton* (1824), Ry. & M. 78. *Distd. R. v. Berry* (1876), 1 Q. B. D. 447. *Consd. R. v. Harris* (1897), 61 J. P. 792; *R. v. Stafford Prison, Ex p. Emery*, [1909] 2 K. B. 81.

**PART VII. SECT. 4, SUB-SECT. 2.—B.**

**1. Accused if mute by visitation of God may be tried.]**—Prisoner, indicted for larceny, stood mute on his arraignment, & a jury was impanelled to try whether he stood mute through

obstinacy or by the visitation of God; & there was a verdict of “mute by the visitation of God.” Prisoner was somewhat deaf, & altogether dumb, but could communicate intelligence to others, & be communicated with by

signs. In the foregoing circumstances he was arraigned & tried for the larceny, & convicted thereof.—*R. v. —* (1840), 1 Craw. & D. 402.—**IR.**

*Sect. 4.—Proceedings before plea: Sub-sect. 2, B., C., D. & E.; sub-sects. 3 & 4, A. & B. (a).]*

**2435.** — Defence by counsel—Evidence not interpreted.]—*R. v. WHITFIELD*, No. 2427, *ante*.

**2436.** Communication with accused mute by visitation of God—By signs.]—*R. v. JONES*, No. 2421, *ante*.

**2437.** — —.]—*R. v. DYSON*, No. 2424, *ante*.

**2438.** — —.]—*R. v. PRITCHARD*, No. 2425, *ante*.

**2439.** — —.]—*R. v. BERRY*, No. 2429, *ante*.

**2440.** — By writing.]—*R. v. THOMPSON*, No. 2423, *ante*.

#### C. Refusal to Plead.

**2441.** Plea of not guilty entered at direction of court.]—Criminal Law Act, 1827 (c. 28), s. 2, authorising the ct. to direct a plea of not guilty to be entered for a party who stands mute of malice, or will not answer directly to an indictment, applies to the case of a party who refuses to plead, on the ground that he has previously pleaded to another indictment for the same offence, but which indictment was not valid in consequence of its having been found upon the testimony of witnesses not duly sworn to give evidence before the grand jury.—*R. v. BITTON* (1833), 6 C. & P. 92.

**2442.** —.]—Prisoner declining to plead to an indictment, the ct. directed a plea of not guilty to be entered.—*R. v. BERNARD* (1858), 8 State Tr. N. S. 887; 1 F. & F. 240; 22 J. P. Jo. 257.

*Annotations:—Mentd. R. v. Kohn* (1864), 4 F. & F. 68; *R. v. Lomas* (1913), 110 L. T. 239.

**2443.** —.]—*R. v. SOUTHEY*, No. 2400, *ante*.

**2444.** —.]—A ct. of assize has power to order, at the request of the prosecution, that in the event of a bill of indictment being found, the trial thereof shall be postponed till the next session.

Prisoner in this case refused to plead & the recorder entered a plea of not guilty.—*R. v. DORAN* (1914), 10 Cr. App. Rep. 67, C. C. A.

**2445.** Validity of conviction of prisoner unaffected.]—If on arraignment a prisoner persist in saying he will be tried by his King & his country, & refuses to put himself on his trial, in the ordinary way, it will not invalidate a conviction.—*R. v. DAVIS* (1820), Gow, 219.

#### D. Unfitness to Plead owing to Insanity.

**2446.** Application of Criminal Lunatics Act, 1800 (c. 94).]—Sect. 1 of the above Act is confined to cases of treason, murder, & felony; sect. 2 extends to all offences. Therefore, if, on a trial for a misdemeanour, prisoner appears to be insane, & the jury find him so, the ct. may order him to be confined until His Majesty's pleasure be known.—*R. v. LITTLE* (1821), Russ. & Ry. 430, C. C. R.

**2447.** As ground of defence of insanity.]—*R. v. SOUTHEY*, No. 2400, *ante*.

**2448.** —.]—If it is part of the defence that prisoner is insane at the time of the trial, it should be alleged that he is unfit to plead.—*R. v. PERRY* (1919), 14 Cr. App. Rep. 48, C. C. A.

#### PART VII. SECT. 4, SUB-SECT. 2.—D.

**2449 i.** Issue tried by jury.]—When prisoner had been under arrest on a charge of attempt at shooting, an inquisition was held before a jury to ascertain whether he was of sufficiently sound mind to be placed upon his trial. After the examination of several medical witnesses the jury found prisoner insane, & he was committed to gaol during H.M.'s pleasure.—*R. v.*

*LONG* (1854), 4 Nfld. L. R. 58.—**NFLD.**

**2449 ii.** —.]—If the ct. entertains doubt as to the sanity of a prisoner, the fact of such insanity should be put in issue & tried.—*R. v. HIRA PUNJA* (1863), 1 Bom. 33.—**IND.**

**2449 iii.** —.]—The preliminary issue of soundness of mind or otherwise ought to be tried by the jury.—*R. v. BHEEKOO KALWAR* (1872), 10 B. L. R. 10; 19 W. R. 15.—**IND.**

**2449.** Issue tried by jury.]—*R. v. DYSON* (1831), 1 Lew. C. C. 64; 7 C. & P. 305, n.

*Annotations:—Fold. R. v. Pritchard* (1836), 7 C. & P. 303; *R. v. Berry* (1876), 45 L. J. M. C. 123; *R. v. Stafford Prison, Ex p. Emery*, [1909] 2 K. B. 81.

**2450.** — Issue is sanity at time of trial.]—*R. v. PRITCHARD*, No. 2425, *ante*.

**2451.** — —.]—*R. v. KEARY* (1878), 14 Cox, C. C. 143.

**2452.** —.]—*R. v. WHITFIELD*, No. 2427, *ante*.

**2453.** —.]—*R. v. BERRY*, No. 2429, *ante*.

**2454.** — Ability of accused to comprehend the nature of the proceedings.]—A prisoner, who was unable to read or write, & who was unable to speak above a whisper, & could only do that for a moment or two at a time, was indicted for wilful murder. The judge ordered a jury to be sworn to try the question whether prisoner was able to plead. The jury found he was able to plead. The jury were then sworn to try whether prisoner was insane; they found he was sane. They were then sworn to try the question whether prisoner was so incapable of speaking as to be unable to communicate to his solr. the facts necessary to his own case; they found that, at the present time, he was not capable of speaking so as to be able to communicate such facts to his solr. The jury were then sworn to try whether this incapacity arose from his own unlawful act, & they found it did. The judge said after that finding he would not ask the jury whether the incapacity arose from the visitation of God. Prisoner then pleaded not guilty to the indictment, & the trial was adjourned to the next sessions.—*R. v. HARRIS* (1897), 61 J. P. 792.

**2455.** — —.]—*R. v. STAFFORD PRISON (GOVERNOR), Ex p. EMERY*, No. 2430, *ante*.

**2456.** — Evidence.]—A party having been indicted for a misdemeanour in uttering seditious words, & upon his arraignment, refusing to plead, & showing symptoms of insanity, & an inquest being forthwith taken under Criminal Lunatics Act, 1800 (c. 94), s. 2, to try whether he was insane or not:—*Held*: the jury might form their own judgment of the present state of deft.'s mind from his demeanour while the inquest was being taken, & might thereupon find him to be insane without any evidence being given as to his present state.—*R. v. GOODE* (1837), 7 Ad. & El. 536; 112 E. R. 572.

*Annotation:—Mentd. R. v. Swindall & Osborne* (1846), 2 Car. & Kir. 230.

**2457.** — —.]—Where a jury is empanelled to try whether a prisoner is insane or not at the time when he is brought up to plead to an indictment, the counsel for the prosecution is to begin & call his witnesses to prove the sanity of prisoner.—*R. v. DAVIES* (1853), 3 Car. & Kir. 328.

**2458.** — — Onus of proof on accused.]—Where a jury is empanelled, at the instance of the counsel for a prisoner, to try whether he is insane or not at the time when brought up to plead to an indictment, the proof of the insanity is incumbent on the counsel for prisoner.—*R. v. TURTON* (1854), 6 Cox, C. C. 385.

**2459.** No appeal lies from verdict of jury.]—There is no appeal under Criminal Appeal Act,

*m. Inability to instruct counsel—Detention.*]—*R. v. DELORME* (1923), Q. R. 35 K. B. 203.—**CAN.**

*n.* — —.]—Where a person charged with assault was found to be insane & unable to instruct counsel & agent for his defence:—*Held*: he must be confined during H.M.'s pleasure.—*H.M. ADVOCATE v. ROBERTSON* (1891), 3 White, 6.—**SCOT.**



1907 (c. 23), against the verdict of a jury on an issue as to whether a prisoner is of sound mind & understanding so as to be capable of pleading & taking his trial.—*R. v. JEFFERSON* (1908), 72 J. P. 467; 24 T. L. R. 877; 1 Cr. App. Rep. 95; C. C. A.

*Annotations*.—*Reid. R. v. Alexander* (1913), 109 L. T. 745; *R. v. Gilbert* (1914), 84 L. J. K. B. 1424.

#### *E. Arraignment upon Charge of Previous Conviction.*

**2460. Must not take place until found guilty of subsequent offence—Effect of Larceny Act, 1861 (c. 96), s. 116.]**—*FAULKNER v. R.*, No. 2412, *ante*.

#### SUB-SECT. 3.—CERTIORARI TO QUASH INDICTMENT.

See CROWN PRACTICE, Vol. XVI., pp. 474, 475.

#### SUB-SECT. 4.—MOTION TO QUASH INDICTMENT.

##### *A. Time for Making.*

**2461. Before plea pleaded.]**—After traverse of an indictment the party cannot take exception that the sheriff's name is not indorsed on the return of the *venire*.—*FITZ-HUGH'S CASE* (1619), Cro. Jac. 527; 79 E. R. 451.

**2462.** —.]—*R. v. KNIGHTLEY* (1696), Comb. 364; Holt, K. B. 398; 90 E. R. 530.

*Annotation*.—*Mentd. R. v. Harris* (1699), 12 Mod. Rep. 268.

**2463.** —.]—*R. v. ROOKWOOD* (1696), 4 Harg. St. Tr. 649; 13 State Tr. 139; 1 East, P. C. 110, 113; Holt, K. B. 683; 90 E. R. 1277.

*Annotations*.—*Consd. R. v. Kinloch* (1746), 18 State Tr. 395. *Reid. R. v. Heane* (1864), 4 B. & S. 947. *Mentd. R. v. Laver* (1722), 8 Mod. Rep. 82; *Heward v. Shipley* (1803), 4 East, 180; *R. v. Duffy* (1849), 7 State Tr. N. S. 795; *Mulcahy v. R.* (1867), 15 W. R. 446.

(1696), Holt, K. B. 689; 2 Salk. 634; 13 State Tr. 485; 90 E. R. 1280.

*Annotations*.—*Reid. Mulcahy v. R.* (1867), 15 W. R. 446; *R. v. Lynch* (1903), 72 L. J. K. B. 167; *R. v. Casement* (1916), 86 L. J. K. B. 467. *Mentd. Sparenburgh v. Bannatyne* (1797), 1 Bos. & P. 163; *R. v. McCafferty* (1867), 10 Cox, C. C. 603; *R. v. Ransford* (1874), 31 L. T. 488.

**2465.** —.]—*R. v. HANNAM* (1787), 1 Leach, 420, n.

**2466.** —.]—The Ct. of *Nisi Prius* will not notice objections to an indictment upon the trial, which fully appear on the record.—*R. v. SOUTER* (1818), 2 Stark. 423, N. P.

**2467.** —.]—Where a party has pleaded, & not demurred, to an indictment, an alleged defect upon the face of it cannot be taken advantage of before

verdict, even where the objection is such that a verdict would cure it.—*R. v. CARRUTHERS* (1844), 4 L. T. O. S. 179; 1 Cox, C. C. 138.

**2468.** —.]—*Semble*: where it is intended to take objection to any of the counts in an indictment, the proper course is to move to have such counts struck out of the indictment before plea pleaded, & it is too late to take such an objection at the close of the case for the prosecution.—*R. v. CHAPPLE & BOLINGBROKE* (1892), 66 L. T. 124; 56 J. P. 360; 17 Cox, C. C. 455, C. C. R.

**2469.** —.]—*R. v. LYNCH*, No. 1001, *ante*.

**2470.** —.]—In strictness an objection to an indictment for a formal defect apparent on the face of it should be taken before plea; but the ct. refused to hold that such an objection might not be taken at a later period & even after verdict.—*R. v. THOMPSON*, [1914] 2 K. B. 99; 83 L. J. K. B. 643; 110 L. T. 272; 78 J. P. 212; 30 T. L. R. 223; 24 Cox, C. C. 43; 9 Cr. App. Rep. 252, C. C. A.

**2471. After plea pleaded—Withdrawal of plea.]**—*FRITH'S CASE* (1845), cited in 9 J. P. 167.

*Annotation*.—*Reid. R. v. Wilson* (1845), 9 J. P. 167.

**2472. Not too late after plea pleaded.]**—*R. v. ROLLO* (1754), Say. 158; 96 E. R. 837.

**2473.** —.]—*R. v. HEANE*, No. 2485, *post*.

**2474.** —.]—*Motion to quash at close of case for prosecution.]*—*R. v. CASEMENT*, No. 1002, *ante*.

**2475.** —.]—*Indictment quashed.]*—An indictment may be quashed after the close of the case for the prosecution.—*R. v. JAMES* (1871), 12 Cox, C. C. 127.

*Annotation*.—*Reid. R. v. Benson* (1908), 98 L. T. 933.

##### *B. When granted.*

##### *(a) In General.*

**2476. Defect must be on face of indictment.]**—*R. v. WAKEFORD* (1728), 1 Barn. K. B. 47; 94 E. R. 33.

**2477.** —.]—A motion to quash an indictment must be for something apparent on the face of the indictment.—*R. v. BRISTOW* (1754), Dunning, 30.

**2478.** —.]—An indictment, which is not clearly bad, ought not to be quashed.—*R. v. HANSON* (1755), Say. 229; 96 E. R. 862.

**2479. Partial quashing of indictment.]**—An indictment cannot be quashed in part.

The ct. will not, on the application of deft., quash an indictment for perjury.—*R. v. WITHERS* (1849), 4 Cox, C. C. 17.

**2480.** —.]—An indictment was framed under Libel Act, 1843 (c. 96), ss. 4 & 5, whereas defts. were only committed under sect. 5 of the Act:—*Held*: the ct. would not quash the indictment,

given in charge to the jury.—*R. v. HOPKINS* (1832), 1 Craw. & D. 184.—*IR*.

**2472 i. Not too late after plea pleaded.]**—The ct. can entertain a motion to quash an indictment at any time.—*R. v. HOWES* (1887), 5 Man. L. R. 339.—*CAN*.

**q. Not after case for prosecution closed.]**—An indictment will not be quashed after the case for the prosecution has closed.—*R. v. HAYES & SLEVIN* (1842), 2 Craw. & D. 499; 2 Leg. Rep. 386.—*IR*.

#### PART VII. SECT. 4, SUB-SECT. 4.—*B. (a).*

**r. Offence not indictable.]**—An indictment setting forth an offence which is not indictable will be quashed on motion to that effect.—*R. v. BEAUVAIS* (1904), Q. R. 14 K. B. 498.—*CAN*.

**s. Several indictments—Charges iden-**

#### PART VII. SECT. 4, SUB-SECT. 4.—*A.*

**2461 i. Before plea pleaded.]**—Any objection to a defective indictment for any defect apparent on the face of it must be taken by demurrer or motion to quash the indictment before deft. has pleaded, & not afterwards.—*R. v. FLYNN* (1878), 2 P. & B. 321.—*CAN*.

**2461 ii.** —.]—Dft. was indicted & convicted for rape committed upon the person of W. Application was made to the trial judge on behalf of prisoner to reserve a case for the opinion of the ct. on the ground that it was not alleged in the indictment that the person upon whom the offence was committed was not the wife of prisoner:—*Held*: dft.'s counsel was obliged to take the objection before pleading to the indictment, & not having done so it was not open to him to take it subsequently.—*R. v. WRIGHT* (1906), 39 N. S. R. 103.—*CAN*.

**2461 iii.** —.]—An accused should

not be charged with more than one offence in a particular count. If it is clear on the face of the indictment that a count contains more than one offence, & no objection is taken before plea, or if it is not clear, & evidence is attempted to be led, & no objection is taken, it is too late to raise the objection afterwards where there is no prejudice to the accused.—*R. v. VIVIAN* (1917), T. P. D. 588.—*S. AF*.

**o. Before jury charged—Disagreement of jury—Effect of.]**—Where deft. has had an opportunity to move to quash the indictment when the cause was called for trial, & before the jury was sworn, but has neglected to avail himself of it, he is put in no better position, as regards his application, by the jury failing to agree on a verdict & being discharged in consequence.—*R. v. WALLACE* (1868), 7 N. S. R. 382.—*CAN*.

**p.** —.]—An indictment cannot be quashed after prisoner has been



**Sect. 4.—Proceedings before plea: Sub-sect. 4, B. (a), (b) & (c).]**

but would quash so much of it as purported to charge deft. under sect. 4.—*R. v. FELBERMANN & WILKINSON* (1887), 51 J. P. 168.

**2481. Discretion of court.]**—It is in the discretion of the ct. whether they will quash any indictment whatever upon motion (*per* CUR.).—*R. v. JOHNSON* (1752), 1 Wils. 325; 95 E. R. 643.

**2482. — Power of court of quarter sessions.]**—An order of quarter sessions, brought up by *certiorari*, appeared to be an order quashing an indictment containing counts for forcible entries, assaults, & a riot. On motion to quash the order:—*Held*: the sessions, having jurisdiction over the subject-matter of the indictment, had jurisdiction to quash it.—*R. v. WILSON* (1844), 8 Q. B. 620; a New Mag. Cas. 163; 1 New Sess. Cas. 427; 14 L. J. M. C. 3; 4 L. T. O. S. 153; 9 J. P. 167; 115 E. R. 233; *sub nom.* *R. v. GLOUCESTERSHIRE J.J.*, *R. v. WILSON*, 8 Jur. 1069.

**2483. — How exercised.]**—This is an application made on behalf of defts. to quash the indictment or in the alternative to quash certain counts of the indictment. Such an application is one the granting of which is within certain limits in the discretion of the ct. If the ct. should be of opinion that the indictment is clearly bad, or that any counts in it are clearly bad, it would be the duty of the ct. to quash the one or the other as the case might be. If the matter were one of doubt, & if the language of the indictment or of certain counts in it were such as to cause embarrassment to defts. in their defence & to prejudice the fair trial of the case, then the ct. would have discretion to quash the indictment or such counts of it as might be necessary (LORD RUSSELL OF KILLOWEN, C.J.).—*R. v. JAMESON*, [1896] 2 Q. B. 425; 65 L. J. M. C. 218; 75 L. T. 77; 60 J. P. 662; 12 T. L. R. 551; 18 Cox, C. C. 392.

*Annotations:—Mentd.* *R. v. Audley*, [1907] 1 K. B. 383; *R. v. Stride & Millard*, [1908] 1 K. B. 617; *R. v. Porter* (1909), 3 Cr. App. Rep. 237; *R. v. Crewe*, *Ex p. Sekgome*, [1910] 2 K. B. 576; *Coldingham Parish Council v. Smith*, [1918] 2 K. B. 90.

**2484. — Not granted in case of doubt.]**—On a motion to quash an indictment the ct. should not interfere where there is doubt (COLERIDGE, J.).—*R. v. BURNBY* (1843), 5 Q. B. 348; 1 Dav. & Mer. 362; 13 L. J. M. C. 29; 2 L. T. O. S. 73, 166; 8 J. P. 166; 8 Jur. 240; 114 E. R. 1280.

**2485. — —.]**—(1) When an indictment is found by a grand jury having no jurisdiction, it may be quashed at any stage, at the instance of deft., even after he has pleaded to it.

(2) Where there is any doubt as to its validity, the ct. will not decide the question upon motion, but will leave deft. to his writ of error.—*R. v. HEANE* (1864), 4 B. & S. 947; 3 New Rep. 466; 33 L. J. M. C. 115; 9 L. T. 719; 28 J. P. 500; 10 Jur. N. S. 724; 12 W. R. 417; 9 Cox, C. C. 433; 122 E. R. 714.

*Annotations:—As to (2) Refd.* Knowlden v. R. (1864), 5 B. & S. 532; *R. v. Yates* (1883), 48 J. P. 102. *Generally, Mentd.* *R. v. Tomlinson* (1866), 12 Jur. N. S. 944; *R. v. Thompson* (1913), 78 J. P. 212.

**2486. — Lengthy argument not permitted.]**—Counsel are not allowed to argue at length *at nisi prius* the invalidity of an indictment,

*tical.*—The practice of quashing indictments, when there are two or more of them, is only applicable to cases where the charges which they contain are one & the same, but only presented in a different light, & not to cases where the charges are distinct & separate, even although they arise out of the same transaction.—ANON.

(1841), Ir. Cir. Rep. 165.—IR.

*t. Presence of prosecutor on grand jury.]*—Where one of the grand jurors, by whom an indictment for forcible entry & detainer was found at the sessions, was prosecutor, the indictment was quashed.—*R. v. CUNARD* (1838), Ber. 500.—CAN.

for the purpose of inducing the ct. to refuse to try it.—*R. v. ABRAHAM* (1830), 1 Mood. & R. 7, N. P.

**2487. — Judge may refuse to try bad indictment.]**—A jury sworn on an indictment clearly bad in point of law may be discharged by the judge from giving a verdict.—*R. v. DEACON* (1824), Ry. & M. 27, N. P.

**2488. — —.]**—A judge *at nisi prius* may refuse to try an indictment clearly bad in point of law.—*R. v. TREMEARNE* (1824), Ry. & M. 147, N. P.

**2489. — —.]**—An indictment for perjury committed in the Insolvent Debtor's Ct., alleged that deft. falsely, etc., swore "that his schedule presented to that ct. contained a full, true, & perfect account of all debts owing to him, whereas, in truth & in fact, the schedule did not contain a full, true & perfect account of all debts owing to him," without specifying any debts omitted:—*Held*: this indictment was clearly bad, & no trial ought to be had upon it.

I have no power to quash this indictment & I therefore order the case to be struck out of the list (ABBOTT, C.J.).—*R. v. HEPPER* (1825), 1 C. & P. 608; Ry. & M. 210, N. P.

**2490. Ex officio information not quashed.]**—An information by the A.-G. cannot be quashed, but if an information can be quashed it must be for something that appears on the record, & not for a matter extrinsic.—*R. v. JOAKAM* (1733), Sess. Cas. K. B. 70; 93 E. R. 71.

**2491. — —.]**—The ct. will not give leave to quash an information filed *ex officio* by the A.-G. He may stop the proceedings upon it by *noli prosequi* & file another.—*R. v. STRATTON* (1779), 1 Doug. K. B. 239; 21 State Tr. 1045; 99 E. R. 156.

*Annotations:—Consd.* *R. v. Mitchell* (1848), 6 State Tr. N. S. 545. *Refd.* *R. v. Duffy* (1848), 4 Cox, C. C. 123. *Mentd.* *R. v. Dudley & Stephens* (1884), 14 Q. B. D. 273.

**2492. Quashing coroner's inquisition.]**—A coroner's inquisition found that, on a day & at a place named, deceased being on board a steam-boat then floating & being navigated in a river, a boiler burst, whereby boiling water & coals were cast upon deceased, whereby deceased instantly died:—*Held*: the inquest must be quashed, because no time was sufficiently laid for the time of the explosion, or for that of the death.

Though the ct. will sometimes quash an inquisition on motion, for palpable defects, the most convenient course is to put the party contesting it to demur.—*R. v. BROWNLOW* (1839), 11 Ad. & El. 119; 8 Dowl. 157; 3 Per. & Dav. 52; 9 L. J. M. C. 15; 3 J. P. 722; 4 Jur. 103; 113 E. R. 358.

*Annotations:—Refd.* *Oldershaw v. King* (1857), 3 Jur. N. S. 1152. *Mentd.* *Re Appleton* (1839), 3 J. P. 738.

**(b) On Motion of Prosecution.**

**2493. Refused after plea before another indictment found.]**—The ct. will not quash a defective indictment on the motion of prosecutor after plea pleaded, before another good indictment be found.—*R. v. WYNN* (1802), 2 East, 226; 102 E. R. 355.

**2494. Refused after judgment on demurrer.]**—After judgment on demurrer an indictment cannot

**PART VII. SECT. 4, SUB-SECT. 4.—B. (b).**

**a. Partial quashing.]**—A judge has power, on application of prosecution to quash one of several counts in an indictment.—*R. v. SIROIS* (1887), 27 N. B. R. 610.—CAN.

**b. Indictment lost between trials—**

be quashed at the instance of prosecutor.—*R. v. SMITH* (1838), 2 Mood. & R. 109, N. P.

*Annotation* :—*Refd.* *R. v. Pringle* (1840), 2 Mood. & R. 276.

**2495. Motion granted.**—*R. v. BURFORD* (1731), 2 Barn. K. B. 80; 94 E. R. 369.

**2496. — Terms imposed.**—*R. v. WEBB* (1764); 3 Burr. 1468; 1 Wm. Bl. 460; 97 E. R. 931.

*Annotation* :—*Consd.* *R. v. Duffy* (1848), 4 Cox, C. C. 123.

**2497. —**—*R. v. GLENN* (1820), 3 B. & Ald. 373; 106 E. R. 699.

**2498. — Costs.**—*R. v. SMITH* (1845), 9 J. P. Jo. 115.

**2499. —**—The ct. has a power to quash an indictment upon the application of prosecutor, on the ground that the evidence will not support the offence as laid, although prisoner might be convicted of a lesser offence upon it.—*R. v. LOWE & MINGHAM* (1846), 6 L. T. O. S. 456.

**2500. — Accused cannot waive objection.**—If there be an objection to the indictment, deft.'s counsel cannot waive the objection & permit the case to be tried on the merits.—*R. v. HUNTING-TOWER (LORD)* (1843), 1 L. T. O. S. 414; 1 Cox, C. C. 47.

#### (c) On Motion of Accused.

**2501. Refused in case of serious charge.**—An indictment for any heinous offence will not be quashed on motion.—*R. v. BELTON (INHABITANTS)* (1696), 1 Salk. 372; Holt, K. B. 345; 91 E. R. 323.

**2502. —**—On motion to quash an indictment found for disobeying an order of sessions :—*Held* : the offence was too great to quash the indictment for it.—*R. v. BELL* (1731), 2 Barn. K. B. 105; 94 E. R. 385.

**2503. — Except on clearest grounds.**—The ct. never quashes indictments for serious offences before trial but upon the clearest & plainest grounds, but leaves the party to his remedy by demurrer or compels him to plead.—*R. v. WETHERILL* (1784), Cald. Mag. Cas. 432.

**2504. — Treason.**—*R. v. LYNCH*, No. 1001, ante.

**2505. — Murder.**—We never quash indictments for nuisances, for forgery, for murder or for disobeying justices' orders; the remedy is to move in arrest of judgment (*per CUR.*).—*R. v. BOYCE* (1753), Dunning, 6.

*Annotation* :—*Refd.* *R. v. Robinson* (1759), 2 Burr. 799.

**2506. — Perjury.**—An indictment for perjury or forgery will not be quashed on motion for insufficiency therein before the guilt or innocence of the party is tried.—ANON. (1661), 1 Sid. 54; 82 E. R. 965.

*Annotation* :—*Refd.* *R. v. Nixon* (1719), 1 Stra. 185.

**2507. —**—It is not the course to quash indictments of perjury, nuisance, or the like, but to put the party to plead to them (*per CUR.*).—ANON. (1684), 1 Vent. 369; 86 E. R. 237.

**2508. —**—Indictments for perjury, forgery, maintenance are never quashed on motion,

but the party is always put to plead to them, but as to riots or other offences of a public nature the ct. is very tender of quashing them (*per CUR.*).—ANON. (1698), 12 Mod. Rep. 231; 88 E. R. 1283.

**2509. —**—The ct. refused to quash an indictment for perjury for want of an addition to deft.'s name where deft. produced no affidavit giving his proper addition. *Semble* : the ct. will on motion quash such an indictment for want of such addition if the exception be probably taken.—*R. v. THOMAS* (1823), 3 Dow. & Ry. K. B. 621; 2 L. J. O. S. K. B. 41.

**2510. —**—*R. v. WITHERS*, No. 2479, ante.

**2511. — Forgery.**—ANON., No. 2506, ante.

**2512. —**—*R. v. BOYCE*, No. 2505, ante.

**2513. —**—ANON., No. 2508, ante.

**2514. Refused where cheating or fraud alleged.**—*R. v. ORBELL* (1703), 6 Mod. Rep. 42; 12 Mod. Rep. 499; 87 E. R. 804.

**2515. —**—*R. v. PARRY* (1703), 2 Ld. Raym. 865; 92 E. R. 78.

**2516. —**—*R. v. GIBSON* (1721), 11 Mod. Rep. 340; 88 E. R. 1076.

*Annotation* :—*Refd.* *Eddowes v. Hopkins* (1780), 1 Doug. K. B. 376.

**2517. —**—An indictment for selling by false weights is not to be quashed upon motion.—*R. v. CROOKES* (1766), 3 Burr. 1841; 97 E. R. 1127.

**2518. Refused where offence is of public nature — Extortion.**—The ct. will not quash an indictment for extortion.—*R. v. WADSWORTH* (1694), 5 Mod. Rep. 13; 87 E. R. 489.

**2519. —**—*R. v. BAILEY* (1744), 2 Stra. 1211; 93 E. R. 1134.

**2520. —**—*R. v. KING* (1748), 2 Stra. 1268; 93 E. R. 1173.

**2521. — Disobedience to order of sessions.**—*R. v. BELL*, No. 2502, ante.

**2522. —**—*R. v. BOYCE*, No. 2505, ante.

**2523. —**—Where an indictment at common law for disobeying an order of sessions for the maintenance of a bastard child was defective but only on points which would render it bad on demurrer, the ct. refused to interfere by quashing it.—*R. v. TAYLOR* (1841), 9 Dowl. 600; Woll. 193; 5 J. P. 467; 5 Jur. 679.

**2524. — Disturbance of the peace.**—ANON., No. 2508, ante.

**2525. —**—An indictment, wherein a disturbance of the peace is charged, ought not to be quashed.—*R. v. JOPSON* (1752), Say. 27; 96 E. R. 791.

*Annotation* :—*Refd.* *R. v. Storr* (1765), 3 Burr. 1698.

**2526. — Nuisance.**—ANON., No. 2507, ante.

**2527. —**—The ct. refused to quash an indictment on motion on the ground of surplusage, it being for a nuisance.—*R. v. WIGG* (1705), 2 Salk. 460; 2 Ld. Raym. 1163; 91 E. R. 397.

*Annotations* :—*Refd.* *R. v. Belton* (1696), 1 Salk. 372. *Mentd.* *R. v. Mallard* (1728), 1 Barn. K. B. 108; *R. v. Hill* (1729), 1 Barn. K. B. 259.

*Fresh indictment granted.*—In the interval between a first & second trial for murder, the original indictment & informations were lost. At the instance of the Crown, the ct. permitted a fresh indictment to be sent up to the grand jury, & ordered the proceedings to be quashed.—*R. v. DOWLING* (1844), 3 Craw. & D. 178.—IR.

#### PART VII. SECT. 4, SUB-SECT. 4.— B. (c).

**2501 i. Refused in case of serious charge.**—In cases of crimes of great magnitude the ct. does not usually quash an indictment at the instance of prisoner, but he is to put to his

demurrer or his plea.—*R. v. SHEARES* (1798), 27 State Tr. 266.—IR.

*c. Refused after plea—Illegal arrest.*—Prisoner, who has appeared before the trial justice without raising the point that he had been arrested without a warrant, cannot successfully raise the point on a motion to quash.—*It. v. FUDWELL* (1916), 34 W. L. R. 130; 10 W. W. R. 205.—CAN.

*d. When agent of prosecutor on grand jury.*—Defts. were indicted for conspiracy to prevent C. from recovering his rents. W., agent of C., was on the grand jury, which found the bill. A motion was made to quash the

indictment because of W.'s presence on the grand jury, it being urged that his position was such as to prejudice him against the accused, & therefore, to render him incompetent to be on the grand jury.—*Held* : W. was incompetent, & the indictment must be quashed.—*R. v. GORRET* (1866), 1 P. E. I. 262.—CAN.

*e. Composition of grand jury.*—A true bill being found against deft. for libel, deft. moved to have same quashed on three several grounds : (1) one of the grand jurors who found the bill was of affinity to deft. in the seventh degree; (2) the names of two persons on the jury were not the same

*Sect. 4.—Proceedings before plea: Sub-sect. 4, B. (c); sub-sect. 5. Sect. 5: Sub-sect. 1.]*

2528. ———.]—The ct. will not on motion quash an indictment for a nuisance.—*R. v. BISHOP* (1738), *Andr.* 220; 95 E. R. 371.

2529. ———.]—*R. v. BOYCE*, No. 2505, *ante*.

2530. ———.]—Indictment for a nuisance must be demurred to, not quashed.—*R. v. SUTTON* (1767), 4 Burr. 2116; 98 E. R. 104.

*Annotation:—Mentd. Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193.

2531. *Granted where no indictable offence disclosed.*—A motion to quash an indictment may be made on the grounds that the indictment discloses no indictable offence.—*R. v. HALL*, [1891] 1 Q. B. 747; 60 L. J. M. C. 124; 64 L. T. 394; 17 Cox, C. O. 278.

*Annotations:—Consd. R. v. Kakelo*, [1923] 2 K. B. 793. *Mentd. Saunders v. Holborn District Board of Works*, [1895] 1 Q. B. 64; *Boynnton v. Ancholme Drainage & Navigation Comrs.*, [1921] 2 K. B. 213.

2532. *Refused where accused has forfeited his recognisances.*—There can be no motion to quash an indictment, which has been removed by *certiorari*, after the recognisance for trying has been forfeited.—*ANON.* (1703), 1 Salk. 380; 91 E. R. 331.

2533. ———.]—*R. v. BARKLEY* (1724), *Sess. Cas.* K. B. 125; 93 E. R. 127.

2534. *Refused to corporation.*—*R. v. BIRMINGHAM & GLOUCESTER RY. CO.*, No. 991, *ante*.

#### SUB-SECT. 5.—DEMURRER.

2535. *Time for demurring — Before plea.*—Objections to an indictment, which are within Criminal Law Act, 1826 (c. 64), ss. 20 & 21, must be taken by demurrer. It is too late to take them on the trial.—*R. v. LAW* (1839), 2 Mood. & R. 197, N. P.

2536. ———.]—Deft. in an indictment cannot, after plea, take advantage of any defect which is aided after verdict by Criminal Law Act, 1826 (c. 64), s. 21, the only mode of taking advantage of such defects being by demurrer.—*R. v. ELLIS* (1842), *Car. & M.* 564.

*Annotation:—Refd. R. v. Spalding* (1842), *Car. & M.* 568.

2537. ———.]—*Withdrawal of plea for purpose of demurring.*—Where prisoner in a case of felony has in the absence of his counsel pleaded to an indictment which is objectionable on demurrer, the judge will, on the application of prisoner's counsel, allow prisoner to demur before the evidence is gone into.

In a case of embezzlement, if prisoner demurs to the indictment, & the demurrer be decided against him, he may still plead over to the felony & take his trial.—*R. v. PURCHASE* (1842), *Car. & M.* 617.

*Annotations:—Refd. R. v. Hunt* (1848), 3 Cox, C. C. 215; *R. v. Mitchel* (1848), 6 State Tr. N. S. 599.

2538. ———.]—Where deft. had pleaded

inadvertently to an indictment under circumstances which might show it to have been a mistake on his part, the ct. refused to allow him to withdraw his plea for the purpose of demurring, where the objection was one of a technical character, not in any way affecting the merits of the case.

The decision was one peculiarly for the discretion of the presiding judge (DENMAN, C.J.).—*R. v. BROWN* (1848), 2 Car. & Kir. 504; 1 Den. 290; 17 L. J. M. C. 145; 12 J. P. 596; 3 Cox, C. C. 127, C. C. R.

2539. ———.]—*Not after verdict.*—*R. v. CORNWALL* (1664), 1 Sid. 208; 82 E. R. 1060.

*Annotation:—Refd. Castledine v. Mundy* (1832), 4 B. & Ad. 90.

2540. *What objections may be taken on demurrer.—To jurisdiction of court as well as to indictment.*—Upon a demurrer to an indictment found in an inferior ct., objections may be taken, as well to the jurisdiction of such ct. as to the subject-matter of such indictment.—*R. v. FEARNEY* (1780), 1 Leach, 425; 1 Term Rep. 316; 99 E. R. 1115.

*Annotations:—Refd. R. v. Marsh* (1837), 6 Ad. & El. 236; *R. v. Bidwell* (1845), 10 J. P. 264.

2541. *Demurrer may be against part of indictment.*—*TAYLOR v. R.*, [1895] 1 Q. B. 25; 64 L. J. M. C. 11; 71 L. T. 571; 11 T. L. R. 6; 18 Cox, C. C. 45; 58 J. P. Jo. 716; 15 R. 6; *sub nom. R. v. TAYLOR*, 43 W. R. 24; 39 Sol. Jo. 11.

*Annotation:—Refd. R. v. Riley*, [1896] 1 Q. B. 309.

2542. *Demurrer against indictment generally.—Judgment may be for the Crown as to part.*—If an indictment contains two distinct charges, for two distinct & independent offences, & deft. demurs generally, though one of the offences be not indictable, or be insufficiently alleged, yet there shall be judgment for the King, if the other offence be indictable & sufficiently alleged. For an indictment may be good in part & bad in part.—*R. v. How* (1726), *Sess. Cas.* K. B. 134; 2 Stra. 699; 93 E. R. 136.

*Annotations:—Refd. R. v. Cheere* (1825), 4 B. & C. 902. *Mentd. A.-G. of New South Wales v. Macpherson* (1870), L. R. 3 P. C. 268.

2543. *Right of accused to demur & plead over.*—*SMITH v. BOWEN* (1709), 11 Mod. Rep. 230; 2 Ld. Raym. 1288; 88 E. R. 1008.

*Annotation:—Refd. R. v. Phelps* (1841), *Car. & M.* 180.

2544. ———.]—A prisoner may demur & plead over to an indictment at the same time.—*R. v. ADAMS* (1842), *Car. & M.* 299; 6 J. P. 205.

*Annotations:—Refd. R. v. Mitchel* (1848), 3 Cox, C. C. 1. *Mentd. Murray v. R.* (1845), 7 Q. B. 700; *Drake v. Footitt*, *Drake v. Hankin* (1881), 7 Q. B. D. 201.

2545. ———.]—*In treason & felony.*—A man cannot plead over in any case but in treason or felony, & not in case of a misdemeanour (HOLT, C.J.).—*R. v. GODDARD* (1703), 2 Ld. Raym. 920; 2 Salk. 171; 92 E. R. 114.

*Annotations:—Consd. R. v. Taylor* (1824), 3 B. & C. 50. *Refd. R. v. Charlesworth* (1861), 1 B. & S. 460. *Mentd. R. v. Crowhurst* (1724), 2 Ld. Raym. 1363.

2546. ———.]—Pleading over is or y

*R. v. MASON* (1872), 22 C. P. 24—CAN.

2545 i. *Right of accused to demur & plead over.—In treason & felony.*—A prisoner indicted for a felony & capital is not entitled to demur & plead over at the same time.—*R. v. MITCHEL* (1848), 3 Cox, C. C. 1.—IR.

2545 ii. ———.]—The ct. will not pronounce final judgment on an indictment for a non-capital felony, a demurrer thereto being disallowed, but will allow prisoner to plead over.—*R. v. DUFFY* (1849), 1 Ir. Jur. 167.—IR.

h. ———.]—*In misdemeanour.*—In a

as those contained in the panel annexed to the *venire facias*; (3) one of the grand jurors had previously to the finding of the indictment expressed an opinion as to deft.'s guilt, hostile to deft., & from ill-will:—*Held*: the first ground alleged was not sufficient to quash an indictment, & from the evidence before him, the second & third grounds were also insufficient.—*R. v. LAWSON* (1888), 2 P. E. I. 398.—CAN.

i. *Defective indictment.—Defect must be clear.*—An application to the ct. on the part of deft. to quash an indictment will be refused unless the defect is clear & obvious.—*R. v. WALLACE* (1868), 7 N. S. R. 382.—CAN.

#### PART VII. SECT. 4, SUB-SECT. 5.

2537 i. *Time for demurring.—Withdrawal of plea for purpose of demurring.*—Prisoner was not permitted to withdraw his plea of not guilty for the purpose of demurring to the indictment.—*R. v. SHEALS* (1845), 3 Crawl. & D. 330.—IR.

g. *What objections may be taken on demurrer.—Defect patent on indictment.*—The ct. will not arrest judgment after verdict, or reverse it in error, for any defect patent on the face of the indictment. Such defect must be objected to by demurrer, or by motion to quash the indictment.—

allowed in case of felony, in *favorem vitæ* (LE BLANC, J.).—R. v. GIBSON (1806), 8 East, 107; 103 E. R. 284.

*Annotations*.—*Refd.* R. v. Taylor (1824), 3 B. & C. 502; R. v. Mitchel (1848), 6 State Tr. N. S. 599. *Mentd.* R. v. Cox (1897), 14 T. L. R. 122.

2547. ———.]—R. v. PHELPS, No. 649, *ante*.

2548. ———.]—R. v. PURCHASE, No. 2537, *ante*.

2549. ———. Whether granted as of right.]—Prisoner cannot of right demur & plead over to an indictment for felony.—R. v. ODGERS (1843), 2 Mood. & R. 479, N. P.

*Annotations*.—*Refd.* R. v. Mitchel (1848), 6 State Tr. N. S. 599; R. v. Fenwick (1849), 2 Car. & Kir. 915.

2550. ———.]—*Qu.*: whether, in a case of felony not capital, a judgment against prisoner on a demurrer to the indictment too conclusive against him, as in misdemeanour, & whether prisoner being tried for the felony after a judgment against him on demurrer is confined to capital cases.—R. v. BOWEN (1844), 1 Car. & Kir. 501; 1 Den. 22; 4 L. T. O. S. 140 a; 1 Cox, C. C. 88; 8 J. P. Jo. 771, C. C. R.

On general demurrer to an indictment, under Forgery Act, 1830 (c. 66), s. 19, judgment for the Crown must be final.—R. v. FADERMAN, LAURIO & GORDON (1850), 3 Car. & Kir. 353; 1 Den. 565; 4 New Sess. Cas. 161; 14 J. P. 624; 4 Cox, C. C. 359.

*Annotations*.—*Refd.* *Re* Strahan, Paul & Bates (1855), 7 Cox, C. C. 85; Mulcahy v. R. (1868), L. R. 3 H. L. 306. *Mentd.* R. v. Coulson (1850), 4 Cox, C. C. 227; R. v. Mellor (1858), 7 Cox, C. C. 454; R. v. Westley (1859), 23 J. P. 805.

2552. ———.]—In an indictment for felony, the judgment on demurrer is final & prisoner is not allowed to plead over.—R. v. HENDY (1850), 4 Cox, C. C. 243.

2553. ———.]—MULCAHY v. R., No. 810, *ante*.

2554. ———. In Misdemeanour—Judgment for Crown is final.]—Indictment charged that deft. on, etc., in the second year of the reign of the present King kept a gaming-house. Plea, that on, etc., in the fourth year of the reign of the present King, deft. was arraigned upon an indictment, which charged that deft. on Jan. 18, in the fifty-seventh year of the reign of the late King & on divers other days & times between that day & the day of taking the inquisition, kept a gaming-house, etc., to the nuisance of the subjects of the King & against the peace, etc. The plea then averred the identity of the offences described in the two indictments & the acquittal of deft. Upon demurrer to this plea concluding with a prayer of judgment of *respondeas ouster*:—*Held*: (1) the plea was bad because the indictment upon which the acquittal was alleged to have taken place, on the face of it, charged an offence committed in the reign of the late King; & it was not competent to deft. to show by averment that it was for the same offence as that charged in the indictment before the ct., because that would be in effect to contradict the record; (2) the Crown was entitled to final judgment, notwithstanding the form in which demurrer concluded.

prosecution for a misdemeanour, if deft. demurs to the indictment, & the demurrer is overruled, he has no right to answer over to the offence charged against him, but sentence may be pronounced at once against him.—R. v. HOUSTON (1841), 4 I. L. R. 174.—R.

k. *Indictment bad on demurrer—Fresh indictment.*]—An indictment having been held bad on demurrer, the judgment was that the indictment be quashed, so that another indictment might be preferred, not that defts. be discharged.—R. v. TERNEY (1869), 29 U. C. R. 181.—CAN.

*Semble*: such an indictment must conclude *contra pacem domini regis*.—R. v. TAYLOR (1824), 3 B. & C. 502; 5 Dow. & Ry. K. B. 422; 2 Dow. & Ry. M. C. 487; 3 L. J. O. S. K. B. 68; 107 E. R. 820; *subsequent proceedings* (1825), 3 B. & C. 612.

*Annotations*.—*As* to (1) *Refd.* R. v. Jennings (1844), 4 L. T. O. S. 233. *As* to (2) *Fold.* R. v. Mitchel (1848), 6 State Tr. N. S. 545. *Generally, Mentd.* *Ex p.* Bartlett (1843), 7 Jur 649; Gray v. R. (1844), 6 State Tr. N. S. 117.

2555. ———.]—R. v. BOWEN, No. 2550, *ante*.

2556. ———. Liberty given to plead over.]—On an indictment against the inhabitants of a township for non-repair of a highway, the ct. granted leave to defts. to demur, with liberty to plead over in case judgment were given against them on the demurrer.—R. v. TRYDDYN (INHABITANTS) (1852), Bail Ct. Cas. 19; 21 L. J. M. C. 108; 16 J. P. Jo. 180.

2557. Withdrawal of demurrer—Not without consent of prosecution.]—Demurrer cannot be withdrawn by deft. without consent of prosecutor.—R. v. TYRER (1734), Cunn. 31; 2 Barn. K. B. 417; 94 E. R. 1044.

2558. In discretion of court.]—After argument upon demurrer in a criminal case, it is in the discretion of the ct. to allow the demurrer to be withdrawn & a plea of not guilty entered.—R. v. SMITH (1850), as reported in 4 Cox, C. C. 42.

*Annotation*.—*Mentd.* R. v. Tomlinson, [1895] 1 Q. B. 706.

2559. Judgment on demurrer how reviewable.]—The Ct. for Crown Cases Reserved has no jurisdiction either from Crown Cases Act, 1848 (c. 78), or any other source, to review a judgment given against a prisoner on a general demurrer to an indictment by the judge before whom prisoner took his trial. Such a judgment can only be reviewed on a writ of error.—R. v. FADERMAN, LAURIO & GORDON (1850), 3 Car. & Kir. 353; 1 Den. 565; T. & M. 286; 4 New Sess. Cas. 161; 19 L. J. M. C. 147; 16 L. T. O. S. 514; 14 J. P. 304; 4 Cox, C. C. 359; *sub nom.* R. v. FAIDERMAN, 14 Jur. 377, C. C. R.

*Annotations*.—*Refd.* R. v. Mellor (1858), 7 Cox, C. C. 454; R. v. Westley (1859), 23 J. P. 805. *Mentd.* R. v. Coulson (1850), 4 Cox, C. C. 227; *Re* Strahan, Paul & Bates (1855), 7 Cox, C. C. 85; Mulcahy v. R. (1868), L. R. 3 H. L. 306.

## SECT. 5.—PLEA—THE GENERAL ISSUE.

### SUB-SECT. 1.—NATURE OF PLEA.

2560. Whether double plea allowable—General & special pleas—Exception in felonies.]—KIRTON v. HOXTON (1596), Poph. 115; 79 E. R. 1222.

*Annotation*.—*Consd.* R. v. Gibson (1806), 8 East, 107.

2561. ———.]—In criminal cases a deft. cannot plead a special plea in addition to the general issue.—R. v. STRAHAN, PAUL & BATES (1855), 7 Cox, C. C. 85.

*Annotation*.—*Refd.* R. v. Banks (1911), 75 J. P. 567.

2562. ———.]—R. v. CHARLESWORTH, No. 3227, *post*.

—.]—*See, further*, Sect. 3, sub-sect. 5, *ante*.

l. *Who may open.*]—The ct. will not permit a demurrer to be opened even in a prosecution at the suit of the Queen, by any member of the inner Bar, except the Attorney or Solicitor-General.—R. v. DUFFY (1846), 2 Cox, C. C. 45.—IR.

*Sect. 5.—Plea—The general issue: Sub-sects. 1, 2,*

**2563. Plea must be voluntary act of accused.]**

—*R. v. NEALE* (1846), 10 J. P. 170.

**2564. — Unauthorised plea of attorney in absence of accused.]**—A., an infant, was charged with maliciously injuring a window & a bell-pull, & being ill, told his father that he had broken the window, but not intentionally, & that there ought to be compensation. The father thereon went to attend the hearing. A., being unable to do so, & an attorney he consulted advising that through him *pltf.* should plead guilty, which the attorney did, there being no communication meanwhile with A., the justices convicted A., & sentenced him to imprisonment:—*Held*: the conviction ought to be quashed on the ground that neither the father nor attorney had authority from A. to plead guilty.—*R. v. AVES* (1871), 24 L. T. 64; 35 J. P. 533.

**2565. — Withdrawal of previous plea.]**—On a plea of not guilty there ought to be no suggestion by the ct. that that plea should be withdrawn or that there should be a plea of guilty.—*R. v. KING* (1920), 15 Cr. App. Rep. 13, C. C. A.

**2566. Plea must not be ambiguous.]**—In trespass of assault, battery & wounding, a plea of not guilty as to the *vi et armis*, & a justification *molliter manus imposuit* as to the residue were adjudged bad upon demurrer.—*BARRET v. HEVESETT* (1591), Cro. Eliz. 242; 78 E. R. 498.

**2567. —]**—Applt. was charged with being unlawfully in possession of a coining mould without lawful excuse. When called upon to plead, he said that he was guilty of having the mould in his possession. This was entered as a plea of guilty. Later, when sentence was about to be passed, applt. set up what he regarded as a lawful excuse for the possession of the mould. No effect was, however, given to this statement of applt., who was then sentenced:—*Held*: applt. had not pleaded guilty, no legal sentence had been passed, & the case must go back & applt. be called upon to plead to the indictment.—*R. v. BAKER* (1912), 28 T. L. R. 363; 7 Cr. App. Rep. 217; 76 J. P. Jo. 184, C. C. A.

*Annotations*:—*Refd.* *R. v. Ingleson* (1914), 11 Cr. App. Rep. 21; *R. v. Golathan* (1915), 84 L. J. K. B. 758; *R. v. Wakefield*, [1918] 1 K. B. 216; *R. v. King* (1920), 15 Cr. App. Rep. 13; *R. v. Lloyd* (1923), 17 Cr. App. Rep. 184. *Mentd.* *Crane v. Public Prosecutor*, [1921] 2 A. C. 299.

**2568. — Plea of not guilty entered if any doubt.]**—Where a prisoner formally pleads guilty

to a felony, but accompanies the plea by a statement disclaiming any felonious intention, it is the duty of the ct. to enter a plea of not guilty. Applt. pleaded guilty to a charge of receiving certain horses knowing them to have been feloniously stolen, & handed to the ct. a written statement which concluded with these words: "I am guilty of taking the horses not knowing them to have been stolen." A plea of "Guilty" was thereupon entered on the record, & sentence was passed:—*Held*: applt. had not pleaded guilty, & that no legal sentence had been passed; the case must go back, & applt. be called upon to plead afresh to the indictment.—*R. v. INGLESON*, [1915] 1 K. B. 512; 84 L. J. K. B. 280; 112 L. T. 313; 24 Cox, C. C. 527; 11 Cr. App. Rep. 21; 78 J. P. Jo. 521, C. C. A.

*Annotations*:—*Refd.* *R. v. Rhodes* (1914), 11 Cr. App. Rep. 33; *R. v. Golathan* (1915), 24 Cox, C. C. 704; *R. v. King* (1920), 15 Cr. App. Rep. 13. *Mentd.* *Crane v. Public Prosecutor*, [1921] 2 A. C. 299.

**2569. Plea must be understood by accused.]**—On an appeal on the ground that applt. pleaded guilty by mistake, the ct. will satisfy itself on the facts whether he really did not understand the effect of his plea.—*R. v. RHODES* (1914), 11 Cr. App. Rep. 33, C. C. A.

*Annotation*:—*Refd.* *R. v. Golathan* (1915), 24 Cox, C. C. 704.

**2570. —]**—Where a plea of guilty to a charge in an indictment is entered, the ct. must be satisfied that the accused did in fact intend to plead guilty to the full charge preferred against him. If not so satisfied, the ct. will quash the conviction & sentence.—*R. v. GOLATHAN* (1915), 84 L. J. K. B. 758; 112 L. T. 1048; 79 J. P. 270; 31 T. L. R. 177; 24 Cox, C. C. 704; 11 Cr. App. Rep. 79, C. C. A.

*Annotation*:—*Mentd.* *R. v. Wakefield*, [1918] 1 K. B. 216; *Crane v. Public Prosecutor*, [1921] 2 A. C. 299.

**2571. Effect of plea due to misstatement of law.]**—If *deft.* pleads guilty owing to a misstatement of the law by the judge, the ct. will quash the conviction.—*R. v. ALEXANDER* (1912), 107 L. T. 240; 76 J. P. 215; 28 T. L. R. 200; 23 Cox, C. C. 138; 7 Cr. App. Rep. 110, C. C. A.

**2572. Recording the plea—Practice at Central Criminal Court.]**—*R. v. NEWMAN* (1852), 3 Car. & Kir. 240; 2 Den. 390; 21 L. J. M. C. 75; 16 J. P. 117; 16 Jur. 111; 5 Cox, C. C. 547, C. C. R.

#### SUB-SECT. 2.—WITHDRAWAL OF PLEA.

**2573. Application must be voluntary.]**—*R. v. KING*, No. 2565, *ante*.

#### PART VII. SECT. 5, SUB-SECT. 1.

**2563 i. Plea must be voluntary act of accused.]**—If a prisoner persists in pleading guilty, it is not the judge's duty to enter a plea of not guilty merely because prisoner adds a statement which if proved might amount to a defence.—*R. v. MARTIN* (1904), 4 S. R. N. S. W. 720; 21 N. S. W. W. N. 233.—*AUS.*

*m. Plea of guilty—What amounts to.]*—In answer to a charge of frequenting a disorderly house, accused said: "I was there if that makes me guilty," & was convicted without any evidence being taken.—*Held*: such admission was not a plea of guilty & the conviction should therefore be quashed.—*R. v. SWEET* (1914), 29 W. L. R. 887; 7 W. W. R. 608; 19 D. L. R. 694; 23 Can. Crim. Cas. 272.—*CAN.*

*n. — Murder.]*—Accused, in answer to a charge of murder, stated he had killed his wife, but that he had done so in consequence of his having discovered her in an act of adultery on the previous day:—*Held*: such

statement did not amount to a plea of guilty on the charge, & it was the duty of the ct. to try whether the provocation therein disclosed was sufficiently grave & sudden to reduce the offence.—*NETAI LUSKAR v. R.* (1885), 1 L. R. 11 Calc. 410.—*IND.*

*o. — — —.]*—Accused, charged with the murder of his wife & infant son, in his confession, stated he had killed his wife because she had quarrelled with him & objected to go to another village where he proposed a change of house on account of their poverty. The sessions judge treated this statement as a plea of guilty on the charge of murder, convicted the accused, & sentenced him to death:—*Held*: accused's statement did not amount to a plea of guilty on the charge of murdering his wife. He alleged a sudden provocation; he ought therefore to have been put on his trial, in order that the ct. might ascertain whether the provocation was grave & sudden enough to prevent the offence from amounting to murder.—

*R. v. SAKHARAM* (1890), 1 L. R. 14 Bom. 564.—*IND.*

*p. — To lesser crime than that charged.]*—Prisoner, observing his father violently engaged in a row, which the latter had provoked, by drunken abusiveness & threats, in which he was being seriously assaulted, struck at the party assaulting, with his knife, which shortly deprived him of life. The grand jury found a verdict of wilful murder, & prisoner having pleaded guilty to the lesser crime of manslaughter:—*Held*: the Crown was justified in accepting the plea, & abandoning the charge of wilful murder. The act having been committed in defence of a parent, was a mitigating circumstance.—*R. v. HOLLETT* (1884), 7 Nfld. L. R. 29.—*NFLD.*

*q. Plea of not guilty—Effect of.]*—An accused who desires to plead *autrefois acquit* or *autrefois convict* may lose his right to do so by pleading not guilty when arraigned on the indictment.—*R. v. HOLLAND* (1914), 33 N. Z. L. R. 931.—*N.Z.*

2574. Judge has discretion to allow.]—*R. v. BROWN*, No. 2538, *ante*.

2575. — After jury charged.]—*Qu.*: whether a prisoner may withdraw the plea of not guilty after the jury are charged.—*R. v. HOLDSWORTH* (1832), 1 *Lew. C. C.* 279.

2576. — After opening speech of prosecution.]—On the trial of an indictment for forgery against two prisoners, after the opening speech for prosecution one of them asked to be allowed to withdraw his plea of not guilty & to plead guilty. This was done & the plea of guilty was recorded. He was then examined as a witness on the part of the prosecution against his co-deft., & in the course of such examination he swore that he had no knowledge of the instrument in question being forged. Upon this he was allowed to withdraw his plea of guilty & to plead not guilty, the jury withdrawing their verdict.—*R. v. CLOUTER & HEATH* (1859), 8 *Cox, C. C.* 237.

[*Annotation*:—*Reid*. *R. v. Plummer*, [1902] 2 *K. B.* 339.

2577. — —.]—*R. v. TURNER* (1889), 24 *L. Jo.* 409.

2578. — After removal of indictment by *certiorari*.]—Where an indictment has been removed by *certiorari*, & deft. moves to withdraw his plea of not guilty, & to demur, the costs follow the judgment, as upon a conviction, & the motion will be granted without terms as to costs.—*R. v. BINKES* (1805), 2 *Smith, K. B.* 619.

2579. — —.]—An indictment had been removed & sent down to trial as a *Q. B.* record:—*Held*: deft. could not withdraw his plea of not guilty & plead guilty.—*R. v. BARRETT* (1838), 2 *Lew. C. C.* 264.

2580. — Criminal information—Costs & fine.]—*R. v. ALDRED* (1845), 5 *L. T. O. S.* 58; 9 *J. P. Jo.* 264.

2581. Time of application to withdraw plea of guilty—Not after sentence.]—A prisoner who has pleaded guilty to a charge of larceny, & upon whom sentence has been passed, cannot afterwards

be allowed to retract his plea, & plead not guilty.—*R. v. SELL* (1840), 9 *C. & P.* 346.

*Annotation*:—*Reid*. *R. v. Plummer*, [1902] 2 *K. B.* 339.

2582. — Any time before sentence.]—(1) On the trial of an indictment charging three persons jointly with conspiring together, if one pleads guilty & has judgment passed against him, & the other two are acquitted, the judgment passed against the one who pleaded guilty is bad & cannot stand.

(2) Where a prisoner has pleaded guilty to an indictment, the ct. has jurisdiction to allow him before sentence to withdraw his plea & plead not guilty.—*R. v. PLUMMER*, [1902] 2 *K. B.* 339; 71 *L. J. K. B.* 805; 86 *L. T.* 836; 66 *J. P.* 647; 51 *W. R.* 137; 18 *T. L. R.* 659; 46 *Sol. Jo.* 587; 20 *Cox, C. C.* 269, *C. C. R.*

2583. — After conviction on confession.]—*R. v. CLOUTER & HEATH*, No. 2576, *ante*.

2584. — Proceedings commenced out of time.]—*C.* was indicted for night poaching on Feb. 6, 1863. He pleaded guilty, but subsequently applied by his counsel for leave to withdraw the plea, & to move in arrest of judgment, upon the ground that the proceedings against him had not been commenced within twelve calendar months, as directed by Night Poaching Act, 1828 (*c. 69*), s. 4:—*Held*: the application to withdraw the plea was one which ought to be granted, & as no warrant & information was produced showing that proceedings had been commenced within twelve months, the objection was fatal.

*Qu.*: at what time during the trial such an objection ought to be taken.—*R. v. CASBOLT* (1869), 21 *L. T.* 263; 11 *Cox, C. C.* 385.

*Annotations*:—*Reid*. *R. v. West* (1897), 46 *W. R.* 316. *Mentd.* *R. v. Brown* (1913), 8 *Cr. App. Rep.* 173.

#### SUB-SECT. 3.—SPECIAL PLEAS.

See Part VIII., *post*.

#### PART VII. SECT. 5, SUB-SECT. 2.

2574 i. Judge has discretion to allow.]—Prisoner was charged for: (1) attempting to discharge a loaded revolver at *L.* with intent to murder *L.*; (2) having upon his person a loaded revolver with intent unlawfully to do injury to *L.*; (3) without lawful excuse, pointing a loaded revolver at *L.* Prisoner pleaded guilty, & elected to be tried with a jury; but, before the jury was called, his counsel applied for leave to withdraw the plea & plead guilty to the charge contained in the third count, & *autrefois convict* in respect of the first two charges. The judge refused the application & declined to reserve a case for the ct.—*R. v. LOMBARD* (1914), 26 *W. L. R.* 647.—*CAN.*

2581 i. Time of application to withdraw plea of guilty—Not after sentence.]—After judgment, it is too late to apply to change a plea of guilty to one of not guilty, & even before judgment the ct. has a discretion in the matter.—*R. v. O'BRIEN*, [1918] 3 *W. W. R.* 848.—*CAN.*

*r.* — Not after jury charged.]—After prisoner had pleaded guilty in an indictment for false pretences, & had been given in charge to the jury, an application was made for liberty to withdraw the plea & to demur:—*Held*: prisoner having been given in charge, the plea could not be withdrawn.—*BOURKE'S CASE* (1841), 1 *r. Cir. Rep.* 191.—*IR.*

*s.* Prisoner under misapprehension.]—*R. v. HUDDLELL* (1876), 20 *L. C. J.* 301.—*CAN.*

*J.*—VOL. XIV.

*t.* — —.]—Although an accused has pleaded guilty, yet if before the case is closed it clearly appears that the accused never intended to admit the truth of a fact which is an essential ingredient in his guilt & therefore, pleaded guilty under a misapprehension of what constitutes guilt, it is the duty of the presiding judge or magistrate to offer to allow him to withdraw his plea, if he wishes to do so, & to enter a plea of not guilty.—*R. v. RICHMOND*, [1917] 2 *W. W. R.* 1200; 29 *Can. Crim. Cas.* 89.—*CAN.*

*a.* — —.]—Prisoners, under the misapprehension that they were merely repeating the confession they made when they pleaded guilty before the magistrate, pleaded guilty in the Supreme Ct. to a count in an indictment charging them with the same offence to which they had previously pleaded. This was discovered prior to sentence:—*Held*: the ct. had jurisdiction, as sentence had not been pronounced, to amend the second pleas by entering pleas of *autrefois convict*, & to record judgment on those pleas for the accused.—*R. v. SMITH, R. v. KING* (1911), 31 *N. Z. L. R.* 352.—*N.Z.*

*b.* — —.]—Two persons, who were charged with theft by house-breaking & with being habitual criminals, pleaded guilty to the charge of theft & admitted that they were habitual criminals, & were sentenced to terms of penal servitude & preventive detention, one having asked, & been refused, leave to withdraw his admission that he was a habitual

criminal. Accused appealed & asked leave to withdraw their pleas to the charge of habitual criminality, alleging that in pleading guilty they believed that they were merely admitting that the list of previous convictions annexed to the indictment was correct, & did not understand the nature of the charge & the penal consequences that it involved:—*Held*: as the procedure had been regular throughout, & the accused had been advised by law agents, their allegations as to their misunderstanding of the charge could not be accepted as grounds for allowing the plea to be withdrawn.—*PAUL v. H.M. ADVOCATE, KNOX v. H.M. ADVOCATE*, [1914] 5 *C. (J.)* 69.—*SCOT.*

*c.* Substitution of plea.]—Prisoner having pleaded not guilty to an indictment for feloniously stabbing, cannot withdraw that plea, & submit to a common assault; but the jury may acquit of the felony, & find him guilty of the assault.—*MOORE'S CASE* (1842), 1 *r. Cir. Rep.* 653.—*IR.*

*d.* — —.]—A party indicted for murder, to which he has pleaded not guilty, will not be permitted to withdraw such plea, & to plead guilty of manslaughter.—*CORDIAL'S CASE* (1841), 1 *r. Cir. Rep.* 312.—*IR.*

*e.* Facts in indictment compatible with innocence.]—Where accused pleads guilty to a charge, & it appears that the indictment alleges only facts which might or might not amount to the offence, the plea of guilty will be struck out.—*R. v. LABOURDETTE* (1908), 13 *B. C. R.* 443.—*CAN.*



## SECT. 6.—POSTPONEMENT OF TRIAL.

## SUB-SECT. 1.—IN GENERAL.

**2585. Civil proceedings pending.]**—Pending a suit in the spiritual ct., touching the validity of a will, an indictment for forging it ought not to be tried.—*R. v. RHODES* (1726), 2 Stra. 703; 93 E. R. 795.

*Annotation:—Mentd. R. v. Nunez* (1736), *Lee temp. Hard.* 265.

**2586. Witnesses not appearing—Bound over to a subsequent session.]**—A comr. of gaol delivery may, at his discretion, discharge or continue on their commitments in gaol, prisoners committed for trial, but against whom the witnesses do not appear, being bound over to a subsequent session.—*ANON.* (1810), *Russ. & Ry.* 173, C. C. R.

**2587. — Material witness in charge of rape.]**—In charge for a rape, prisoner will be ordered to be detained till the next assizes, on the application for the postponement of his trial. In consequence of the absence of a material witness.—*R. v. BILLINGHAM* (1837), 7 C. & P. 800, n.

**2588. To instruct witness as to nature of oath.]**—A person who has no notion of eternity or of a future state of reward & punishment cannot be examined as a witness, but the trial may be postponed until the witness is instructed in the nature of this obligation.—*R. v. WHITE* (1786), 1 Leach, 430.

*Annotations:—N.F. R. v. Hall* (1849), 14 J. P. 25. *Refd. Maden v. Catanach* (1861), 7 H. & N. 360.

**2589. —.]**—Where a child, tendered as a witness for the prosecution, is so ignorant of the nature of an oath as to be incompetent to give evidence, the trial will not be postponed, at least after the jury are charged, in order that such child may be instructed.

*Semble:* if the jury has not been charged, the trial should not, for such a purpose be postponed.—*R. v. HALL* (1849), 14 J. P. 25.

**2590. —.]**—Where the material witness against prisoner was not sufficiently acquainted with the nature & obligation of an oath, & this appeared as soon as the jury was charged, & before any evidence given:—*Held:* the discharge of the jury was improper, & an acquittal should have been directed.—*R. v. WADE* (1825), 1 Mood. C. C. 86, C. C. R.

*Annotations:—Refd. R. v. Charlesworth* (1861), 1 B. & S. 460; *R. v. Hollinrake Whitehead* (1866), 14 W. R. 677.

**2591. —.]**—The ct. will not postpone a trial in order that a witness only six years of age, & too young to comprehend the meaning of an oath, may be instructed. *Semble:* it would be otherwise if the incompetency arose from want of education, & not from immaturity.—*R. v. NICHOLAS* (1846), 2 Car. & Kir. 246; 2 Cox, C. C. 136.

**2592. —.]**—Where a bill for rape on a child under the age of 10 years had been ignored by the

grand jury in consequence of the judge refusing to allow the child to be sworn as a witness, on the ground of its want of knowledge of the obligation of an oath, prisoner was ordered to be detained in custody until the child could be properly instructed.—*R. v. BAYLIS* (1849), 13 L. T. O. S. 509; 4 Cox, C. C. 23.

**2593. —.]**—Upon a charge of gross indecency committed with a boy eight years of age & of assault on the same boy, the boy cannot give evidence except on oath. The ct., being satisfied that the boy did not understand the nature or meaning of an oath, adjourned the case for the purpose of the boy receiving some religious instruction & of being taught the meaning of an oath.—*R. v. Cox* (1898), 62 J. P. 89.

**2594. Illness of witness before grand jury.]**—Where it was stated by the grand jury on their returning a true bill for murder that an important witness was too ill to give evidence in ct., the judge directed two surgeons to see the witness, & on their stating on the *voire dire* that the witness was too ill to give evidence in ct., the judge ordered the trial to be postponed to the next assizes & prisoner to be detained in custody.—*R. v. CHAPMAN* (1838), 8 C. & P. 558.

*Annotations:—Refd. R. v. Guttridge* (1840), 9 C. & P. 228. *Mentd. R. v. Sealife* (1841), 9 Dowl. 553; *R. v. Andrews* (1844), 2 Dow. & L. 10.

**2595. Several postponements—Application for discharge—Habeas Corpus Act, 1679 (c. 2), s. 7.]**—*R. v. BOWEN*, No. 2600, *post*.

**2596. —.]**—Where the trial of prisoners had been successively postponed for two assizes, in consequence of the absence of a material witness, & the affidavit, on which application was made for further postponement, stated, that the witness in question was believed to have gone to India as a soldier, so that there was not any prospect of his soon return, the judge ordered the recognisances of prosecutor to be discharged, & discharged prisoners without compelling them to enter into any recognisances for their future appearance.—*R. v. BRIDGMAN* (1841), *Car. & M.* 271; *previous proceedings* (1840), 4 J. P. 557.

## SUB-SECT. 2.—GROUNDS FOR POSTPONEMENT.

## A. On Application of Prosecution.

**2597. Absence of material witness—Through illness.]**—If, in a case of felony, a witness for the prosecution is too ill to attend the assizes, this is a good ground for postponing the trial, but will not authorise the reading of the deposition of the witness taken before the magistrate.—*R. v. SAVAGE* (1831), 5 C. & P. 143; 1 Nev. & M. M. C. 286.

*Annotations:—Refd. R. v. Austen* (1856), 7 Cox, C. C. 55. *Mentd. R. v. Middleton* (1873), L. R. 2 C. C. R. 38.

## PART VII. SECT. 6, SUB-SECT. 1.

**f. Witness not appearing.]**—Although the Crown elects to proceed with a speedy trial in the absence of a material witness, & although the trial has commenced, the ct. has power to grant an adjournment to enable the witness to be produced.—*R. v. GORDON* (1898), 6 B. C. R. 160.—*CAN.*

**g. — Application after jury sworn.]**—Prisoner indicted for felony, challenged two jurors peremptorily, & after a full jury had been sworn, but before he was given in charge, prisoner applied for postponement of trial, on ground of absence of material witness:—*Held:* application was not too late, but prisoner was bound to account for the delay.—*R. v. DOWNEY* (1845), 3 *Craw. & D.* 314.—*IR.*

**h. Right of Crown to postpone.]**—The Crown can never, as of right, postpone the trial of a prisoner without an affidavit.—*R. v. SCULLY* (1831), 1 *Craw. & D.* 168.—*IR.*

**k. After jury charged—Felony.]**—A trial cannot be postponed after prisoner has been given in charge for a felony.—*R. v. HOPES* (1835), 1 *Craw. & D.* 169, n.—*IR.*

**l. Crime committed in another county.]**—*Semble:* the judge at the trial should in the exercise of his judicial discretion postpone the case, to enable the trial to take place in the county where a view of the *locus in quo* could conveniently be had.—*R. v. McNAMARA* (1878), 14 Cox, C. C. 229.—*IR.*

**m. Order for postponement recalled —Production of absent witness.]**—A judge presiding at the assizes has power, during the sitting, to recall his order postponing the trial of a prisoner till the next assizes, & to order the trial to proceed, the absent witness, upon whose account the order for postponement was made, having been produced.—*R. v. REDD* (1911), 20 W. L. R. 645; 21 *Man. L. R.* 785.—*CAN.*

## PART VII. SECT. 6, SUB-SECT. 2.—A.

**n. Absence of material witness—Necessity for affidavit.]**—An application to postpone a trial in consequence of the absence of witnesses must be supported by special affidavit, showing that the witnesses in question are



**2598.** — — —.]—The presentment of a bill for a capital offence may be postponed on affidavit of the attorney for the prosecution stating the illness of a material & necessary witness, although such witness have been examined before a magistrate, & his deposition do not disclose matter of sufficient importance to show that his evidence was necessary, as the important facts may have been discovered since.—*R. v. PALMER* (1834), 6 C. & P. 652.

*Annotation* :—*Refd. R. v. Heeson* (1878), 14 Cox, C. C. 40.

**2599.** — — —.]—Where a trial for felony is postponed on the application of counsel for the prosecution, on the ground of the absence of a material witness, it is in the discretion of the judge whether, on consideration of the circumstances of each particular case, he will order prisoner to be detained till the next assizes, or admit him to bail, or discharge him on his own recognisance.—*R. v. OSBORN* (1837), 7 C. & P. 799.

*Annotation* :—*Refd. R. v. Austen* (1856), 7 Cox, C. C. 55.

**2600.** — — —.]—Before the spring assizes, 1840, A. was committed to take his trial at those assizes for shooting B. The trial was postponed to the summer assizes, on the ground, that B. was too ill from his wounds to be able to attend to give evidence. Before the summer assizes B. died, & at those assizes a true bill for the murder of B. was found against A., & application was made on the part of the prosecution to postpone the trial to the next spring assizes, on the ground of the illness of a material witness :—*Held* : the application should be granted, & A. was not entitled to his discharge under Habeas Corpus Act.—*R. v. BOWEN* (1840), 9 C. & P. 509.

**2601.** — — —.]—Upon motion by the prosecution in a case of felony, to put off the trial, on the ground of the absence of a material witness, who has not made a deposition before the committing magistrate, the judge will require an affidavit stating what points the witness is expected to prove, in order that he may form a judgment as to the witness being material or not.

An affidavit of a surgeon, that a witness is the mother of an unweaned child which is afflicted with inflammation of the lungs, & that the child could neither be brought to the assize town nor separated from its mother without danger to its life, is sufficient ground for the absence of the witness, in order to found a motion to postpone the trial.—*R. v. SAVAGE* (1843), 1 Car. & Kir. 75.

**2602.** — — —.]—*R. v. TAIT*, No. 2898, *post*.

**2603.** — — —.]—A trial for murder was put off until the next assizes, upon an application on the part of the prosecution, on the ground of the inability of a material witness to attend, although the witness was not examined before the magistrates, there being an affidavit of a medical man as to an injury to the witness, rendering it, in his opinion, unsafe that he should travel. & this, even after the trial had been appointed for a particular day.—*R. v. LAWRENCE* (1866), 4 F. & F. 901.

material.—*R. v. DOUGALL* (1874), 18 L. C. J. 85.—*CAN.*

*o.* — — — *On private business.*—A trial for forgery might be postponed in the absence of prosecutor, a material witness, on his private affairs.—*R. v. M'CONVILLE* (1837), 1 Craw. & D. 170, n.—*IR.*

*p.* *Discretion of court.*—*Pltf.*, having been committed to gaol for trial on a charge of unlawfully & forcibly kidnapping & taking one B. without authority, with intent to transport him out of Canada against his will, was, on June 24, 1872, brought

before the county judge, by whom he consented to be tried. The judge fixed July 3 for the trial, & on that day prisoner said he was ready, but upon the request of counsel for the Crown the trial was postponed till July 15, when prisoner was found guilty on both counts :—*Held* : the judge had power to postpone the trial, & the record was not defective in not stating the cause of the adjournment.—*CORNWALL v. R.* (1872), 33 U. C. R. 106.—*CAN.*

*q.* — — —.]—When an indictment for felony has been found against a

**2604.** — — — *Kept away by accused.*—If it be moved on the part of the prosecution in a case of felony to postpone the trial on the ground of the absence of a material witness, the practice, where the absence of the witness can be traced to the acts of prisoner or his friends, is not to discharge prisoner from custody except on very sufficient bail, but where no collusion appears between the absent witness & prisoner or his friends, the practice is to discharge prisoner on his own recognisance.—*R. v. BEARDMORE* (1836), 7 C. & P. 497.

*Annotation* :—*Refd. R. v. Osborn* (1837), 7 C. & P. 799.

**2605.** — — —.]—In the absence of a material witness, & on its appearing by affidavit that he had applied to prosecutor to know if the matter could not be settled without a trial, & that money should not be wanting if it could, the judge directed the trial to be postponed, & prisoner remanded till the next assizes, unless he found sureties for his appearance & gave seven days' notice of bail.—*R. v. PARISH* (1837), 7 C. & P. 782.

**2606.** — — —.]—A true bill was found against several prisoners for a rape. Prisoners had been on bail, & prosecutrix did not appear either before the grand jury, or to give evidence on the trial, & an application being made to the judge to postpone the trial, founded on affidavit, stating, that in the belief of deponent, prosecutrix was kept out of the way in consequence of money having been given to her by some of the prisoners, the judge postponed the trial, & would not admit prisoners to bail.—*R. v. GUTTRIDGE* (1840), 9 C. & P. 228.

*Annotations* :—*Refd. R. v. Scalfie* (1841), 9 Dowl. 553; *R. v. Andrews* (1844), 2 Dow. & L. 10.

**2607.** — — — *Absence abroad.*—If the trial of a prisoner indicted for felony be postponed, on the ground of the absence from England of prosecutor who is a material witness for the prosecution, prisoner will not be allowed his costs, but the judge will discharge him on his own recognisance.—*R. v. CROWE* (1829), 4 C. & P. 251.

**2608.** — — —.]—Where it was sworn that a material witness for the prosecution, who had previously been in attendance, had absconded during the assizes, as it was believed for the purpose of avoiding giving evidence upon the trial, & that every effort had been made to discover where he was gone & to secure his attendance :—*Held* : this was sufficient to justify a postponement of the trial, although it was not sworn that the witness had absconded by the procurement or contrivance of prisoners, or either of them, or that prosecutor would be enabled to produce the witness at the next assizes.

Although in ordinary cases, upon indictments for murder, the ct., upon postponing the trial, will continue prisoner in custody, yet if it appear tolerably clearly, upon the face of the depositions, that the offence amounts only to manslaughter, the ct. will depart from this rule & suffer prisoner to be discharged from custody upon his entering into his own recognisance, with sufficient sureties to appear & take his trial. But on a serious

prisoner at one assizes, there is no prerogative or absolute right in the Crown to postpone the trial; such postponement is the act of the ct., in the exercise of its discretion.—*R. v. M'CAHILL* (1859), 11 I. C. L. R. 188; 11 Ir. Jur. 249.—*IR.*

*r.* — — — *No substantial reason for postponement.*—The ct. will exercise a discretionary power in allowing the Crown to postpone trials, when bills have been found a considerable time, & the trial more than once postponed. Therefore, where indictments were pending against the prisoner for three

**Sect. 6.—Postponement of trial: Sub-sect. 2, A. & B.]**

charge of this nature, the ct. will not discharge prisoner upon his own recognisance merely.—*R. v. BRIDGEMAN* (1840), 4 J. P. 557; *subsequent proceedings* (1841), Car. & M. 271.

**2609. — Absence from home—Impossibility of communication.]**—On an indictment for bribery, the trial was, on the application of prosecutor, postponed to the next assizes on account of the absence of material evidence of the town clerk, who was away from home. It was not known when he would return, nor was it possible to communicate with him in time.—*R. v. MOBBS* (1860), 2 F. & F. 18.

**2610. — Danger of spreading infectious disease by witnesses' attendance.]**—Postponement of a case was allowed on the ground that infection might be conveyed to the public by the attendance of witnesses.—*R. v. TAYLOR* (1882), 15 Cox, C. C. 8.

**2611. Local prejudice created by accused.]**—A criminal information having been granted against deft., he, before the trial at *nisi prius*, distributed handbills in the assize town, vindicating his own conduct, & reflecting on prosecutor's. This matter being disclosed to the judge at *nisi prius* by an affidavit:—*Held*: this was sufficient ground to put off the trial.—*R. v. JOLLIFFE* (1791), 4 Term Rep. 285; 100 E. R. 1022.

*Annotations*.—*Mentd.* *R. v. Willett* (1795), 6 Term Rep. 294; *Spencely v. De Willott* (1806), 3 Smith, K. B. 321; *Ex p. Fernandez* (1861), 10 C. B. N. S. 3; *Re Fernandes* (1861), 6 H. & N. 717; *Dixon v. Farrer* (1886), 17 Q. B. D. 658; *R. v. Tibbits*, [1902] 1 K. B. 77.

**2612. After acquittal on one indictment—Further indictments to be tried.]**—*Semble*: where there are several indictments against prisoners, on all of which they have been arraigned, prosecutor having tried some of the indictments, & failed in obtaining a conviction, ought not to be allowed to postpone the trial of the remaining cases till the next session.—*R. v. FULLER* (1839), 9 C. & P. 35.

**2613. Where fresh counts are added to indictment.]**—When counsel for the prosecution has obtained leave to add a count to an indictment, on the ground that the indictment as framed will not enable him to disclose all the facts of the transaction, deft. cannot claim to be tried at once upon the indictment already preferred, & the trial must be postponed.—*R. v. STONE* (1858), 1 F. & F. 310.

**2614. Where further charges are pending.]**—Upon a charge of murder by poison, the presentment of a bill to the grand jury cannot be postponed to the next assizes on the ground that other & like charges may, before that time, be brought against prisoner & if no bill is so presented prisoner

is entitled to be discharged.—*R. v. HEESON* (1878), 14 Cox, C. C. 40.

**2615. To give notice to accused under Prevention of Crime Act, 1903 (c. 59).]**—Objection that proper notices under sect. 10 (4) (b) of above Act have not been given, must be taken at the trial, that the trial may, if necessary, be postponed.—*R. v. WESTON* (1909), as reported in 3 Cr. App. Rep. 53, C. C. A.

*Annotation*.—*Mentd.* *R. v. Smith* (1909), 3 Cr. App. Rep. 40.

**2616. To obtain further evidence.]**—Counsel for the prosecution moved to put off a trial for murder till it could be ascertained whether the Crown would pardon a person convicted of bigamy to whom it was alleged one of the prisoners had made an important statement:—*Held*: postponement would be granted.—*R. v. OWEN* (1839), 9 C. & P. 83.

*B. On Application of Accused.*

**2617. Former right to imparle on trial of misdemeanour.]**—*R. v. FITZGERALD* (1701), 1 Ld. Raym. 706; 12 Mod. Rep. 562; 91 E. R. 1371.

**2618. —.]**—Deft., on an information for a misdemeanour, is entitled, on pleading, to an imparlance until the next term.—*ANON.* (1702), 11 Mod. Rep. 5; 88 E. R. 847.

**2619. To put special plea into formal shape.]**—*R. v. CHAMBERLAIN*, No. 2402, *ante*.

**2620. To prepare defence.]**—*R. v. KENNEDY* (1854), 18 J. P. Jo. 261.

**2621. —.]**—The trial of a prisoner for murder, he having been only committed for trial about a week before the assizes, was postponed upon his own application to the ensuing assizes, upon affidavits by a near relative of prisoner, of various facts which, it was suggested, might sustain the defence of insanity, supported by an affidavit of the attorney that there had not been time to obtain witnesses for the defence.—*R. v. LONGHURST* (1866), 4 F. & F. 969; 10 Cox, C. C. 353.

**2622. —.]**—Even upon an indictment recently found against a soldier for murder, & removed into the Central Criminal Ct. for the purpose of a more speedy trial, on an affidavit by prisoner's attorney, the case being of recent occurrence, that he had not sufficient time to prepare the defence, & suggesting the possibility of a defence, the trial was postponed.—*R. v. TAYLOR* (1869), 11 Cox, C. C. 340.

**2623. — Fresh evidence adduced by prosecution.]**—An application, on behalf of the defence, to postpone the trial of a prisoner charged with murder, in order to afford an opportunity of investigating the evidence & characters of certain witnesses who had not been examined before the committing magistrate, but who were to be called for the prosecution to prove previous attempts by

years, & the counsel for the Crown alleged no reason for not proceeding to trial, except that they were not ready, the ct. refused to postpone the trial.—*BYRNE'S & GILMORE'S CASE* (1841), Ir. Clr. Rep. 68.—*IR.*

**s. — Absence of witness.]**—In a criminal trial, one of the witnesses for the prosecution was not forthcoming. An application, on the part of the Crown, that the trial should be suspended, & the jury put aside, to await the arrival of the absent witness, was refused.—*R. v. MITCHELL* (1840), 2 Caw. & D. 71.—*IR.*

**t. — Second postponement.]**—A judge of assize has power on the application of the Crown & notwithstanding prisoner's demand for an immediate trial, to postpone such a trial a second time after bill found by

the grand jury, without ordering prisoner's release in bail, if satisfied that such postponement is necessary in order to secure the ends of justice.—*R. v. DRIPPS* (1874), 13 Cox, C. C. 25.—*IR.*

**PART VII. SECT. 6, SUB-SECT. 2.—B.**

**a. In general.]**—During a special term of the Supreme Ct. holden for special business a true bill was found against the accused. Upon application for postponement of trial on several grounds:—*Held*: it being a special term was sufficient to concede to the motion for postponement. Want of time to prepare defence, absence of witnesses, & illness of accused, are good grounds why the Crown should not force accused to trial.—*R. v. PARNELL* (1889), 7 Nfld. L. R. 402.—*NFLD.*

**2623 i. To prepare defence—Fresh evidence adduced by prosecution.]**—Prisoner was charged with murder. His counsel was informed by counsel for the Crown that the Crown intended to give in evidence the testimony of two men who had not been examined at the preliminary hearing before the magistrate. A *résumé* of the evidence which would probably be given by these two men was then handed to prisoner's counsel, who thereupon applied for a postponement of the trial to the next assizes at C., to be held six or seven months later, on the ground that prisoner was taken by surprise by the introduction of the new evidence. A statement of counsel for prisoner of the grounds for a postponement was accepted by the ct., in lieu of an affidavit. There was no assertion that the evidence which

the accused on the life of the deceased, was refused.—*R. v. JOHNSON* (1847), 2 Car. & Kir. 354.

**2624.** — — —.]—The production of fresh evidence on behalf of the prosecution, not known, or forthcoming, at the preliminary investigation, & not, previously to the trial, communicated to the other side, may be ground for a postponement of the trial if it appears necessary to justice.—*R. v. FLANNAGAN & HIGGINS* (1884), 15 Cox, C. C. 403.

**2625.** — — —.]—**No copy of depositions in possession of defence.**—A prisoner had been committed on a charge of high treason, & afterwards the grand jury returned a true bill against him with others for feloniously demolishing a house, under 7 & 8 Geo. 4, c. 30, s. 8. He pleaded to that indictment, & wished to be tried after the other prisoners, who were indicted with him for feloniously demolishing the house, on the ground that he had had no copy of depositions as to the charge:—*Held*: the application could not be allowed, as the prosecution might have been commenced without going before any magistrate, & then there would have been no depositions.—*R. v. SIMPSON* (1842), Car. & M. 669; 4 State Tr. N. S. 1387.

**2626. Inability of accused through illness to instruct counsel.**—*Ex p. SANDYS, R. v. WATERS* (1870), 34 J. P. Jo. 773.

**2627. Absence of material witness—Through illness.**—A rule was made upon prosecutor to show cause why the trial should not be put off, one of deff.'s witnesses not being able without danger of her life to appear at the trial.—*R. v. BUDGEL* (1727), 1 Barn. K. B. 20; 94 E. R. 13.

**2628.** — — —.]—If the trial of an indictment for felony is postponed at the instance of prisoner, on account of the illness of a witness, prisoner is never required to pay the costs of prosecutor. Where the trial of a case of felony is postponed, the ct. will not make any order for the expenses, till after the trial has actually taken place.—*R. v. HUNTER* (1829), 3 C. & P. 591; *subsequent proceedings*, 4 C. & P. 128.

*Annotation*:—*Refd. Re Young* (1847), 9 L. T. O. S. 394.

**2629.** — — —.]—**Absence abroad.**—The ct. refused adjournment on affidavit of the absence of material witnesses, when the case was suspicious, & the witnesses were foreigners, never likely to return to England.—*R. v. D'EON* (1764), 3 Burr. 1513; 1 Wm. Bl. 510; 97 E. R. 955.

*Annotations*:—*Consd. R. v. Jones* (1806), 8 East, 31; *R. v. Mitchel* (1848), 6 State Tr. N. S. 599.

prisoner hoped to obtain would be available; & the foundation of the application was not that prisoner then knew of certain material witnesses, but that he wished to inquire into the antecedents of the two Crown witnesses:—*Held*: the question whether prisoner was entitled to a traverse of the trial to the C. assizes should be answered in the negative & against prisoner.—*R. v. MULVIHILL* (1914), 26 W. L. R. 955.—*CAN.*

**b.** — — —.]—**Obstruction by prison officials.**—Where prisoner states in his affidavit for postponement of his trial that, in consequence of the harshness of the governor of the gaol in which he is confined in refusing to allow him pens, ink, & paper whereby to communicate with his friends & prepare for his trial, he cannot procure witnesses whose names are given in the affidavit, & who are also stated to be necessary for his defence, the ct. will grant a postponement.—*R. v. WALKER* (1851), 5 Cox, C. C. 320.—*IR.*

**c.** — — —.]—**Absence of material witness—Necessity of affidavit.**—To induce a ct. to postpone a criminal trial on account of the absence of a witness, it must be

shown, by affidavit, that the witness is material, that due diligence has been used to secure his attendance, & that it can be obtained by the postponement.—*R. v. MITCHELL* (1848), 3 Cox, C. C. 1.—*IR.*

**d.** — — —.]—**Contents of affidavit.**—If a postponement be asked for the traverser on the grounds of the difficulty of obtaining material witnesses, the affidavit should set forth the names & descriptions of such witnesses & state such special circumstances as render the attendance of such witnesses difficult, if not impossible.—*R. v. BIRCH* (1852), 6 Cox, C. C. 10.—*IR.*

**e.** — — —.]—**Time for making application.**—Prisoner, indicted for felony, after a full jury had sworn, but before he was given in charge, applied for a postponement of the trial, on the ground of the absence of a material witness:—*Held*: the application was not too late; but prisoner was bound to account for the delay.—*R. v. DOWNEY* (1845), 3 Craw. & D. 314.—*IR.*

**2626 i. Accused unable to conduct defence.**—*Semble*: the recent indisposition of the traverser, rendering him

**2630.** — — —.]—*R. v. JONES*, No. 997, *ante*.

**2631.** — — —.]—*R. v. WIGHT* (1854), 18 J. P. Jo. 118.

**2632.** — — —.]—**Unable to be found.**—*R. v. SPRY* (1846), 10 J. P. Jo. 373.

**2633.** — — —.]—**Witness for prosecution favourable to accused.**—(1) When an application is made on behalf of a prisoner charged with murder to put off the trial, in consequence of the absence of a material witness for the prosecution, whose depositions have been taken before the coroner, & who is expected to give evidence favourable to prisoner, it is not necessary to swear that the witness has been subpoenaed by prisoner.

(2) Prisoner has a right to have the trial postponed, although counsel for the prosecution consent that the witness's depositions may be read, & although prisoner was in point of fact present when the deposition was taken before the coroner.

(3) In a charge of murder prisoner will nevertheless be continued in custody.—*R. v. TAYLOR* (1840), 4 J. P. 509.

*Annotation*:—*As to* (3) *Refd. R. v. Bridgeman* (1840), 4 J. P. 557.

**2634.** — — —.]—Prisoner's counsel moved to postpone a trial for murder, on an affidavit which stated that one of the witnesses for prosecution, who has been bound over to appear at the assizes, was absent, & that on cross-examination that witness could give material evidence for prisoner:—*Held*: this was sufficient ground for postponing the trial without showing that any endeavour had been made on the part of prisoner to procure the witness's attendance, as prisoner might necessarily expect, from his having been bound over, that he would appear.—*R. v. MACARTHY* (1842), Car. & M. 625.

**2635.** — — —.]—**Examination of witness upon interrogatories by consent.**—The ct. upon application of deff. postponed the trial of an information for a misdemeanour upon deff.'s consenting by writing under his own hand to the examination upon interrogatories of a witness for the Crown.—*R. v. MORPHEW* (1814), 2 M. & S. 602; 105 E. R. 506.

**2636. Local prejudice at place of trial.**—*THURTELL'S CASE* (1823), *Times*, Dec. 6; *Atlay's Famous Trials*; *Jones's Rep.* 1824.

*Annotations*:—*Refd. Goldie v. Beagin* (1847), 8 L. T. O. S. 319. *Mentd. R. v. Garside & Mosley* (1834), 2 Ad. & El. 266; *Hawksworth v. Showler & Boyce* (1843), 13 L. J. Ex. 86.

incapable of conducting his defence in person, is not sufficient to induce the ct. to postpone the trial, unless, perhaps, in very special circumstances, as no man is bound to defend himself in person.—*R. v. BIRCH* (1852), 6 Cox, C. C. 10.—*IR.*

**f.** — — —.]—**Absence of counsel—Through illness.**—Prisoner was indicted for murder. After the case for the prosecution had been closed & deff.'s counsel had given notice that they had no evidence to adduce, application was made to have the case adjourned on account of the absence through illness of the senior counsel for deff. & his consequent inability to address the jury. On an affidavit to that effect:—*Held*: in the circumstances, as it was reasonable to suppose that the junior counsel had not come prepared to address the jury, the trial would be adjourned over that day only.—*R. v. MURPHY* (1875), 2 Q. L. R. 383.—*CAN.*

**2636 i. Local prejudice at place of trial.**—Accused were members of a trade union which was engaged in a strike, in the course of which the occurrences forming the subject of

*Sec. 6.—Postponement of trial: Sub-sect. 2, B.; sub-sect. 3. Sect. 7: Sub-sects. 1, 2, 3 & 4.]*

**2637.** —[It is a good ground for putting off a trial, that the panel of jurors at the assizes has been taken from a neighbourhood where an excitement has been raised against prisoner, likely to prevent a fair trial.—*R. v. BOLAM* (1839), 2 Mood. & R. 192, N. P.]

*Annotations:—Consd. R. v. Geach* (1840), 9 C. & P. 409. *Reid. Goldcutt v. Beagin* (1847), 8 L. T. O. S. 319.

#### SUB-SECT. 3.—PROCEDURE.

**2638.** Where application to be made—Court of trial.—*R. v. SPRY*, No. 2632, *ante*.

**2639.** Time for application—After accused given in charge of jury—Before evidence given.—*Semble*: a trial for felony may be postponed on application by prisoner on sufficient cause shown by affidavit, after the jury have been charged with the indictment, & before any evidence has been given in the case.—*R. v. FITZGERALD* (1843), 1 Car. & Kir. 201.

**2640.** — Before bill found by grand jury.—*R. v. DORAN*, No. 2444, *ante*.

**2641.** Application supported by affidavit—Necessity for.—In order to postpone the trial of a criminal case, on account of the absence of a material witness, *vivâ voce* evidence of such illness will not be admitted. It must be upon affidavit.—*R. v. ANDREWS* (1849), 13 J. P. 122.

**2642.** — Sufficiency of.—*R. v. JOLLIFFE*, No. 2611, *ante*.

**2643.** — —.—*R. v. JONES*, No. 997, *ante*.

**2644.** — — Absence of witness.—*R. v. TAYLOR*, No. 2633, *ante*.

**2645.** — — —.—*R. v. MACARTHY*, No. 2634, *ante*.

**2646.** — — —.—*R. v. SAVAGE*, No. 2601, *ante*.

**2647.** — — —.—*R. v. LONGHURST*, No. 2621, *ante*.

**2648.** — On behalf of prisoner—Public bias by newspaper comments.—*THURTELL'S CASE*, No. 2636, *ante*.

**2649.** — — —.—*R. v. TAYLOR*, No. 2610, *ante*.

**2650.** — On behalf of prosecution.—*R. v. PALMER*, No. 2598, *ante*.

**2651.** Costs of postponement—Order not made till after trial.—*R. v. HUNTER*, No. 2628, *ante*.

**2652.** — Application by accused to postpone trial—Accused to pay costs of application—Prosecutor only entitled to costs if named on back of bill.—If the trial of an indictment for perjury is put off on the application of deft., he must pay the costs of the day. In such case prosecutor is

not entitled to any costs on his own account, unless his name appears on the back of the bill.—*R. v. DOYLE* (1790), 1 Esp. 123, N. P.

**2653.** — — Accused pays no costs.—*R. v. HUNTER*, No. 2628, *ante*.

**2654.** — Absence of prosecutor—Accused not allowed costs.—*R. v. CROWE*, No. 2607, *ante*.

**2655.** — Postponement owing to illness of witness—Prosecutor allowed costs up to postponement.—Upon the postponement of a trial for the recovery of a witness who is ill, prosecutor may then be allowed the costs of the prosecution incurred up to the date of such postponement.—*R. v. WILSON* (1874), 12 Cox, C. C. 622.

*Ball.*—See Part IV., Sect. 11, *ante*.

#### SECT. 7.—THE HEARING.

##### SUB-SECT. 1.—PUBLIC TRIAL.

Right of public to admission.—See COURTS, Vol. XVI., pp. 128–131, Nos. 259–289.

##### SUB-SECT. 2.—PRESENCE OF COMPLAINANT.

**2656.** Offence against child—Prevention of Cruelty to Children Act, 1894 (c. 41), s. 16 (b).—By sect. 16 of above Act it is provided that where in any proceedings with relation to an offence of cruelty within the meaning of the Act, or of any of the offences mentioned in the schedule to the Act, the ct. is satisfied by the evidence of a registered medical practitioner that the attendance before the ct. of any child of whom the offence is alleged to have been committed would involve serious danger to its life or health, & is further satisfied that the evidence of the child is not essential to the just hearing of the case, the case may be proceeded with & determined in the absence of the child:—*Held*: this enactment does not require the presence of the child in ct. in every case, but only when the evidence of the child is necessary.—*R. v. HALE*, [1905] 1 K. B. 126 74 L. J. K. B. 65; 91 L. T. 839; 69 J. P. 83 53 W. R. 400; 21 T. L. R. 70; 49 Sol. Jo. 68 20 Cox, C. C. 739; 3 L. G. R. 40, C. C. R.

##### SUB-SECT. 3.—PRESENCE OF ACCUSED.

**2657.** Presence in dock after plea—In treason.—*R. v. HORNE TOOE* (1794), 25 State, Tr. 1. *Annotations:—Consd. R. v. Zulueta* (1843), 1 Car. & Kir. 215. *Mentd. R. v. Stone* (1796), 25 State Tr. 1155; *Eagleton v. Kingston* (1803), 8 Ves. 438; *R. v. Lambert & Perry* (1810), 31 St. Tr. 335; *R. v. Smith* (1828), 8 B. & C. 341; *R. v. Parry* (1837), 7 C. & P. 836; *R. v. Frost* (1839), 4 State Tr. N. S. 85; *Mansoll v. R.* (1857), 8 E. & B. 54; *R. v. Meany* (1867), 15 W. R. 1082.

& had heard the evidence & suggestions in the defence of A. as to the guilt of B.—*R. v. TAYLOR & DALY* (1902), 37 L. T. 28.—*IR.*

**1.** *Separate indictments tried concurrently.*—When separate indictments have been found, the ct. has no jurisdiction to restrain proceedings on one until the other be disposed of, unless there be some allegation of illegality, or injustice, or violation of duty on the part of prosecutor.—*R. v. DUFFY* (1849), 1 Ir. Jur. 188.—*IR.*

#### PART VII. SECT. 7, SUB-SECT. 3.

**m.** *Presence in court during trial—May be dispensed with—Illness.*—During the trial for a misdemeanour prisoners were ill, suffering from fits, & permission, of which they availed themselves, was given them to be

the criminal charge had taken place. A great number of those upon the jury panel were either members of, or otherwise connected with, an employers federation, which had been formed to resist the operations of the strikers:—*Held*: the trial of the indictment should be adjourned upon the application of accused to enable accused, if they thought fit, to move for a change of venue.—*R. v. FEARON* (1909), 43 L. T. 228.—*IR.*

**g.** *Fair trial prejudiced by newspaper reports.*—The publication, in newspapers circulating largely in the assize city, of news matter with display headings stating that a person accused of murder, for which he is to be tried at that assize, has confessed his guilt to a police officer, is good cause for postponing the trial.—*R. v. WILLIS &*

*POPLE* (1913), 23 W. L. R. 702; 4 W. W. R. 761; 9 D. L. R. 646.—*CAN.*

**h.** *Not on amendment of indictment.*—Upon the amendment of the indictment at the trial, no postponement of the trial will be granted, if prisoner be not prejudiced in his defence.—*R. v. SENEAL* (1862), 8 L. C. J. 287.—*CAN.*

**k.** *Separate trials on joint indictment—Objection to presence of jurors.*—A. & B. were jointly indicted for the murder of C. The depositions disclosed statements made by A. in the absence of, but incriminating B. Prisoners were tried separately. A. having been found guilty:—*Held*: it was not a sufficient reason for the adjournment of the trial of B. that the majority of the jurors on the panel had remained in ct. during the trial of A.,

**2658.** — In felony.]—On an indictment for larceny, appln. that prisoner should not be tried at the bar of the ct., but should sit with his counsel, as it was necessary that he should instruct them during the trial:—*Held*: in a case of felony prisoner must be put to the bar, & no distinction could be made between one case of felony & another.—*R. v. TERENCE* (1839), 9 C. & P. 485, n.

**2659.** — —.]—A person who surrenders to take his trial on a charge of felony at the assizes, must be tried at the bar of the ct., & cannot take his trial at any other part of the ct., even with the consent of the prosecutor.—*R. v. ST. GEORGE* (1840), 9 C. & P. 483.

*Annotations*:—*Mentd.* *R. v. Bird* (1851), 5 Cox, C. C. 20; *R. v. Ladyman* (1851), 15 J. P. 581; *R. v. Cheeseman* (1862), L. & C. 140; *R. v. Brown* (1883), 10 Q. B. D. 381; *R. v. Duckworth*, [1892] 2 Q. B. 83; *R. v. Linneker*, [1906] 2 K. B. 99.

**2660.** — —.]—Where a captain in the army surrendered in discharge of his bail to take his trial at the Central Criminal Ct., for feloniously shooting at another with intent to kill him, etc.:—*Held*: he must take his place within the dock like all other prisoners charged with felony.—*R. v. DOUGLAS* (1841), Car. & M. 193.

**2661.** — —.]—A merchant of London was indicted for an offence against the Act of Parliament prohibiting slave-trading. His counsel applied to the ct. to allow the prisoner to sit by him, not on the ground of his position in society, but because he was a foreigner, & several of the documents in the case were in a foreign language, & it would, therefore, be convenient for his counsel to have him by his side, that he might consult him during the trial:—*Held*: the appln. was one which ought not to be granted.—*R. v. ZULUETA* (1843), 1 Car. & Kir. 215; 2 L. T. O. S. 76; 1 Cox, C. C. 20.

*Annotation*:—*Mentd.* *Santos v. Illidge* (1859), 6 C. B. N. S. 841.

**2662.** — In misdemeanour.]—*R. v. CARLILE* (1834), 6 C. & P. 636, n.

*Annotations*:—*Mentd.* *Rich v. Basterfield* (1847), 16 L. J. C. P. 273; *Walker v. Brewster* (1867), L. R. 5 Eq. 25; *Fritz v. Hobson* (1880), 14 Ch. D. 542; *Barber v. Penley*, [1893] 2 Ch. 447; *Lyons v. Gulliver*, [1914] 1 Ch. 631; *Malzy v. Eichholz & Castiglione* (1916), 115 L. T. 9.

**2663.** — —.]—Deft., who surrenders to take his trial on a charge of misdemeanour, need not stand at the bar to be tried, but may be allowed a place at the table of the ct.—*R. v. LOVERT* (1839), 9 C. & P. 462; 3 State Tr. N. S. 1177.

**2664.** Presence in court during trial—In misdemeanour—Whether dispensed with—After appearance.]—On the trial of an indictment for a misdemeanour, either by commission of *oyer & terminer* or gaol-delivery, deft. must appear in person, but, after appearance, may be dismissed on entering into another recognisance to appear

to receive judgment.—*R. v. MEYLER* (1784), 4 Doug. K. B. 18; 99 E. R. 745.

**2665.** — —.]—Age & infirmity.]—*R. v. CONSTABLE*, No. 3483, *post*.

**2666.** — May be dispensed with—Lunatic.]—*R. v. HAYNES* (1900), 64 J. P. 441.

**2667.** — Disorderly behaviour of accused—Trial continued after removal from court.]—*R. v. BERRY* (1897), 104 L. T. Jo. 110.

*Annotations*:—*Fold.* *R. v. Browne* (1906), 70 J. P. 472. *Mentd.* *R. v. Lee Kun*, [1916] 1 K. B. 337.

**2668.** — —.]—Deft., charged with a misdemeanour, screamed & threw herself down in the dock & behaved in such a manner that it was impossible to proceed with the case. She was ordered to be removed. A plea of not guilty was entered, & she was tried, convicted, & sentenced in her absence.—*R. v. BROWNE* (1906), 70 J. P. 472.

**2669.** — Removal out of sight of witness.]—For good reason a judge may order the removal of a deft. out of sight though not out of hearing of a witness giving evidence.

If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter (LORD COLERIDGE, J.).—*R. v. SMELLIE* (1919), 14 Cr. App. Rep. 128, C. C. A.

**2670.** — Temporary absence owing to illness.]—*R. v. ORTON* (*alias* CASTRO) (1873), Archbold's Criminal Pleading, Evidence & Practice, 26th ed. 174.

**2671.** — Jury may be discharged on disagreement in absence of accused.]—*R. v. RICHARDSON*, No. 3443, *post*.

#### SUB-SECT 4.—ORDER OF TRIAL.

**2672.** Whether Crown has precedence.]—The Crown prosecutes in every case, & has no precedence in a criminal ct. (WATSON, B.).—*R. v. LONDON* (1858), 1 F. & F. 381.

**2673.** Separate indictments against two accused persons for same offence—Election of prosecution.]

—Two prisoners were separately indicted for successive rapes on the same woman. One of the prisoners was defended by counsel, the other was undefended. The ct. refused the appln. of counsel for the defended prisoner to have that case first tried, the prosecution having elected to take the undefended case first.—*R. v. BENNETT*, *R. v. BOND* (1866), 10 Cox, C. C. 331.

**2674.** Two indictments against same person—Election of prosecution.]—*Ex p. CASTRO*, No. 2876, *post*.

**2675.** — —.]—Effect of error.]—*R. v. LONG* (1912), 8 Cr. App. Rep. 17, C. C. A.

**2676.** Cross indictments.]—If there be cross indictments for assault to be tried as traverses at

absent from ct. Some time after they had retired the jury returned into ct., asked for & received a further direction from the presiding judge, & subsequently returned in ct. a verdict of guilty. On each of these occasions defts. were absent, but counsel & their sors. were present:—*Held*: conviction was good.—*R. v. ABRAHAMS* (1895), 21 V. L. R. 343.—AUS.

**n.** — Felony.]—Unless in the case of misconduct rendering it impracticable to continue the proceedings in his presence, or at his request & with the permission of the ct., the trial of a person accused of felony cannot proceed in his absence.—*R. v. McDougall* (1904), 8 O. L. R. 30; 24 C. L. T. 324; 3 O. W. R. 750.—CAN.

**o.** — —.]—Waiver of privilege—Discretion of judge.]—On the trial of a prisoner for murder, after the jurymen had retired to consider their verdict, they sent a message to the judge that they wished to know whether the foreman could have a private hearing with the judge or the Crown attorney. The request was communicated by the judge to counsel for the Crown & for prisoner, & after discussion, it was agreed & consented to by both counsel that the judge should visit the jury in their room, unaccompanied by counsel, but taking with him the registrar & the ct. stenographer. This arrangement was carried out, & the judge in the jury room gave further instruction to the jury in answer to a question put by

one of the jurymen. The proceedings in the jury room were recorded by the stenographer. A verdict of guilty was then given. Upon a case stated by the judge for the opinion of the ct.:—*Held*: prisoner had the privilege of being present during the whole of the trial, but he might waive that privilege & the waiver by his counsel, in his presence & acted upon, was his waiver; also there was substantially a permission by the judge for the prisoner to be out of ct. during the time of the proceedings in the jury room.—*R. v. MEHARG* (1921), 51 O. L. R. 220.—CAN.

**p.** — —.]—Fresh direction to jury in absence of prisoner.]—*R. v. PARIS* (1922), 69 D. L. R. 373; 38 Can. Crim. Cas. 126.—CAN.

**Sect. 7.—The hearing: Sub-sects. 4, 5 & 6, A., B. & C.]**

the Assizes, & the same transaction be the subject of both indictments, the judge will direct the jury to be sworn in both traverses, & the counsel for the prosecution of that which is entered first will open his case & call his witnesses; & the counsel on the other side will then open his case & call his witnesses, & there will be no reply on either side.—*R. v. WANKLYN, R. v. VAUGHAN* (1838), 8 C. & P. 290.

**SUB-SECT. 5.—TRIAL OF FOREIGNER.**

**2677. Interpretation of evidence.]**—When a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence, & is not defended by counsel, the evidence given at the trial must be translated to him, & compliance with this rule cannot be waived by prisoner. If he is defended by counsel, the evidence must be translated to him unless he or his counsel express a wish to dispense with the translation & the judge thinks fit to permit the omission, but the judge should not permit it unless he is of opinion that the accused substantially understands the nature of

the evidence which is going to be given against him.—*R. v. LEE KUN*, [1916] 1 K. B. 387; 85 L. J. K. B. 515; 114 L. T. 421; 80 J. P. 166; 32 T. L. R. 225; 60 Sol. Jo. 158; 25 Cox, C. C. 304; 11 Cr. App. Rep. 293, C. C. A.

**SUB-SECT. 6.—WITNESSES.**

**A. Ordering Witnesses out of Court.**

**2678. At request of party.]**—*R. v. JOHNSON* (1728), *Fost.* 46; 10 *State Tr.* 111, n.  
*Annotation*:—*Mentl. Gray v. R.* (1844), 3 L. T. O. S. 449.

**2679. —.]**—*R. v. COOK* (1696), as reported in 13 *State Tr.* 311.

*Annotations*:—*Mentl. R. v. Edmonds* (1821), 4 B. & Ald. 471; *Mansell v. R.* (1857), 8 E. & B. 54; *Mulcahy v. R.* (1867), 15 W. R. 446.

**2680. —.]**—Either party at any period of a cause has a right to require that the unexamined witnesses should be out of ct.—*SOUTHEY v. NASH* (1837), 7 C. & P. 632.

**2681. — During legal argument.]**—It is almost a matter of right for a party to have a witness go out of ct. while a legal argument is going on as to his evidence.

It is in the discretion of the judge how far he

**PART VII. SECT. 7, SUB-SECT. 5.**

**a. Interpreter ignorant of nature of oath.]**—On trial of a Chinese who did not understand English, an interpreter was produced by the Crown to whom the usual oath on the Gospel was administered. While the jury were deliberating it transpired that the interpreter was not a Christian, although on previous occasions when he had acted as interpreter he had been sworn on the Bible. He knew nothing about an oath except the name. Prisoner having been convicted, the ct. sustained the conviction.—*R. v. AN FOO* (1869), 8 N. S. W. S. C. R. 343.—**AUS.**

**r. Necessity for extreme care.]**—Where, on a trial for a serious crime, accused requires an interpreter, & is not represented by counsel, then before acting on an apparent admission by accused of the truth of the charge, careful inquiries should be made by repeated questions so as to put it beyond all doubt that accused does really intend such an admission.—*R. v. YEE FONG*, [1921] 1 W. W. R. 896; 16 Alta. L. R. 139; 34 Can. Crim. Cas. 278; 58 D. L. R. 105.—**CAN.**

**a. Bad character of interpreter—Not necessarily a disqualification.]**—An interpreter was sworn, who interpreted the statements of the witnesses to the ct. The interpreter was objected to by counsel for prisoners on account of his bad character, & the judge was not satisfied with the manner in which he performed his duties; but there was nothing to show that the interpreter had dishonestly performed his duties, or had been guilty of misinterpretation of the evidence.—*Held*: no substantial wrong or miscarriage was occasioned by continuing the trial with this interpreter.—*R. v. WALKER & CHINLEY* (1910), 13 W. L. R. 47.—**CAN.**

**t. Translation of evidence—Not necessarily literal—Discretion of court.]**—There is no rule requiring a literal translation of everything that takes place at a trial to be given to or furnished prisoners speaking a foreign language only. The interpretation of the evidence is a matter for the judge, always being careful that prisoners suffer no prejudice, & where it appears that all proper precautions were taken & that prisoners suffered no prejudice, the conviction will not be set aside because there has not been a literal

translation of the evidence in all its details.—*R. v. SYLVESTER* (1912), 45 N. S. R. 525; 1 D. L. R. 186; 19 Can. Crim. Cas. 302.—**CAN.**

**a. —.]**—Prisoner, a foreigner, was tried for perjury committed when giving testimony upon the trial of two other men upon a criminal charge. Prisoner's testimony at that trial was interpreted to the ct., & taken down from the lips of the interpreter by the ct. stenographer. At the trial of prisoner, the stenographer produced his transcript of what he had taken down. The interpreter was also called, & swore that there were some things that he did not give to the stenographer, things that had no relevancy; but that he gave the substance of it fully & faithfully.—*Held*: this, in the absence of satisfactory & clear evidence that something material had been left out or improperly put in, was sufficient to prove what took place at the first trial.—*R. v. BOAGH SINGH* (1913), 24 W. L. R. 941.—**CAN.**

**b. Charge not understood—Sufficiency of interpretation.]**—Deft. was convicted for keeping a disorderly house. Upon an application for a *habeas corpus* & a *certiorari* in aid:—*Held*: the proceedings were not bad because of deft., who was a foreigner, not understanding the nature of the charge & not making his plea with a knowledge of its meaning; the evidence showed that he understood & was fully advised.—*R. v. MAH SAM* (1910), 15 W. L. R. 666; 4 Sask. L. R. 84.—**CAN.**

**c. Where translation not applied for—Accused defended by counsel.]**—A conviction for murder will not be set aside because the evidence of witnesses for the prosecution given in a language of which deft. was ignorant was not translated to him, where he was defended by counsel speaking & thoroughly acquainted with the language of the witnesses, & where neither deft. nor his counsel asked that the evidence be translated.—*R. v. LONG* (1902), Q. R. 11 K. B. 328.—**CAN.**

**d. —.]**—On a trial for felony, the evidence for the prosecution being given in a language of which prisoners were wholly ignorant, was not translated to them:—*Held*: the conviction must be quashed, & it made no difference that the prisoners

were defended by counsel, & that counsel had not asked for the evidence to be translated.—*R. v. KROOK LEONG* (1909), 4 Hong Kong, 161.—**HONG KONG.**

**e. Evidence not translated—Misdemeanour.]**—A foreigner charged with felony properly pleaded to the indictment, which was interpreted to him by an interpreter chosen by himself & duly sworn. The foreigner was defended by counsel. The conviction was of misdemeanour only. After verdict it appeared that the interpreter had not interpreted any of the evidence to the prisoner:—*Held*: as the conviction was of misdemeanour, there had been no mistrial, & the verdict must stand. *Qu.*: whether the same result would have followed had the conviction been for felony.—*R. v. FONG CHONG* (1888), 6 N. Z. L. R. 374.—**N.Z.**

**f. Discretion of judge.]**—Deft. attempted to show by affidavits that, not understanding English, he did not know that he was on trial, & did not understand the evidence given. This was contradicted by one who was sworn as an interpreter at the trial, & by a policeman:—*Held*: the capacity of the interpreter & all matters connected with the interpretation of the evidence were questions for the judge.—*R. v. MECKLETT* (1909), 18 O. L. R. 408; 13 O. W. R. 1039.—**CAN.**

**g. Jury de medietate linguæ.]**—An alien charged with a criminal offence is not entitled to a jury *de medietate linguæ*.—*R. v. VALENTINE* (1871), 10 N. S. W. S. C. R. 113.—**AUS.**

**h. —.]**—An alien charged with an indictable offence is not entitled to a jury *de medietate linguæ*.—*R. v. CARLSEN* (1876), 14 N. S. W. S. C. R. 268.—**AUS.**

**k. —.]**—Our jury law contains no reference to the trial of aliens or to juries *de medietate linguæ*, & in such matters we are governed by English law, where no such rights exist.—*R. v. MELENDEZ* (1876), 6 Nfld. L. R. 121.—**NFLD.**

**l. —.]**—The claim of a foreigner to be tried by a jury composed partly of foreigners & partly British subjects, was disallowed, as it was not stated until after another jury, composed in the ordinary way, had been sworn to try the case.—*Re CAVALAR* (1854), 1 Irv. 564.—**SCOT.**







**Sect. 7.—The hearing: Sub-sect. 6, C., D. & E.]**

conduct in the box, shows himself decidedly adverse, it is always in the discretion of the judge to allow a cross-examination; (2) but if a witness called, stands in a situation which of necessity makes him adverse to the party calling him, the counsel may, as matter of right, cross-examine him (BEST, C.J.).—CLARKE *v.* SAFFERY (1824), Ry. & M. 126, N. P.

*Annotations*:—As to (1) FOLLID. PRICE *v.* MANNING (1889), 42 Ch. D. 372. As to (2) N.F. PRICE *v.* MANNING (1889), 42 Ch. D. 372.

**2704.** ———.]—You may put a leading question to an unwilling witness on the examination in chief at the discretion of the judge (ALDERSON, B.).—PARKIN *v.* MOON (1836), 7 C. & P. 408.

**2705.** ———.]—R. *v.* MURPHY, No. 2681, *ante*.

**2706.** ———.]—A witness whose testimony turns out to be unfavourable to the party calling him is not therefore an "adverse" witness within Common Law Procedure Act, 1854 (c. 125), s. 22. To make him an "adverse witness," so as to entitle the party calling him to contradict him by other evidence showing that he has made at other times a statement inconsistent with his present testimony, he must in the opinion of the presiding judge be adverse in the sense of showing a hostile mind. *Semble*: whether adverse or not, is for the judge & not for the ct. to determine.—GREENOUGH *v.* ECCLES (1859), 5 C. B. N. S. 786; 28 L. J. C. P. 160; 33 L. T. O. S. 91; 5 Jur. N. S. 766; 7 W. R. 341; 141 E. R. 315.

*Annotations*:—FOLLID. RICE *v.* HOWARD (1886), 16 Q. B. D. 681. *Refd.* AMSTELL *v.* ALEXANDER (1867), 16 L. T. 830.

**2707.** ———.]—A party to an action who calls an opponent as a witness has no right to cross-examine him, however hostile he may be, without the leave of the judge. Whether the witness is a litigant or not, it is a matter of discretion in the judge whether he shows himself so hostile as to justify his cross-examination by the party calling him.—PRICE *v.* MANNING (1889), 42 Ch. D. 372; 61 L. T. 537; 37 W. R. 785; *sub nom.* PRICE *v.* MANNING, MANNING *v.* PRICE, 58 L. J. Ch. 649, C. A.

**2708.** ———.]—**Whether appeal lies.**—At the trial of an action deft.'s counsel, in order to show that a witness called by him was hostile, & to obtain leave to treat him as such under Common Law Procedure Act, 1854 (c. 125), s. 22, asked the judge to look at an affidavit made by the witness in a former action. The judge being of opinion that there had been nothing in the witness's demeanour, or in the way he had given his evidence, to show that he was hostile, refused to look at the affidavit. On motion for a new trial:—*Held*: the discretion given to the judge under sect. 22 of the Act was absolute, & the ct. had no jurisdiction to review his decision.—RICE *v.* HOWARD (1886), 16 Q. B. D. 681; 55 L. J. Q. B. 311; 34 W. R. 532; 2 T. L. R. 457, D. C.

*Annotations*:—*Refd.* R. *v.* SMITH (1909), 2 Cr. App. Rep. 86; R. *v.* WILLIAMS (1913), 29 T. L. R. 188.

**2709.** ———.]—R. *v.* SMITH (1909), 2 Cr. App. Rep. 86, C. C. A.

**2710.** ———.]—*Semble*: there would have to be very exceptional circumstances to justify an appeal to the Ct. of Criminal Appeal from the ruling of a judge at a trial that a witness for the Crown should be treated as a hostile witness if indeed an appeal lay upon that ground

at all.—R. *v.* WILLIAMS (1913), 77 J. P. 240; 29 T. L. R. 188; 8 Cr. App. Rep. 133, C. C. A.

**2711.** ———.]—**Unfair bias.**—If on the trial of a charge of murder a witness for the prosecution shows any unfair bias, the counsel who calls him may cross-examine him.—R. *v.* CHAPMAN (1838), 8 C. & P. 558.

*Annotations*:—*Mentd.* R. *v.* Guttridge, Goodwin & Fellows (1840), 9 C. & P. 228; R. *v.* Scalfie (1841), 9 Dowl. 553; *Ex p.* Andrews (1844), 1 New Sess. Cas. 199.

**2712.** ———.]—**Unwillingness.**—The situation in which a witness stands towards either party, does not give the party calling the witness a right to cross-examine him unless the witness's evidence be of such a nature as to make it appear that the witness is an unwilling one.

If a witness for a prosecution disprove prosecutor's case, prosecutor may call other witnesses to prove the facts denied by the former witness, & thus incidentally contradict that witness & show him to be unworthy of credit; but prosecutor cannot adduce any evidence not otherwise admissible for the sole purpose of discrediting his own witness.—R. *v.* BALL (1839), 8 C. & P. 745.

**2713.** ———.]—**Whether merely contradictory evidence.**—R. *v.* SMITH, No. 2709, *ante*.

**2714.** ———.]—Where a witness for the prosecution gives a different answer on examination in chief to that which was expected, his deposition may be put in his hand to refresh his memory & the question then put to him. If the witness persists in giving the same answer after his memory has been so refreshed, the question may be repeated to him from the depositions in a leading form.—R. *v.* WILLIAMS (1853), 6 Cox, C. C. 343.

**2715.** **Where hostility must be shown—In open court.**—R. *v.* SMITH, No. 2709, *ante*.

**2716.** **Inconsistent previous statement—Whether contradiction permissible.**—*Assumpsit* for money had & received. Plea, that the promises in the declaration mentioned were made by deft. jointly with A. & issue thereon. A. was called as a witness by deft., to prove a partnership, but he proved the contrary; deft. then tendered in evidence an answer of A. to a bill filed in chancery, in which A. swore that up to a certain time he was a partner with deft.:—*Semble*: this answer was not admissible in evidence, because the only effect of it was to discredit A., deft.'s own witness; but:—*Held*: it was competent to deft., after A. had denied the partnership, to prove the existence of it by other witnesses.—EWER *v.* AMBROSE (1825), 3 B. & C. 746; 5 Dow. & Ry. K. B. 629; 3 L. J. O. S. K. B. 115; 107 E. R. 910; *subsequent proceedings*, 4 B. & C. 25.

*Annotations*:—*Consd.* WRIGHT *v.* BOCKETT (1834), 1 Mood. & R. 414. *Refd.* BRADLEY *v.* RICARDO (1831), 8 Bing. 57.

**2717.** ———.]—Where a witness gives evidence destructive of the case which he was called to prove, the party calling him may, in order to neutralise his evidence, show that he had before the trial given to the attorney an account of the transaction entirely different from that sworn to by him at the trial.—WRIGHT *v.* BECKETT (1834), 1 Mood. & R. 414.

*Annotations*:—*Apld.* DUNN *v.* ASLETT (1838), 2 Mood. & R. 122. *Refd.* MELHUISE *v.* COLLIER (1850), 15 Q. B. 878.

**2718.** ———.]—The counsel calling a witness who has given unfavourable evidence on cross-examination, may, on re-examination, ask him questions to show inducements to betray the

**PART VII. SECT. 7, SUB-SECT. 6.—C.**

**2716 i.** **Inconsistent previous statement—Whether contradiction permissible.**—An "adverse" witness, within

the meaning of the rule providing for the introduction of evidence of a previous contradictory statement, is one who has exhibited such hostile

animus towards the party calling him as to reveal a desire not to tell the truth.—R. *v.* MARCENIUK, [1923] 3 W. W. R. 758.—CAN.

party who has called him.—*DUNN v. ASLETT* (1838), 2 Mood. & R. 122, N. P.

2719. ———.]—Where a witness gives on cross-examination unfavourable testimony to the party calling him, & on re-examination denies having given a different account of the matter so spoken to, the party calling him has no right to discredit him by showing he had given such different account.—*HOLDSWORTH v. DARTMOUTH CORPN.* (1838), 2 Mood. & R. 153, N. P.

*Annotations* :—*Folld.* *Winter v. Butt* (1841), 2 Mood. & R. 357; *Melhuish v. Collier* (1850), 15 Q. B. 878.

2720. ———.]—*R. v. BALL*, No. 2712, *ante*.

2721. ———.]—The counsel calling a witness who gives adverse testimony cannot on re-examination ask whether the witness had not given a different account to the attorney.—*WINTER v. BUTT* (1841), 2 Mood. & R. 357.

*Annotation* :—*Consd.* *Melhuish v. Collier* (1850), 15 Q. B. 878.

2722. ———.]—Although the general rule is, that, on the trial of a cause, a party shall not discredit his own witness, yet, if the witness unexpectedly gives adverse evidence, the party may ask him if he has not, on a particular occasion, made a contrary statement; & the question & answer may be stated by the judge to the jury with the rest of the evidence; the judge cautioning them not to infer, merely from the question that the fact suggested by it is true. *Qu.* : whether, in such case, the party may contradict the witness by evidence as to such former statement.—*MELHUIH v. COLLIER* (1850), 15 Q. B. 878; 19 L. J. Q. B. 493; 15 L. T. O. S. 474; 117 E. R. 690; *sub nom.* *MELHUIH v. COLLIER*, 14 Jur. 621.

*Annotations* :—*Refd.* *Greenough v. Eccles* (1859), 5 C. B. N. S. 786; *R. v. White* (1922), 17 Cr. App. Rep. 60.

2723. ———.]—Deft. was allowed to contradict his own witness, by showing a statement made by him directly contrary to the evidence given by him.—*DEAR v. KNIGHT* (1859), 1 F. & F. 433.

2724. ———.]—In order that a party producing a witness may be allowed to give in evidence, under Common Law Procedure Act, 1854 (c. 125), s. 22, a previous statement of the witness as being inconsistent with his present testimony, it is not necessary that the two statements should be directly or absolutely at variance.—*JACKSON v. THOMASON* (1861), 1 B. & S. 745; 31 L. J. Q. B. 11; 6 L. T. 104; 8 Jur. N. S. 134; 10 W. R. 42; 121 E. R. 891.

2725. ———.]—If a party has been induced to bring a case into ct. from a statement which a witness has previously made in a ct. of bkpcy. & the witness gives different evidence in ct., he may be examined as to his former statement as an adverse witness (*ERLE*, C.J.).—*POUND v. WILSON* (1865), 4 F. & F. 301.

2726. ———.]—If an attesting witness called by a party propounding a will gives evidence against the will, the party calling him may produce evidence to disprove such of the facts stated by him as are material to the issue, & to prove that he has made statements inconsistent with his evidence, although he has denied having made such statements & he is not a hostile witness.—*COLES v. COLES & BROWN* (1866), L. R. 1 P. & D. 70; 35 L. J. P. & M. 40; 13 L. T. 608; 14 W. R. 290.

2727. ———.]—A witness called on behalf of pltf. gave evidence quite different from the proof in the brief of pltf.'s counsel, & from the

heads of evidence as taken down in writing by pltf.'s attorney, & alleged to have been read over by him to the witness. The witness was considered sufficiently adverse, within the meaning of Common Law Procedure Act, 1854 (c. 125), s. 22, to be examined as to his previous statements to pltf.'s attorney; & the judge allowed the witness to be asked whether he did not say the several things stated in the paper containing the heads of his evidence as taken down by pltf.'s attorney, but refused permission to examine the witness from the paper as a "statement in writing" made by him within sect. 24 of the Act.—*AMSTELL v. ALEXANDER* (1867), 16 L. T. 830, N. P.

2728. ———.]—Where in an indictment for rape a witness to whom prosecutrix had made a statement shortly after the commission of the alleged offence, being asked on cross-examination as to the particulars of such statement, gave an answer which was different from that which the prosecuting counsel was instructed she had made :—*Held* : it was competent for the counsel for the prosecution, in re-examination, to ask the witness whether she had not at other times made a different statement, & one inconsistent with her present testimony, to certain persons named; & also to call such persons to give evidence of the statements so made to them under Criminal Procedure Act, 1865 (c. 18), s. 3.—*R. v. LITTLE* (1883), 15 Cox, C. C. 319.

2729. ———.]—*Not evidence of its truth*—*Relevant to credit*.—*R. v. DIBBLE* (*alias* *CORCORAN*) (1908), 72 J. P. 498; 1 Cr. App. Rep. 155, C. C. A.

2730. ———.]—*R. v. WHITE* (1922), 17 Cr. App. Rep. 60, C. C. A.

*Reference to depositions*.—*See* Part VII., Sect. 7, sub-sect. 6, G., *post*.

*D. Calling and Examination of Witness by Judge.*

*See, generally*, EVIDENCE.

2731. *After close of case for prosecution*—*Right of cross-examination*.—After the close of the case for the prosecution, the ct. called a witness whom neither the defence nor prosecution had called. The witness having given certain evidence, counsel for the prosecution claimed the right to cross-examine him :—*Held* : counsel for the prosecution had no right to cross-examine the witness, but was allowed to put questions to him.—*R. v. CLIBURN* (1898), 62 J. P. 232.

2732. *Witness recalled by judge*.—Though the counsel for the prosecution has closed his case, & prisoner's counsel points out a defect, the judge is at liberty to put what question he thinks fit to answer the objection.—*R. v. REMNANT* (1807), Russ. & Ry. 136, C. C. R.

*Annotation* :—*Folld.* *R. v. Sullivan*, [1923] 1 K. B. 47.

2733. ———.]—*Right of cross-examination*.—Where, after the examination of witnesses to fact on behalf of a prisoner, the judge, there being no counsel for the prosecution, calls back & examines a witness for the prosecution, prisoner's counsel has a right to cross-examine again, if he thinks it material.—*R. v. WATSON* (1834), 6 C. & P. 653.

2734. *To prove translation of foreign documents*.—*R. v. M.* (1915), 32 T. L. R. 1; 11 Cr. App. Rep. 207, C. C. A.

*E. Witness Refreshing Memory.*

*See, generally*, EVIDENCE.

2735. *Witness may refer to writing*—& then *speak from recollection*.—A witness may refresh

*Sect. 7.—The hearing: Sub-sect. 6, E.]*

his memory by any book or paper, if he can afterwards swear to the fact from his own recollection. But if he cannot swear to the fact from recollection any farther than as finding it entered in a book or paper, the original book or paper must be produced.—*DOE d. CHURCH & PHILLIPS v. PERKINS* (1790), 3 Term Rep. 749; 100 E. R. 838.

*Annotations:—Expld. R. v. St. Martins, Leicester* (1834), 2 Ad. & El. 210. *Consd. Beech v. Jones* (1848), 5 C. B. 696. *Refld. Burton v. Plummer* (1834), 4 Nev. & M. K. B. 315; *Hill v. Barry* (1842), 7 Jur. 10. *Mentd. Richardson v. Mellish* (1825), 3 Bing. 334; *Jackson v. Galloway* (1845), 14 L. J. C. P. 141; *Bowers v. Nixon* (1848), 12 Q. B. 546.

**2736.** ———.]—Where a receipt for money has been given on unstamped paper, it may be used by a witness who saw it given, to refresh his memory.—*RAMBERT v. COHEN* (1802), 4 Esp. 213, N. P.

*Annotation:—Refld. Hill v. Barry* (1842), 7 Jur. 10.

**2737.** ———.]—Where a witness stated that he let a house as agent to his father, who was present, & that the terms were reduced to writing, to prevent the possibility of mistake, & signed by the wife of the tenant, on purpose to bind her husband, the husband himself not being present, but that the entry was not signed by the witness nor his father, nor did his father's name appear on any part:—*Held*: this was neither a lease nor an agreement, but a mere memorandum, to which deft. might refer to refresh his memory, & upon the witness saying that he had no memory of those things, but from the book, without which, from his own knowledge, he should not have been able to speak to the fact, but, on reading the entry, he had no doubt that the fact really happened, this was held sufficient parol evidence of the demise.—*R. v. ST. MARTIN'S, LEICESTER (INHABITANTS)* (1834), 2 Ad. & El. 210; 4 Nev. & M. K. B. 202; 2 Nev. & M. M. C. 472; 4 L. J. M. C. 25; 111 E. R. 81.

*Annotation:—Refld. Hill v. Barry* (1842), 7 Jur. 10.

**2738.** ———.]—A witness stated that he believed, from a reference to his books of account, & from inspection of a cheque & other documents which were produced to him at the time of his examination, that A. on a certain day paid £500 to B.:—*Held*: this was not sufficient evidence of payment.—*CATOR v. CROYDON CANAL CO.* (1843), 4 Y. & C. Ex. 405, 593; 13 L. J. Ch. 89; 2 L. T. O. S. 225; 8 Jur. 277; 160 E. R. 1064, 1149.

**2739.** ———.]—It is essential that a witness producing a memorandum by which to refresh his memory as to a fact, should be enabled to swear positively to the truth of such fact, although he has no present independent recollection of it; but it is not essential that the memorandum should have been contemporary with the fact.—*HILL v. BARRY* (1842), 7 Jur. 10.

**2740.** ———.]—The cashier of a banking house, upon his examination as a witness, stated that he had ascertained from the clearing book, kept by him, & in his own handwriting, that a certain sum of money was paid in notes of a particular description. The statement was founded solely on the witness's knowledge of the book & of his own handwriting, & not from any recollection of the fact deposited to; & the book was not produced:—*Held*: under these circumstances, the statement could not be received as evidence of the fact deposited to, though it might serve as a ground

for further inquiry.—*DUPUY v. TRUMAN* (1843), 2 Y. & C. Ch. Cas. 341; 63 E. R. 150.

**2741.** ———.]—*R. v. LACEY*, No. 2864, *post*.

**2742.** ———.]—In an action by the acceptor against the drawer of an accommodation bill, on his implied contract of indemnity, *pltf.*, in order to prove that a former bill, in renewal of which the bill in respect of which the action was brought, was given, had been made payable at a particular place, called a banker's clerk, who, without producing the bank book, stated that he had ascertained the fact from an entry therein in his own handwriting, but that, independently of that entry, he had no recollection whatever of the fact:—*Held*: this was not evidence of such fact.—*BEECH v. JONES* (1848), 5 C. B. 696; 136 E. R. 1052.

**2743.** ———.]—A witness said that he made a certain entry, & that seeing such entry he knew that A. must have been at M. on a certain day, but that independent of such entry he had no recollection of it:—*Held*: such evidence was inadmissible.—*R. v. BROOKS* (1848), 12 J. P. 663.

**2744.** ———.]—*Made at the time.*—*R. v. LAYER*, No. 2417, *ante*.

**2745.** ———.]—To prove an act of bkpcy. committed some years back, an old witness shall be allowed to recur to his deposition made at the time, to refresh his memory, & thereby ascertain the date of such act of bkpcy.—*VAUGHAN v. MARTIN* (1796), 1 Esp. 440, N. P.

*Annotation:—Folld. Smith v. Morgan* (1839), 2 Mood. & R. 257.

**2746.** ———.]—Where a license to trade with an enemy, granted abroad, had been returned, after being used, to the secretary of the governor by whom it was issued, who had, as he believed, thrown it aside amongst the waste papers of his office, & did not know what had become of it, having afterwards searched for, but not recollecting the finding of it, & thinking that he had not found it; this is reasonable & probable evidence of the loss of such license, so as to let in parol evidence of its contents; the paper not being considered as of any further use at the time; & the witness's attention not having been then called particularly to the circumstances. & the witness may speak to the contents of the license from memory, though he had made an entry of it in his memorandum book for the private information of himself & the governor; which book was not produced, he having given it to the governor, who was gone abroad without returning it to him; for such book, if in *ct.*, would not have been evidence *per se.*; but could only have been used by the witness to refresh his memory.—*KENSINGTON v. INGLIS* (1807), 8 East, 273; 103 E. R. 346.

*Annotations:—Mentd. Hubbard v. Jackson* (1811), 4 Taunt. 169; *De Tastet v. Taylor* (1812), 4 Taunt. 233; *Flinnt v. Waters* (1812), 15 East, 260; *Willison v. Patteson* (1817), 1 Moore, C. P. 133; *Weir v. Aberdeen* (1819), 2 B. & Ald. 320; *Bacon v. Simpson* (1837), 3 M. & W. 78; *Schmitz v. Van Der Veen* (1915), 84 L. J. K. B. 861; *Rodriguez v. Speyer*, [1919] A. C. 59.

**2747.** ———.]—A witness has no right to refresh his memory with a copy of a paper made by himself six months after he wrote the original, although the original is proved to be so covered with figures that it is unintelligible; the original paper having been written near the time of the transaction.—*JONES v. STROUD* (1825), 2 C. & P. 196.

be referred to by those who took them to refresh their memories, as to the exact answers of the accused, in giving

evidence as to what accused said, but the notes or transcription thereof cannot be put in as evidence.—*R. v.*

*RUTHERFORD*, [1923] 2 W. W. R. 963.  
—*CAN.*

**2748.** ———.]—At a letting of lands, the terms of letting were read from a printed paper, & a party present agreed to take certain premises from Lady Day then next, when the lease of the then tenant would expire. No writing was signed by the parties or their agents, but there was at the foot of the printed paper a memorandum, also read over to the future tenant, stating that the parties had agreed to let & to take, subject to the printed terms, the name of the farm & the rent, & that the letting was for one year certain from Lady Day, & so from year to year, till notice to quit. Some of the terms were special, having relation to husbandry. The new tenant entered at Lady Day, & paid rent:—*Held*: on the trial of an action by the landlord against the tenant the paper above mentioned might be referred to, to refresh the memory of a witness as to such stipulations.—*BOLTON (LORD) v. TOMLIN* (1838), 5 Ad. & El. 856; 2 Har. & W. 369; 1 Nev. & P. K. B. 247; 6 L. J. K. B. 45; 111 E. R. 1391.

*Annotations*:—*Mentd.* *Giles v. Spenoer* (1857), 3 C. B. N. S. 244; *Cornish v. Stubbs* (1870), 22 L. T. 21; *Coatsworth v. Johnson* (1886), 54 L. T. 520.

**2749.** ———.]—To enable a witness to use a paper written by himself for the purpose of refreshing his memory, it must be shown that the paper was written contemporaneously with the transaction it refers to. A witness, who had been examined on interrogatories in a foreign country, stated in one of his answers the contents of a letter which was not produced. On the trial of the cause in England:—*Held*: so much of the answer as related to the contents of the letter was not receivable in evidence.—*STEINKELLER v. NEWTON* (1838), 9 C. & P. 313.

*Annotation*:—*Refd.* *Robinson v. Davies* (1879), 28 W. R. 255.

**2750.** ———.]—A., a surveyor, made a survey or report, which he furnished to his employers; being afterwards called as a witness, he produced a printed copy of this report, on the margin of which he had, two days before, to assist him in giving his explanations as a witness, made a few jottings. The report had been made up from his original notes, of which it was in substance, though not in words, a transcript:—*Held*: he might look at this printed copy of the report, to refresh his memory.—*HORNE v. MACKENZIE* (1839), 6 Cl. & Fin. 628; Macl. & Rob. 977; 7 E. R. 834, H. L.

*Annotation*:—*Mentd.* *Reece v. Miller* (1882), 8 Q. B. D. 626.

**2751.** ———.]—A witness cannot refresh his memory by depositions which he did not make immediately after the occurrence of the facts he deposed to.—*WHITFIELD v. ALAND* (1849), 2 Car. & Kir. 1015; 15 L. T. O. S. 189.

**2752.** ———.]—In the case of every payment there must be a payer as well as a receiver, & either of them can prove it; the parties should have been called if the proposal were to put the receipts in evidence; but it is proposed only to refresh the memory of the witness by means of them, & as they are contemporaneous documents I see no objection to doing so (*BYLES, J.*).—*HISCOX v. BATCHELLOR* (1867), 15 L. T. 543, N. P.

*Annotation*:—*Mentd.* *Green v. Wright* (1876), 1 C. P. D. 591.

**2753.** ———.]—A witness may not refresh his memory of a conversation between himself & prisoner by referring to a note made by himself the day after the arrest, & after he has already given evidence of the conversation on the hearing before the justices.—*R. v. ROBINSON* (1897), 61 J. P. 520.

**2754.** ———.]—*R. v. HARVEY* (1869), 11 Cox, C. C. 546.

*Annotations*:—*Refd.* *R. v. Silverlock* (1894), 63 L. J. M. C. 233; *R. v. Derriock* (1910), 5 Cr. App. Rep. 162; *R. v. Rickard* (1918), 119 L. T. 192.

**2755.** ———.]—*R. v. DUNCAN* (1890), Wood Renton's Law & Practice in Lunacy, 908.

**2756. Writing may be made by another person.]**—*KINGSTON'S (DUCHESS) CASE* (1776), 20 State Tr. 619.

*Annotations*:—*Refd.* *Hill v. Barry* (1842), 7 Jur. 10; *R. v. Sow* (1843), 4 Q. B. 93; *R. v. Basingstoke* (1850), 14 Q. B. 611. *Mentd.* *Galbraith v. Neville* (1789), 1 Doug. K. B. 6, n.; *Wilson v. Rastall* (1792), 4 Term Rep. 753; *Kennell v. Abbott* (1799), 4 Ves. 802; *White v. Hall* (1806), 12 Ves. 321; *R. v. Knappott* (1824), 2 B. & C. 883; *Stafford v. Clark* (1824), 9 Moore, C. P. 724; *Bland v. Lynam* (1827), 5 L. J. O. S. C. P. 87; *Martin v. Nicolls* (1830), 3 Sim. 458; *Thompson v. Blackhurst* (1833), 1 Nev. & M. K. B. 266; *Bandon v. Becher* (1835), 9 Blf. N. S. 532; *R. v. Wye* (1838), 7 Ad. & El. 761; *R. v. Caley* (1841), 5 Jur. 709; *Meddowcroft v. Huguenin* (1844), 4 Moo. P. C. C. 386; *Robertson v. Struth* (1844), Dav. & Mer. 772; *Barrs v. Jackson* (1845), 1 Ph. 582; *Tarry v. Newman* (1846), 15 M. & W. 645; *De Bode v. R.* (1848), 13 Q. B. 364; *Bailey v. Harris* (1849), 13 Jur. 341; *O'Brien v. R.* (1849), 3 Cox, C. C. 360; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *R. v. Blakemore* (1852), 2 Den. 410; *R. v. Haughton* (1853), 1 E. & B. 501; *Shedden v. Patrick* (1854), 23 L. T. O. S. 194; *R. v. Hartington Middle Quarter* (1855), 4 E. & B. 780; *Bremer v. Freeman* (1857), 10 Moo. P. C. C. 306; *Cammell v. Sewell* (1858), 3 H. & N. 617; *Liverpool Bank v. Foggo* (1860), 2 L. T. 594; *Routledge v. Hislop* (1860), 2 E. & B. 549; *Accidental Death Inse. v. Mackenzie* (1861), 5 L. T. 20; *Howlett v. Tarte* (1861), 10 C. B. N. S. 813; *Hunter v. Stewart* (1861), 4 De G. F. & J. 168; *The Justyn* (1862), 6 L. T. 553; *Swan v. North British Australasian Co.* (1862), 7 H. & N. 603; *Rogers v. Hadley* (1863), 9 Jur. N. S. 898; *Simpson v. Foggo* (1863), 8 L. T. 61; *R. v. Fanning* (1866), 10 Cox, C. C. 411; *Sidhee Nuzur Ally Khan v. Ojoodhyaram Khan* (1866), 10 Moo. Ind. App. 540; *Patch v. Ward* (1867), 3 Ch. App. 203; *Finney v. Finney* (1868), L. R. 1 P. & D. 483; *Stimson v. Farnham* (1871), L. R. 7 Q. B. 175; *Ochsenheim v. Papelier* (1873), 8 Ch. App. 695; *Plitters v. Alfrey* (1874), L. R. 10 C. P. 29; *Dover v. Child* (1876), 34 L. T. 737; *Leggott v. G. N. Ry.* (1876), 1 Q. B. D. 599; *R. v. Hutchings* (1881), 6 Q. B. D. 300; *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. 295; *Priestman v. Thomas* (1884), 9 P. D. 210; *Caird v. Moss* (1886), 33 Ch. D. 22; *Setton v. Lafone* (1886), 18 Q. B. D. 139; *Borough v. Collins* (1890), 15 P. D. 81; *Kingston-upon-Hull Corp'n. v. Harding* (1892), 62 L. J. Q. B. 55; *A.-G. for Trinidad & Tobago v. Eliche*, [1893] A. C. 518; *Boswell v. Coaks* (No. 2) (1894), 86 L. T. 365, n.; *Ballantyne v. Mackinnon*, [1896] 2 Q. B. 455; *N. E. Ry. v. Dalton Overseers*, [1898] 2 Q. B. 66; *Bynoe v. Bank of England*, [1902] 1 K. B. 467; *Turley v. Daw* (1906), 94 L. T. 216; *Hill v. Clifford*, *Clifford v. Timms*, *Clifford v. Phillips*, [1907] 2 Ch. 236; *Burdett v. Horne* (1911), 27 T. L. R. 402; *In the estate of Crippen*, [1911] P. 108; *Bedford v. Cowtan*, [1916] 1 K. B. 980; *Isaacs v. Salbstein*, [1916] 2 K. B. 139; *C. (otherwise H.) v. C.*, [1921] P. 399; *Ord v. Ord*, [1923] 2 K. B. 432.

**2757. — Ratified by witness.]**—A witness, for the purpose of refreshing his memory, may refer to entries in a book, which he did not write with his own hand, but which he regularly examined, from time to time, soon after they were written, & while the facts stated in them were fresh in his recollection.—*BURROUGH v. MARTIN* (1809), 2 Camp. 112, N. P.

*Annotations*:—*Refd.* *Burton v. Plummer* (1834), 4 Nev. & M. K. B. 315; *Hill v. Barry* (1842), 7 Jur. 10.

**2758.** ———.]—A witness cannot give a copy of a shop book in evidence, to prove facts contained in the shop book; but if he was originally acquainted with the facts themselves, he may refer to such copy to refresh his memory (*BAYLEY, J.*).—*ANON.* (1827), 1 Lew. C. C. 101.

**2759.** ———.]—A clerk to a tradesman entered the transactions in trade, as they occurred, into a waste book, from his own knowledge; & the tradesman copied the entries, day by day, into a ledger, in the presence of the clerk, who checked them as they were copied:—*Held*: the clerk, in an action brought by the tradesman for goods sold & delivered, might use the entries in the ledger to refresh his memory, although the waste book was not produced, nor its absence accounted

*Sect. 7.—The hearing: Sub-sect. 6, E., F. & G.]*

for, the entries in the ledger being in the nature of entries made by the clerk himself.

The rule, that the best evidence must be produced, precludes a witness from refreshing his memory with a copy of an instrument which might itself be used for refreshing his memory, as much as it precludes the admission in evidence of the copy of an instrument which would be evidence in itself (PATTESON, J.).—BURTON v. PLUMMER (1834), 2 Ad. & El. 341; 4 Nev. & M. K. B. 315; 4 L. J. K. B. 53; 111 E. R. 132.

**2760.** ———.]—On the trial of an issue directed by the Ct. of Ch. to try whether a deed of assignment was fraudulent or not, a witness was called to prove that another deed which bore date more than three years before the trial was not executed on the day on which it bore date, but was executed by one party on the day after, & the other three days after. The witness stated, that he could not recollect how this was, but stated that he had been examined on this subject before comrs. of bkpcy. within a fortnight of the time when the matters occurred, & when the facts were fresh in his memory. He stated that his examination before the comrs. was not in his own handwriting, but he had signed it. The witness was allowed to look at his examination, to refresh his memory.—WOOD v. COOPER (1845), 1 Car. & Kir. 645.

**2761.** ———.]—R. v. LACEY, No. 2864, *post*.

**2762.** ———.]—A person was in the habit from time to time, & within two hours of their occurrence, of reporting to a police inspector proceedings that had taken place at certain meetings where a treasonable conspiracy was carried on. The inspector took down the purport of the report from his dictation, but not the very words he used. When finished, some of the reports were read over by the witness, & some were read to him, & all were signed by him:—*Held*: on examination he might use those reports for the purpose of refreshing his memory.—R. v. MULLINS (1848), 12 J. P. 776; 3 Cox, C. C. 526.

*Annotations*:—*Mentd.* R. v. Bickley (1909), 73 J. P. 239; R. v. Wilson, Lewis & Havard (1911), 6 Cr. App. Rep. 126; R. v. Watson (1913), 109 L. T. 335; R. v. Baskerville, [1916] 2 K. B. 658.

**2763.** ———.]—*Assented to by witness.*—On a commission to examine witnesses, a witness, after giving oral evidence, put in a document which he called a "legalised copy" of a deposition which he stated himself to have made eighteen months earlier before the British Consul at the foreign port near which the loss occurred, & which document purported to contain evidence of his opinion as to the circumstances of the vessel at the time of the loss; & the witness stated that he now confirmed such deposition, & that any discrepancy between that & his present testimony must be attributed to the lapse of time:—*Held*: the document was not admissible in evidence.—ALCOCK v. ROYAL EXCHANGE ASSURANCE CORPN. (1849), 13 Q. B. 292; 18 L. J. Q. B. 121; 12 L. T. O. S. 473; 13 Jur. 445; 116 E. R. 1275.

**2764.** ———.]—A ship's log, written by the mate, who is abroad, may be used to refresh the memory of the captain, who read it about a week after it was written.—ANDERSON v. WHALLEY (1852), 3 Car. & Kir. 54; 19 L. T. O. S. 365.

**2765.** ———.]—BOLTON (LORD) v. TOMLIN, No. 2748, *ante*.

**2766.** ———.]—*Checked by witness.*—A witness may refresh his memory as to the day on which certain proceedings at which he was present took

place, by referring to a newspaper, containing a report of those proceedings & which he read at the time the facts were fresh in his recollection, & then knew that they were correctly reported.—DYER v. BEST (1866), as reported in 4 H. & C. 189. *Annotations*:—*Mentd.* Lewis v. Davis (1875), L. R. 10 Exch. 86; Robinson v. Currey (1881), 7 Q. B. D. 465; Forbes v. Samuel (1913), 109 L. T. 598.

**2767.** ———.]—Prisoner was a timekeeper, & T. was pay clerk, in the employment of a colliery co. It was the duty of prisoner every fortnight to give a list of the days worked by the workmen to a clerk who entered the days & the wages due in respect of them in a time book. At pay time it was the duty of prisoner to read out from the time book the number of days worked by each workman to T., who paid the wages accordingly; & T. saw the entries in the time book while prisoner was reading them out. Upon the trial of an indictment charging prisoner with obtaining money by false pretences:—*Held*: T. might refresh his memory, by referring to the entries in the time book, in order to prove the sums paid by him to workmen.—R. v. LANGTON (1876), 2 Q. B. D. 296; 46 L. J. M. C. 136; 35 L. T. 527; 41 J. P. 134; 13 Cox, C. C. 345, C. C. R.

*Annotation*:—*Mentd.* R. v. May (1900), 64 J. P. 570.

**2768.** ———.]—*Dictated by witness.*—A solr., for the purpose of refreshing his memory, may be allowed to look at his own account of his interview with prisoners, dictated by him to a shorthand writer, & by the latter written in longhand shortly after the interview took place, & read over by the solr. shortly afterwards, although the shorthand writer is alive & is not called as a witness.—R. v. DEXTER, LAIDLER & COATES (1899), 19 Cox, C. C. 360.

*Annotations*:—*Mentd.* R. v. Turner (1909), 3 Cr. App. Rep. 103; R. v. Waller (1909), 26 T. L. R. 142.

**2769.** ———.]—*Notes of counsel—Of former trial.*—A witness might refresh his memory from the notes of counsel, taken at a former trial.—LAWES v. REED (1835), 2 Lew. C. C. 152.

*Annotations*:—*Consd.* R. v. Cuffey (1848), 12 J. P. 807. *Dbtd.* R. v. Mullins (1848), 12 J. P. 776.

**2770.** From depositions.]—VAUGHAN v. MARTIN, No. 2745, *ante*.

**2771.** ———.]—Where an accomplice who could not read had made a statement before the committing magistrate, & at the trial gave evidence falling very short of what he said before the magistrate, the judge allowed his deposition to be shown to him, but would not allow the deposition to be read to him by the officer of the ct., that counsel for the prosecution should examine upon it.—R. v. BEARDMORE (1838), 8 C. & P. 260, N. P.

**2772.** ———.]—*Semble*: where a witness had been examined before comrs. of bkpcy. shortly after the act of bkpcy. he may refer to the deposition he then made, for the purpose of refreshing his memory as to the date.—SMITH v. MORGAN (1839), 2 Mood. & R. 257, N. P.

*Annotation*:—*Mentd.* Metters v. Brown (1863), 1 H. & C. 686.

**2773.** ———.]—A witness cannot be asked on cross-examination to refresh his memory from the deposition which he made before the magistrates; nor can it be put into his hands, so as to call his attention to what he then stated.—R. v. PULLEN (1848), 13 J. P. 90.

**2774.** ———.]—The depositions of a witness before a magistrate cannot be put into his hands at the trial to refresh his memory on cross-examination.—R. v. STOKES (1850), 4 Cox, C. C. 451.

**2775.** ———.]—A witness cannot refresh his

memory from his deposition made before the magistrate.—*R. v. JOEL* (1850), 14 J. P. 227.

**2776.** —[—]—A witness for the prosecution may have his deposition put into his hand in order that he may refresh his memory from it.—*R. v. LAWLER* (1850), 14 J. P. 561.

*Annotation* :—*Mentd. R. v. Brixton Prison Governor, Ex p. Sjoland & Metzler*, [1912] 3 K. B. 568.

**2777.** —[—]—Counsel for prisoner, on cross-examining a witness for the prosecution, is not entitled to put the deposition of the witness into his hand, for the purpose of refreshing his memory, without giving it in evidence.—*R. v. FORD* (1851), 3 Car. & Kir. 113; 2 Den. 245; T. & M. 573; 4 New Sess. Cas. 596; 20 L. J. M. C. 171; 17 L. T. O. S. 135; 15 Jur. 406; 5 Cox, C. C. 184; 15 J. P. Jo. 290, C. C. R.

**2778.** —[—]—*R. v. WILLIAMS*, No. 2714, *ante*.

**2779.** —[—]—The judge allowed the deposition made by a witness to be put into his hands to refresh his memory, & witness was then asked what he said about a fact which he had answered before in the negative, & answered the question affirmatively.—*R. v. QUIN* (1863), 3 F. & F. 818.

**2780. Not from proceedings in another court.**—[—]—A witness cannot have the proceedings in another ct. put into his hands for the purpose of refreshing his memory as to the matters on which he is giving evidence.—*HALLIDAY v. HOLGATE* (1867), 17 L. T. 18, N. P.; *subsequent proceedings* (1868), L. R. 3 Exch. 299, Ex. Ch.

**2781. Blind person—Document read to.**—[—]—An accountable receipt for money given by the agent of one who receives money from different customers for the purpose of investing annuities, etc., requires a stamp. Such agent having become blind, the receipt, although unstamped, may be read over to him in ct. for the purpose of refreshing his memory.—*CATT v. HOWARD* (1820), 3 Stark. 3, N. P.

*Annotation* :—*Mentd. Clarke v. Chaplin* (1847), 5 Ry. & Can. Cas. 294.

**2782. Reference to newspaper article—Written by witness.**—[—]—The editor of a newspaper swore that A. was the writer of a certain art. which had appeared in that paper many years before, & that the manuscript had been lost. A. stated that he had been in the habit of writing such articles for the newspaper in question, but that he had no recollection of having sent the particular article now referred to. He swore, however, that all the statements made in the arts. he did send were true:—*Held*: the newspaper might be put into A.'s hand, in order to refresh his memory; & that he might be asked, whether, looking at the art., he had any doubt that the fact was as therein stated.—*TOPHAM v. M'GREGOR* (1844), 1 Car. & Kir. 320.

*Annotation* :—*Consd. Talbot de Malahide v. Cusack* (1864), 12 L. T. 678.

**F. Privilege of Witness—Incrimination of Witness.**  
See EVIDENCE.

#### G. Depositions and Statements.

See Criminal Procedure Act, 1865 (c. 18).

**2783. Evidence at trial varied from deposition—Evidence in contradiction admitted.**—[—]—*R. v. BOYLE* (1823), cited in 1 Mood. & R., at p. 422.

*Annotation* :—*Consd. Wright v. Beckett* (1834), 1 Mood. & R. 414.

**2784.** —[—]—**Examination by judge.**—[—]—The resolutions of the judges as to cross-examining from the depositions are binding upon prisoner's counsel; but it seems that the judge who tries a case may, if he think fit, notwithstanding those resolutions, himself question a witness as to any discrepancy which appears between his deposition & his evi-

dence on the trial.—*R. v. EDWARDS* (1837), 8 C. & P. 26.

*Annotation* :—*Mentd. R. v. Matthews* (1849), 4 Cox, C. C. 93.

**2785.** —[—]—**Deposition read at trial.**—[—]—A witness at the trial gave evidence which was different from her deposition before the magistrate. The deposition was signed by a mark, which she denied to be hers. Neither the magistrate nor his clerk were at the trial; but a constable proved that he was at the examination, & heard her deposition read over to her, & saw her with a pen in her hand, but did not see her make her mark. He also proved the magistrate's signature, & after reading the deposition, which preceded his own which he had signed, he stated that he believed that that was the deposition which was read over to the witness:—*Held*: this deposition might be read to the witness by the officer of the ct. for the judge to examine her upon it.—*R. v. HALLETT* (1841), 9 C. & P. 748.

**2786.** —[—]—[—]—A witness cannot be cross-examined as to his statements made before the committing magistrate, until his depositions have been read over to him; such questions may, however, be put by the ct. personally, & by prisoner's counsel, as the mouthpiece of the ct., by its permission.—*R. v. PEEL* (1860), 2 F. & F. 21.

*Annotations* :—*Mentd. R. v. Jenkins* (1869), 17 W. R. 621; *R. v. Gloster* (1888), 16 Cox, C. C. 471; *R. v. Perry*, [1909] 2 K. B. 697.

**2787.** —[—]—**Deposition shown to witness—But not read by officer of court.**—[—]—*R. v. BEARDMORE*, No. 2771, *ante*.

**2788.** —[—]—**Deposition put in.**—[—]—In a case of felony, in order to prove that a witness did not state a particular fact before the magistrate, his deposition must be put in, & a witness cannot be questioned as to what he either did or did not state before the magistrate, without first allowing him to read, or have read to him, his deposition taken before the magistrate.—*R. v. TAYLOR* (1839), 8 C. & P. 726.

**2789.** —[—]—**Whether cross-examination permissible.**—[—]—*Held*: the practice hitherto permitted of putting the deposition of a witness into his hand & thereupon asking him if, seeing that, he still persisted in his statement, was an improper practice & should not be continued.—*R. v. NEWTON* (1850), 15 L. T. O. S. 26; 4 Cox, C. C. 262.

**2790.** —[—]—[—]—The practice of placing his deposition in the hands of a witness on cross-examination, & asking him if, having read it, he still persists in his statement, is wrong in principle, & will not be permitted. The proper course is to put the deposition in evidence, for the purpose of contradicting the witness.—*R. v. PALMER* (1851), 5 Cox, C. C. 236.

**2791.** —[—]—**Importance of variation.**—[—]—*R. v. WAINWRIGHT*, No. 2990, *post*.

**2792. Evidence at trial not included in deposition—Evidence to supply omission admissible.**—[—]—Where, on a trial for felony, a witness deposes to a fact, which does not appear in his deposition before the committing magistrate, it is not competent for prisoner's counsel, in his address to the jury, to assume that the witness did not state that fact at the time his deposition was taken: as if such really were the case, the magistrate's clerk ought to be called to prove the silence of the witness on the subject.—*R. v. STANDEN & COOKE* (1840), 4 Jur. 702.

**2793.** —[—]—[—]—If upon the trial of a prisoner a witness gives evidence of facts of which no mention is made in his deposition as taken before the committing magistrate, the clerk to the magistrate may be called for the purpose of stating that



**Sect. 7.—The hearing: Sub-sect. 6, G. & H.; sub-sect. 7, A., B. & C.]**

such facts were stated by the witness when he made his deposition, but were not taken down by him, the clerk.—*R. v. MOORE* (1869), 20 L. T. 987.

**2794. — Cross-examination as to omission.]**—On the trial of a prisoner, his counsel may ask a witness for the prosecution, whether he did not make a certain statement whilst under cross-examination before the magistrates, although the depositions contain no note of such cross-examination.—*R. v. CURTIS* (1848), 2 Car. & Kir. 703.

**2795. — Deposition not put in.]**—If a witness makes at the trial a statement which does not appear in his deposition, he may be asked in cross-examination, without his deposition being put in, whether he ever before made such a statement.—*R. v. MOIRE* (1850), 14 J. P. 435; 4 Cox, C. C. 279.

**2796. Evidence at trial contradicting deposition—Deposition read at trial.]**—*R. v. OLDROYD*, No. 2700, *ante*.

**2797. — —.]**—A deposition made before the committing magistrate may be read against a witness who at the trial repudiates his evidence in the ct. below.—*R. v. SHAFFNER* (1920), 14 Cr. App. Rep. 131, C. C. A.

**2798. Whether depositions must be put in—If statement repeated.]**—A witness may be asked generally whether he had ever said whatever the statement might be, without excepting the evidence he gave before the magistrate, but if the witness attempts to state anything he said before the magistrate, he must be stopped & the deposition put in.—*R. v. DERMODY* (1845), 5 L. T. O. S. 333.

**2799. — Witness unable to read.]**—Where, on cross-examination, a witness is asked, with permission of the judge, to look at his deposition before the committing magistrate, & say whether he still adheres to his present statement, & it appears the witness is unable to read, the depositions cannot be read to the witness for the same purpose without being put in as evidence.—*R. v. MATTHEWS* (1849), 4 Cox, C. C. 93.

**2800. — If referred to by prosecution.]**—The prosecution cannot use or refer to the depositions without putting them in.—*R. v. MULLER* (1864), 10 Cox, C. C. 43.

*Annotation:—***Refd.** *R. v. Beal* (1912), 8 Cr. App. Rep. 95.

**2801. — To contradict witness.]**—Counsel for prisoner may, in cross-examination, caution the witness by referring generally to his depositions, without being obliged to put them in evidence.—*R. v. ORIEL* (1845), 9 J. P. 170.

**2802. — —.]**—*R. v. PALMER*, No. 2790, *ante*.

**2803. — If witness' answer not accepted.]**—*R. v. BUCKNELL* (1858), 1 F. & F. 355.

**2804. — —.]**—The deposition of the witness was placed in his hands by prisoner's counsel, & he was asked if, after looking at it, he adhered to an answer just given:—**Held:** the deposition could not be so used unless it was formally made prisoner's evidence.—*R. v. BREWER* (1863), 9 Cox C. C. 409.

**2805. — —.]**—On a charge of rape prosecutrix, on her cross-examination, cannot be contradicted from the depositions, unless they are put in.—*R. v. WRIGHT* (1866), 4 F. & F. 967.

**2806. — —.]**—In cross-examining a witness who has been examined before the magistrate, although it is admissible to ask him, referring to the depositions, whether he has not said so & so, his answer must be taken, unless the depositions

are put in to contradict him, & it is not admissible to state that the depositions do contradict him, without thus putting them in.—*R. v. RILEY* (1866), 4 F. & F. 964.

**2807. Depositions irregularly taken—Answer omitted—Cross-examination as to question—Depositions not put in.]**—Witnesses before a committing magistrate were duly sworn & examined, & cross-examined by prisoners; minutes thereof were duly made by the clerk, & were then sent to his office to be copied as draft depositions. The witnesses attended there also. T., the copying clerk, while copying the minutes, asked the witnesses some questions for the purpose of making the depositions more correct, clear & complete, & inserted the answers in the depositions. Prisoners were not present. The depositions thus written were taken back to the magistrate. The witnesses in the presence of prisoners, after being duly re-sworn, & after hearing the depositions read over to them, & giving prisoners full opportunity of cross-examination, signed them. The above circumstances appeared at the trial, & a material question was put to one of the witnesses as to something which he had said to T., in answer to one of the above questions so put to him by T. It was objected & ruled that the answer would appear on the depositions, & that they must, therefore, be put in as primary evidence of the statement:—**Held:** the question was legal, & the answer formed no part of the depositions, but was wholly independent of them, & ought, therefore, to have been given, & the depositions need not be put in.—*R. v. CHRISTOPHER, SMITH & THORNTON* (1850), 1 Den. 536; 2 Car. & Kir. 994; T. & M. 225; 4 New Mag. Cas. 61; 4 New Sess. Cas. 139; 19 L. J. M. C. 103; 14 J. P. 83; 14 Jur. 203; 4 Cox, C. C. 76, C. C. R.

*Annotation:—***Mentd.** *R. v. Walsh* (1850), 5 Cox, C. C. 115.

**2808. Statement before magistrate—Cross-examination permissible—Without production of writing.]**—In a case of rape it appeared that prisoner had been taken before the mayor of N., charged with this offence, & that prosecutrix was then sworn & her statement taken down by the mayor, who then asked her some further questions, the answers to which were not taken down, & prisoner was discharged. That which was taken down by the mayor was not read over to prosecutrix, neither was it signed by her or by the mayor. Prisoner was afterwards committed for trial by other magistrates:—**Held:** at the trial prisoner's counsel might cross-examine prosecutrix as to what she said before the mayor of N., without the production of that which was taken down on that examination.—*R. v. GRIFFITHS* (1841), 9 C. & P. 746.

**Use of depositions to refresh memory.]**—*See* Sub-sect. 6, E., *ante*.

**Deposition of absent witness.]**—*See* Sub-sect. 7, E., *post*.

**Statements of accused before magistrates.]**—*See* Sub-sect. 6, F., *ante*, & Part XII., Sect. 5, sub-sect. 2, *post*.

#### H. Swearing Witness.

*See* EVIDENCE.

#### SUB-SECT. 7.—CASE FOR THE PROSECUTION.

##### A. Status of Private Prosecutor.

**2809. May not address jury.]**—*R. v. MILNE* (1804), 2 B. & Ald. 606, n; 106 E. R. 487.

*Annotation:—***Refd.** *R. v. Brice* (1819), 2 B. & Ald. 606.



**2810. — Or open case.]**—A prosecutor of an indictment has no right to address the jury, & state the case for the prosecution.—*R. v. BRICE* (1819), 2 B. & Ald. 606; 106 E. R. 487.

*Annotation.*—*Consd. Cobbett v. Hudson* (1852), 1 E. & B. 11.

**2811. —.]**—Indictment at suit of Crown although at instance of private individual for libel, is not a proceeding at the suit of the party prosecuting & therefore prosecutor in person has no right to address the jury.—*R. v. STODDART* (1819), Dickinson's Practical Guide to Quarter Sessions, 6th ed. 152.

**2812. — Or conduct case.]**—In a criminal prosecution it is not competent to prosecutor to appear & conduct the case in person; but on an affidavit that it was expected that counsel would be instructed, the trial was postponed.—*R. v. GURNEY* (1869), 11 Cox, C. C. 414; Finlason's Rep. 1.

*Annotations.*—*Mentd. Peek v. Gurney* (1871), L. R. 13 Eq. 79; *R. v. Parker & Bulteel* (1916), 25 Cox, C. C. 145.

**2813. — Even though a barrister.]**—A barrister who conducts a criminal prosecution on his own behalf is entitled to no other privilege than an ordinary person, & will not therefore be allowed to comment on the evidence or address the jury.—*R. v. PHILIPS* (1844), 2 L. T. O. S. 287; 1 Cox, C. C. 17.

#### *B. Counsel for the Prosecution.*

**2814. Necessity for.]**—A judge should not be required to act as prosecutor, instead of holding the scales even between the parties. Therefore prosecutions should always be conducted by counsel.—*R. v. HEZELL* (1844), 2 L. T. O. S. 501; 1 Cox, C. C. 348.

*Annotation.*—*Reid. R. v. Farrell & Moore* (1848), 3 Cox, C. C. 139.

**2815. —.]**—The fiction of law in criminal cases is, that the judge is counsel for prisoner. It is a violation of this principle, & indecent, to constitute the judge counsel for the prosecution, & leave him to make out from the depositions a case against prisoner. Therefore, all prosecutions in criminal cases ought to be conducted by counsel, & the ct. will in all cases direct the depositions to be handed to some counsel for that purpose.—*R. v. PAGE* (1847), 8 L. T. O. S. 495; 2 Cox, C. C. 221.

*Annotation.*—*Reid. R. v. Farrell & Moore* (1848), 3 Cox, C. C. 139.

**2816. Duty of counsel for prosecution—To assist justice.]**—In cases of felony it is the duty of counsel for the prosecution to be assistant to the ct. in the furtherance of justice, & not to act as counsel for any particular person or party.—*R. v. THURSFIELD* (1838), 8 C. & P. 269.

stances, to prefer a bill of indictment, yet prosecutor is no party to the prosecution, & cannot insist that he, or counsel retained by him, shall aid in the conduct of the prosecution.—*R. v. GILMORE* (1903), 23 C. L. T. 298; 6 O. L. R. 286; 2 O. W. R. 710.—*CAN.*

#### **PART VII. SECT. 7, SUB-SECT. 7.—B.**

**2816 i. Duty of counsel for prosecution—To assist justice.]**—Prosecuting counsel in a criminal case should act in a quasi-judicial capacity, his duty being to assist the judge in fairly putting the case before the jury & nothing more.—*R. v. MURRAY & MAHONEY* (No. 2), [1917] 1 W. W. R. 404; 10 Alta. L. R. 275.—*CAN.*

**2816 ii. —.]**—The purpose of a criminal trial is not to support at all a theory, but to investigate the facts & to determine the guilt or innocence of the accused; & the duty of a Public Prosecutor is to represent

not the police but the Crown, & this duty should be discharged fairly & fearlessly & with a full sense of the responsibility attaching to his position. It is not his duty to call only witnesses who speak in his favour. He should, in a capital case, place before the ct. the testimony of all the available eye-witnesses, though brought to the ct. by the defence, & though they give different accounts.—*RAM RANJAN ROY v. R.* (1914), 1 L. R. 42 Cal. 422.—*IND.*

**2820 i. — Care in observation.]**—Crown tendered in evidence a conversation between a detective officer & prisoner in which the officer told prisoner that P. had made a statement regarding prisoner's whereabouts at a certain time. Prisoner denied P.'s statement. After objection the conversation was admitted.—*Held*: when prosecution is aware that evidence of this nature, if given, will have no real value, caution & discrimination should

**2817. — —.]**—*R. v. LITTLETON*, No. 2380, ante.

**2818. — —.]**—*R. v. BERENS*, No. 3067, post.

**2819. — —.]**—In a criminal case, counsel for the prosecution ought not to struggle to obtain a conviction, but should regard themselves rather as ministers of justice, assisting in its administration than as advocates.—*R. v. BANKS*, [1916] 2 K. B. 621; 85 L. J. K. B. 1657; 115 L. T. 457; 80 J. P. 432; 25 Cox, C. C. 535; 12 Cr. App. Rep. 74, C. C. A.

**2820. — Care in observations.]**—*R. v. RUDLAND*, No. 3073, post.

**2821. — —.]**—*R. v. PUDDICK*, No. 3072, post.

**2822. — —.]**—Counsel for the prosecution ought not to appeal to religious or racial prejudices.—*R. v. HOUSE* (1921), 16 Cr. App. Rep. 49, C. C. A. *Annotation.*—*Mentd. R. v. Coleman* (1922), 16 Cr. App. Rep. 73.

**2823. Can only address jury once—Where undefended prisoner gives evidence—But calls no other witnesses.]**—The rule must be rigidly observed that counsel must only address the jury once when an undefended prisoner gives evidence, but calls no other witnesses.—*R. v. HARRISON* (1923), 17 Cr. App. Rep. 156, C. C. A.

#### *C. Opening Speech for the Prosecution.*

**2824. When necessary—Prisoner not represented.]**—In a case of felony, where there is counsel for prisoner, the counsel for the prosecution ought always to open the case; but he should not open if prisoner has no counsel, unless there be some peculiarity in the facts of the case to require it.—*R. v. GASCOINE* (1837), 7 C. & P. 772.

**2825. — —.]**—*R. v. JACKSON & FISHER* (1837), 7 C. & P. 773.

**2826. — —.]**—*R. v. BOWLER* (1837), 7 C. & P. 773.

**2827. — Prisoner represented.]**—*Semble*: where a prisoner is defended by counsel, & the facts of the crime imputed to him are few & simple, although the practice in some such cases has been for counsel to enter at once on the examination of witnesses, without previously stating the case to the jury, an opening address is, generally speaking, advantageous, & should therefore be made.—*Re MORGAN* (1852), 6 Cox, C. C. 116.

**2828. May anticipate attack upon witness for prosecution.]**—The counsel for the prosecution, in opening a case of murder, has a right to put hypothetically the case of an attack upon the character of any particular witness for the Crown,

be exercised in tendering it.—*R. v. EYLES* (1917), 17 S. R. N. S. W. 377.—*AUS.*

#### **PART VII. SECT. 7, SUB-SECT. 7.—C.**

**o. Reference to statements of accused—Accused in custody.]**—The evidence of a witness relative to a material conversation with a prisoner when in custody, ought not to be stated in the opening speech of the counsel for the prosecution, as the evidence may possibly be inadmissible when subsequently tendered arising from the circumstances under which the conversation took place.—*R. v. CREAU* (1861), 8 Cox, C. C. 509.—*IR.*

**p. — —.]**—Counsel is not to state in his address to jury statements made by prisoner after his arrest.—*R. v. BODKIN* (1863), 9 Cox, C. C. 404.—*IR.*

**q. Reference to inadmissible evidence.]**—In his opening address on a

*Sect. 7.—The hearing: Sub-sect. 7, C. & D. (a)*

& to state, that if such attack should be made, he shall be prepared to rebut it.—*R. v. COURVOISIER* (1840), 9 C. & P. 362.

**2829. May refer to matters of universal knowledge.**—It is the practice, after arraignment, to allow prisoner's counsel to look at the indictment & the names of the witnesses indorsed on it.

If you look at this in the nature of a public event, universally known, it may be alluded to for the course of justice (*ERLE, J.*).—*R. v. DOWLING* (1848), 7 State Tr. N. S. 381; 12 J. P. 678; 3 Cox, C. C. 509.

**2830. Reference to statements of the accused.**—In opening a case of felony the counsel for the prosecution ought not to state any particular expressions supposed to have been used by the prisoner, nor the precise words of any confession, but he may state the general effect of what the prisoner said.—*R. v. SWATKINS* (1831), 4 C. & P. 548; 2 Man. & Ry. M. C. 510.

**2831.** —[A counsel for the prosecution, on opening a case of felony, has in strictness a right to state in his own way a conversation supposed to have passed between prisoner & a witness whom he intends to call; but, in correct practice, the statement ought to be confined to the general effect of the conversation.—*R. v. DEERING & ATKINSON* (1831), 5 C. & P. 165.

**2832.** —[*R. v. ORRELL* (1835), 7 C. & P. 774; 1 Mood. & R. 467, N. P.  
*Annotations:—Refd. R. v. Hartel* (1837), 7 C. & P. 773; *R. v. Elsley* (1844), 3 L. T. O. S. 6.

**2833.** —[Declarations of a prisoner, not being confessions, which are proposed to be given in evidence on the trial of a case of felony, ought to be opened by the counsel for the prosecution.—*R. v. HARTEL* (1837), 7 C. & P. 773.

**2834.** —[In cases of felony, any conversation or declaration of prisoner, which is intended to be given in evidence, should be opened by the counsel for the prosecution, unless it be a confession, & then it should not be opened.—*R. v. DAVIS* (1837), 7 C. & P. 785.

**2835.** — **Where no case opened against one in joint charge.**—The counsel for the prosecution opening no case against one prisoner, statements made by that prisoner not to be used except in a regular way of evidence.—*R. v. GARDNER & HUMBLER* (1862), 9 Cox, C. C. 332.

**2836. Reference to confession of accused.**—*R. v. ORRELL*, No. 2832, *ante*.

**2837.** —[*R. v. HARTEL*, No. 2833, *ante*.

**2838.** —[*R. v. DAVIS*, No. 2834, *ante*.

**2839.** —[I hold it to be quite clear, that I have no right to interfere with the discretion of counsel in making his opening address to the jury. There are, doubtless, cases in which confessions should not properly be opened; but it is a matter

on which the counsel must exercise his own judgment. I have no power to control it (*ALDERSON, B.*).—*R. v. ELSLEY* (1844), 3 L. T. O. S. 6.

**2840. Objection to evidence during opening speech—Insufficient.**—The Ct. of Criminal Appeal will not entertain an objection to the admissibility of evidence, if the objection was not taken at the trial when the evidence was tendered, although it was taken during the opening speech of counsel for the prosecution.—*R. v. SANDERS*, [1919] 1 K. B. 550; 88 L. J. K. B. 982; 120 L. T. 573; 26 Cox, C. C. 390; 14 Cr. App. Rep. 9, C. C. A.

*D. Witnesses for the Prosecution.**(a) Witnesses on the Back of the Indictment.*

**2841. All must be in attendance.**—The judges have laid down a rule, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment, but the prosecution ought to have all such witnesses in ct., so that they may be called for the defence, if they are wanted for that purpose. If, however, they are called for the defence, the person calling them makes them his own witnesses.—*R. v. WOODHEAD* (1847), 2 Car. & Kir. 520.

**2842.** —[Counsel for the prosecution is not bound to call all the witnesses on the back of an indictment. He may use his own discretion, but must have the witnesses in attendance. If prisoner wishes to have a witness called, when not called for the prosecution, the witness becomes his witness, & counsel for the prosecution will have the right to reply.—*R. v. CASSIDY* (1858), 1 F. & F. 79.

**2843. Prosecution not bound to call all.**—*R. v. BELANEY* (*circa* 1840), cited in 3 Cox, C. C. at p. 83.

*Annotation:—Consd. R. v. Edwards*, Underwood & Edwards (1848), 11 L. T. O. S. 50.

**2844.** —[Though counsel for the prosecution is not bound to call every witness whose name is on the back of the indictment, the judge will sometimes call those omitted to be called by the prosecution.—*R. v. SIMMONDS* (1823), 1 C. & P. 84, N. P.

**2845.** —[The prosecution omitted to call an apprentice of prosecutor who had been implicated in the theft & was examined at the police office & before the grand jury & whose name was on the back of the indictment:—*Held*: prosecutor's counsel are not bound to call all the witnesses whose names are on the back of the indictment merely to let the other side cross-examine them.—*R. v. WHITBREAD* (1823), 1 C. & P. 84, n.

**2846.** —[*R. v. WOODHEAD*, No. 2841, *ante*.

**2847.** —[*R. v. THOMPSON*, No. 2913, *post*.

**2848.** — **Discretion of counsel.**—The calling of a witness, whose name is on the back of the indictment for the other side, to cross-examine him, is by no means of course. It is discretionary

charge of conspiracy the Crown prosecutor, no objection being raised to his doing so, read & commented on extracts from letters which were subsequently held to be inadmissible in evidence. The judge, when summing up, directed the jury to disregard the contents of the letters, as they were not in evidence. Accused appealed against their conviction on the ground that the trial had been prejudiced by the Crown prosecutor's comments. The Ct. of Criminal Appeal refused to interfere with the verdict on this ground.—*R. v. REEVE* (1917), 17 S. R. N. S. W. 81; 34 N. S. W. W. N. 123.—**AUS.**

*r. Reference to unsubstantiated evi-*

*dence.*—In a trial for murder, counsel for the Crown, in opening the case, directed the attention of the jury to the bloodstained clothing of one of the prisoners. It developed later in the trial that the witness capable of proving the ownership of the clothing was the wife of prisoner in question, & she was not examined. The subject was not brought to the attention of the jury in any other way, nor did the trial judge refer to it in his summing up; nor was the charge objected to by either side:—*Held*: counsel for the Crown should not have in his opening indicated evidence of such gravity which he subsequently was unable to submit to the ct. & jury.—*R. v. WALKER & CHINLEY* (1910), 15 B. C. R.

100.—**CAN.**

**PART VII. SECT. 7, SUB-SECT. 7.—**  
**D. (a).**

**s. All should be called.**—All the witnesses who have been examined before the grand jury ought to be called by prosecutor.—*R. v. FARRELL & MOORE* (1848), 3 Cox, C. C. 139.—**IR.**

**2843 i. Prosecution not bound to call all.**—Counsel for the Crown may select such of the witness examined before the grand jury as they consider necessary to make out the case against prisoner, & are not bound to produce every witness indorsed on the indictment.—*FLATLEY'S CASE* (1842), 1r. Cir. Rep. 445.—**IR.**

even in felony, but it is a discretion always exercised, & it seems that the same discretion may well be exercised in misdemeanour.—*R. v. VINCENT* (1839), 9 O. & P. 91; 3 State Tr. N. S. 1037.

*Annotations*:—*Mentd.* *R. v. O'Connell* (1844), 3 State Tr. N. S. 1; *O'Kelly v. Harvey* (1882), 15 Cox, C. C. 435.

**2849.** ———.]—It is generally a matter entirely within the discretion of counsel for the prosecution, whether all the witnesses whose names are upon the back of the indictment, shall be called on behalf of the prosecution or not. The judge has the power to interfere with such discretion, but he will exercise it only in extreme cases.—*R. v. EDWARDS, UNDERWOOD & EDWARDS* (1848), 3 Cox, C. C. 82; 11 L. T. O. S. 50; 12 J. P. 795.

*Annotation*:—*Mentd.* *R. v. Phillips* (1848), 3 Cox, C. C. 88.

**2850.** ———.]—*R. v. CASSIDY*, No. 2842, *ante*.

**2851. Discretion of judge to call witness.**—*R. v. OLDROYD* (1805), Russ. & Ry. 88, C. C. R.

*Annotation*:—*Consd.* *Wright v. Beckett* (1834), 1 Mood. & R. 414.

**2852.** ———.]—*R. v. SIMMONDS*, No. 2844, *ante*.

**2853.** ———.]—**For cross-examination by accused.**—*R. v. TAYLOR* (1823), 1 C. & P. 84, n.

**2854.** ———.]—If counsel for a prosecution decline calling a witness whose name is on the back of the indictment, it is in the discretion of the judge who tries the case, whether the witness shall or shall not be called, for prisoner's counsel to examine him before prisoner is called on for his defence. If the witness be so called, the judge will allow the examination of the witness to assume the shape of a cross-examination, but will not allow prisoner's counsel to call any witnesses to contradict him.—*R. v. BODLE* (1833), 6 C. & P. 186.

**2855.** ———.]—*R. v. EDWARDS, UNDERWOOD & EDWARDS*, No. 2849, *ante*.

**2856. Witness called by prosecution but not examined—Until after examination by accused—Confined to re-examination.**—If counsel for the prosecution call a witness whose name is on the back of the indictment but do not examine him, & such witness be examined by prisoner's counsel, any question put by prosecutor's counsel after this must be considered as a re-examination & therefore prosecutor's counsel cannot ask anything that does not arise out of the previous examination by prisoner's counsel.—*R. v. BEEZLEY* (1830), 4 C. & P. 220.

**2857.** ———.]—*Qu.*: whether the counsel for the prosecution, who, at the instance of the counsel for prisoner, calls a witness, whose name is on the back of the bill, but does not ask him a question, is entitled to examine such witness after he has been examined by the counsel for prisoner.

*Semble*: he is.—*R. v. HARRIS & WOODS* (1836), 7 C. & P. 581.

**2858.** ———.]—In criminal cases, the counsel for the prosecution may content himself with putting into the box a witness whose name is on the back of the bill, without asking him any questions on the part of the prosecution.

**2851 i. Discretion of judge to call witness.**—If counsel for the Crown does not call some of the witnesses whose names are on the back of the indictment, the ct. has discretion to call the witnesses itself in such case.—*R. v. SINCLAIR* (1905), 25 N. Z. L. R. 266.—*N.Z.*

**2860 i. Witness called by defence—Becomes witness for defence.**—If counsel for the Crown does not call some of the witnesses whose names are on the back of the indictment, & counsel for prisoner calls them, this will make

them prisoner's witnesses, & counsel for the Crown will have the right of reply.—*R. v. SINCLAIR* (1905), 25 N. Z. L. R. 266.—*N.Z.*

**2863 i. Right of accused to names & addresses of.**—*R. v. KROWN* (prior to 1816), cited 1 Cox, C. C. at p. 393.—*IR.*

**t. Error in Christian name.**—An objection to a witness, that he was not the individual specified in the list annexed to the indictment, was repelled, the only error being one of

*Semble*: it is better that he should be examined, whether his evidence be favourable to the prosecution or not, as the only object of the investigation is to discover the truth.—*R. v. BULL* (1839), 9 C. & P. 22.

**2859. Accused may insist on witness being called—By prosecution.**—Where there are witnesses on the back of the indictment who have not been called, prisoner may insist on their being put into the box as the witnesses of the Crown, in order that they may be cross-examined on his behalf.—*R. v. BARLEY* (1847), 9 L. T. O. S. 24; 11 J. P. 247; 2 Cox, C. C. 191.

**2860. Witness called by defence—Becomes witness for defence.**—*R. v. WOODHEAD*, No. 2841, *ante*.

**2861.** ———.]—**Right of reply.**—*R. v. CASSIDY*, No. 2842, *ante*.

**2862. Name of relative of accused included.**—It is no objection to a witness's name being put on the back of an indictment for murder, that he is the brother of prisoner; & if he was present at the time the wound was given, & was examined at the inquest, & that not at the instance of prisoner, it seems his name should be on the back of the indictment.—*R. v. CHAPMAN* (1838), 8 C. & P. 558.

*Annotations*:—*Mentd.* *R. v. Guttridge, Goodwin & Fellows* (1840), 9 C. & P. 228; *R. v. Scalfie* (1841), 9 Dowl. 553; *R. v. Andrews* (1844), 2 Dow. & L. 10.

**2863. Right of accused to names & addresses of.**—The ct. refused to grant a rule, calling upon the prosecutor of an indictment for a conspiracy to furnish to deff. the names & additions of the witnesses on the back of the bill of indictment, even though it was sworn by him that he was totally unacquainted with those persons, & that he had reason to believe that they had been improperly procured & suborned for the purpose of the prosecution.—*R. v. GORDON* (1842), 2 Dowl. N. S. 417; 12 L. J. M. C. 84; 6 Jur. 990.

*Annotation*:—*Refd.* *R. v. O'Connell* (1844), 5 State Tr. N. S. 1.

**2864.** ———.]—*Semble*: a witness may refresh his memory from notes taken in writing by a policeman from the lips of the witness, which have been read over to & signed by the witness. But after looking at them he must speak from a refreshed recollection, not from the notes only.

A prisoner indicted for felony is not entitled to a list of the names & addresses of the witnesses on the back of the indictment, but he will be allowed to inspect the indictment for the purpose of seeing the names of such witnesses (*ERLE, J.*).—*R. v. LACEY* (1848), 3 Cox, C. C. 517; *sub nom.* *R. v. CUFFEY*, 7 State Tr. N. S. 467; 12 J. P. 807.

**2865.** ———.]—*R. v. DOWLING*, No. 2829, *ante*.

(b) *Witnesses not on the Back of the Indictment.*

**2866. Should be called if able to give material evidence.**—*R. v. ORCHARD* (1838), 8 C. & P. 559, n.

**2867. Discretion of judge to call.**—On a trial for murder, every person who was present at the time of the transaction which gives rise to the charge, ought to be called as a witness on

his Christian names, which need not have been given.—*H.M. ADVOCATE v. MATHESON* (1837), 1 Swin. 593.—*SCOT.*

#### PART VII. SECT. 7, SUB-SECT. 7.—D. (b).

**a. In general.**—An agent of the A.G. may call witnesses at the trial on behalf of the Crown who were not called at the preliminary hearing, & whose names were not indorsed upon the charge.—*R. v. MCCLAIN* (1915),

*Sect. 7.—The hearing: Sub-sect. 7, D. (b) & (c) & E. (a).]*

the part of the prosecution; for even if they give different accounts, the jury should hear the evidence, & draw their own conclusions as to the truth. Therefore, where the widow & daughter of the deceased were present at the time when the fatal blow was supposed to have been given, & the widow was examined as a witness, the judge directed the daughter to be called by counsel for the prosecution, although she had been brought to the assizes by the other side, & her name was not on the back of the indictment.

On a trial for murder it appeared that three surgeons had examined the body of the deceased, & that there was a difference of opinion among them. Two of them were called for the prosecution, but the third was not, & as his name was not on the back of the indictment, the counsel for the prosecution declined calling him, though he was in ct. The judge directed him to be called, & he was examined by his lordship at the conclusion of the case for the prosecution.—*R. v. HOLDEN* (1838), 8 C. & P. 606.

*Annotation:—Reid. R. v. Edwards, Underwood & Edwards* (1848), 11 L. T. O. S. 50.

**2868.** ———.]—On the trial of an indictment for a rape, prosecutrix, a servant, stated that she made almost immediate complaint to her mistress, & that on the next day a washerwoman washed her clothes, on which were blood. Neither the mistress nor the washerwoman were under recognisance to give evidence, nor were their names on the back of the indictment, but they were at the assizes attending as witnesses for prisoner. The judge directed that both the mistress & the washerwoman should be called by counsel for the prosecution, but said that he should allow counsel for the prosecution every latitude in their examination.—*R. v. STRONER* (1845), 1 Car. & Kir. 650.

**2869.** ———.]—The ct. refused, on the application of prisoner's counsel, to call a witness who had not been called by the prosecution.—*R. v. WIGGINS* (1867), 31 J. P. 728; 10 Cox, C. C. 562.

**2870.** ——— If not called, should be available.]—Where a prisoner charged with larceny has given two different accounts of the way in which he became possessed of the stolen property, it is not incumbent on prosecutor to call as witnesses persons who, in one of the statements, he says could prove his innocence, with a view of disproving that statement; but it may be prudent in prosecutor to have these persons in attendance at the trial, though he does not call them, to avoid the effect of the observations by prisoner, or his counsel,

30 W. L. R. 388; 7 W. W. R.

**CAN.**

**b. Requested by defence to call.]—**Accused, being on trial on a charge of conspiring with prisoner & others to assist prisoner to escape from prison, prisoner not being named as a Crown witness on the back of the indictment, nor included in the list of witnesses intended to be called by the Crown, an application was made to the trial judge by counsel for the accused for an order directing that prisoner be called as a witness for the Crown, or, in the alternative, called by a judge & examined as a witness, & was refused, counsel for the Crown undertaking that counsel for the accused should have full opportunity to interview prisoner in order to decide whether or not to call him as a witness for the defence.—*R. v. HAGEL & WESTLAKE* (1914), 27 W. L. R. 271.—**CAN.**

**c. When called by prosecution—**

that these persons could prove prisoner's innocence, but that he has not the means of procuring their attendance.—*R. v. DIBLEY* (1849), 2 Car. & Kir. 818.

**(c) Additional Evidence.**

**2871. General rule—Evidence not given before justices.]—**Material evidence may be given against a prisoner on his trial, in addition to what appears, from the depositions, to have been given against him before the magistrates. But, it is only fair that prisoner's counsel should be apprised of the character of such evidence.—*R. v. WARD* (1848), 2 Car. & Kir. 759; 12 L. T. O. S. 6; 12 J. P. 554; 3 Cox, C. C. 279.

*Annotation:—Mentd. Dawes v. Hawkins* (1860), 7 Jur. N. S. 262.

**2872. Notice to accused of additional evidence—& name of witness.]—**Where additional evidence has been obtained on the part of the prosecution, after the return of the depositions & committal of the prisoner, he is not entitled either to copies of such evidence or a list of the witnesses. He may, however, look at the bill in ct.—*R. v. CONNOR* (1845), 5 L. T. O. S. 433; 9 J. P. 330; 1 Cox, C. C. 233.

**2873.** ———.]—If on the trial of a prisoner it is intended to produce witnesses which were not examined before the committing magistrate, the prosecution should give notice to prisoner of their names & the substance of what is expected they will prove.

This is the practice of the Central Criminal Ct., which is the principal criminal ct. in the kingdom & should be followed by all inferior cts.—*R. v. STIGINANI* (1867), 10 Cox, C. C. 552.

*Annotation:—Consd. R. v. Greenslade* (1870), 11 Cox, C. C. 412.

**2874.** ———.]—A witness, whose evidence is relevant, may be called by the prosecution, although he has not been before the magistrates & although his name & the substance of his evidence had not been given to prisoner or his attorney.—*R. v. GREENSLADE* (1870), 11 Cox, C. C. 412.

**2875.** ———.]—*R. v. WARD*, No. 2871, *ante*.

**2876.** ———.]—*Ex p. CASTRO* (1873), 37 J. P. Jo. 260.

**2877.** ——— Effect of failure to give.]—*R. v. FLANNAGAN & HIGGINS*, No. 2624, *ante*.

**E. Reading Deposition of Absent Witness.**

**(a) In General.**

See Indictable Offences Act, 1848 (c. 42), s. 17, & Criminal Law Amendment Act, 1867 (c. 35), s. 6.

**2878. Proof of admissibility—Must appear on face of deposition—Extraneous proof inadmissible.]**

by the prosecution.—*R. v. BROWN* (1869), 6 W. W. & A'B. 239.—**AUS.**

**PART VII. SECT. 7, SUB-SECT. 7.—E. (a).**

**d. Proof of admissibility.]—**Where a deposition has been tendered in evidence in the prosecution at the trial of an accused person & proof has been given that deponent is dead, that the deposition was taken in the presence of accused, & that the latter had full opportunity of cross-examining deponent. Such deposition is then admissible in evidence against such accused person without further proof being given that it has been read over to the deponent before he has signed it.—*R. v. BRANSCOMBE* (1921), 21 S. R. N. S. W. 363.—**AUS.**

**2878.1. ——— Must appear on face of deposition—Extraneous proof inadmissible.]—**On an indictment for larceny the Crown gave in evidence the

*Should be examined by prosecution.]—*On a trial for rape, counsel for prosecution produced & tendered for examination, on the part of prisoner, a person whose name was not indorsed on the indictment.—*Held:* the production of the witness in such manner, without examination on the part of prosecution was irregular.—*R. v. ALEXANDER* (1841), 2 Craw. & D. 126.—**IR.**

**PART VII. SECT. 7, SUB-SECT. 7.—D. (c).**

**2877.1. Notice to accused of additional evidence—Effect of failure to give.]—**It is a rule of practice to be observed in all cts. to which prisoners are committed not to permit the examination of witnesses, the knowledge of whose evidence has been withheld from prisoner till the trial. *Semble:* such examination may be allowed where a very strong excuse to the satisfaction of the presiding judge is put forward

—The deposition of a witness absent from illness, to be admissible under Indictable Offences Act, 1848 (c. 42), s. 17, must be regular, & appear to have been regularly taken upon the face thereof, & cannot be proved by extraneous evidence to have been properly taken in fact.—*R. v. MILLER* (1850), 4 Cox, C. C. 166.

**2879. — Onus on prosecution.]**—Before a deposition of a person who is dead, or so ill as not to be able to travel, can be read on the trial, under Indictable Offences Act, 1848 (c. 42), s. 17, it must be proved affirmatively on the part of the prosecution that the deposition was taken in the presence of the accused person, & that he or his counsel or attorney had a full opportunity of cross-examining the witness.

To render the deposition of an absent person admissible it is not necessary that he should be absolutely unable to travel, it is sufficient if his attendance would place his life in jeopardy.—*R. v. DAY* (1852), 19 L. T. O. S. 35; 6 Cox, C. C. 55.

**2880. Sufficiency of mode of taking—In absence of prisoner.]**—An examination of a witness was taken on the 28th in the absence of prisoner, & then signed by the magistrate. On the 29th prisoner was brought up, & the deposition taken & signed on the previous day was read in his presence, & that of the other prisoners, & an opportunity given him for cross-examination.

Subsequently the witness died:—*Held*: her deposition so taken was admissible in evidence as against prisoner absent at the time that it was taken.—*R. v. HAKE* (1845), 1 Cox, C. C. 226.

**2881. —.]**—A deposition of a deceased witness, partly taken from the examination of the witness in the presence of the party accused on a previous day, & not then read over but read over on a subsequent examination of the witness in the presence of the party accused, the witness then being further examined, & cross-examined on behalf of the party accused, & the notes of the magistrate's clerk of the whole being subsequently fair copied in an adjoining room, & then read over to the witness in the presence of the party accused & signed by the witness & the magistrate:—*Held*: to be admissible.—*R. v. BATES* (1860), 2 F. & F. 317.

**2882. — Not taken by committing magistrate.]**—A deposition taken by virtue of Indictable Offences Act, 1848 (c. 42), s. 17, may be read in evidence against prisoner, although taken before two magistrates who acted only upon that occasion, & prisoner was afterwards committed for trial by another magistrate.—*R. v. DE VIDIL* (1861), 9 Cox, C. C. 4.

*Annotations:—Consd. Ex p. Huguet* (1873), 29 L. T. 41; *Re Guerin* (1888), 58 L. J. M. C. 42.

deposition of a witness which referred to a chattel alleged to have been stolen by prisoner, & which the witness identified when making the deposition. The Crown then offered evidence to prove that the chattel produced was the same as that referred to in the deposition. The ct. rejected the evidence.—*R. v. MULLINS*, 3 J. R. N. S. 56.—**N.Z.**

**g. — Not on face of deposition.]**—The statement of deceased, taken on oath by a magistrate, detailing the circumstances under which a felony was committed upon him, is admissible in evidence on the trial of accused, though it does not appear on its face to have been taken in the presence of accused, it being proved that it was taken in his presence.—*R. v. MILLAR* (1861), 5 All. 87.—**CAN.**

**1. Sufficiency of mode of taking—**

*Evidence not on oath or affirmation—Presence of accused.]*—Prisoner having been arrested on a charge of poisoning S., a magistrate took down in writing the deposition of S., & then swore him to the truth of it. Prisoner being then brought into the room, the magistrate slowly read over the deposition to S., & asked him if it was true, & having been answered in the affirmative, he then reswore S. to his deposition in the presence of prisoner, & read over the information of S. to him. Prisoner put several questions to deponent which, with the answers of the latter thereto, were at the time reduced to writing & annexed to the deposition. Deponent having died, the entire document was read in evidence on the part of the Crown at the trial of prisoner:—*Held*: the evidence was inadmissible both because the informa-

**2883. —.]**—*R. v. REES* (1888), *Times*, Dec. 20.

**2884. — Signature of magistrate.]**—Robbery with violence to the person. Deceased afterwards dying, the deposition is admissible on the charge of murder, not indeed as a dying deposition, but as made in the presence of both prisoners with full opportunity of cross-examination. The fact that the whole of the depositions are signed by the magistrate is sufficient although the actual deposition is not signed.

A statement made by the one prisoner on the charge of robbery is evidence against the other prisoner on the charge for murder.—*R. v. LEE* (1864), 4 F. & F. 63.

*Annotations:—Consd. R. v. Edmunds* (1909), 25 T. L. R. 658. *Refd. R. v. Parker* (1870), L. R. 1 C. C. R. 225.

**2885. — Evidence not on oath or affirmation.]**—On a charge preferred under sect. 4 of the Criminal Law Amendment Act, 1885 (c. 69), for carnally knowing a girl under the age of thirteen years, the magistrates before whom the preliminary investigation took place, being of opinion that the prosecutrix did not understand the nature of an oath, received as evidence her unsworn statement, as provided for by the 4th section of the Act, & signed & returned her statement so made, with the depositions, to the assizes.

At the trial it was proposed, after proving that the prosecutrix was so ill as to be unable to travel or to attend to give evidence at the assizes, to tender in evidence her statement so made before the magistrates, as being a deposition within the meaning of sect. 17 of Indictable Offences Act, 1848 (c. 42):—*Held*: sect. 17 of Indictable Offences Act, 1848 (c. 42), only applies to depositions taken upon oath or affirmation; & a statement made under the circumstances of this case was not a deposition "taken as aforesaid"—i.e., on oath or affirmation within the meaning of sect. 17 of Indictable Offences Act, 1848 (c. 42)—so as to render it admissible as evidence in the absence of the prosecutrix.—*R. v. PRUNTEX* (1888), 16 Cox, C. C. 344.

**2886. Presumption of "full opportunity"—Evidence in rebuttal admissible.]**—Where it is proved that prisoner was present when the depositions of deceased were taken although the law will presume that, as he was present, he had a "full opportunity" within Indictable Offences Act, 1848 (c. 42), s. 17, evidence may nevertheless be offered to prove that he had not a "full opportunity" within s. 17 so as to render the depositions inadmissible.—*R. v. PEACOCK* (1870), 12 Cox, C. C. 21.

*Annotation:—Refd. R. v. Shurmer* (1886), 2 T. L. R. 737.

**2887. Sufficiency of deposition—Witness &**

tion was originally taken down without an oath having been previously administered to the informant, & also because prisoner was not present from the commencement.—*R. v. WALSH* (1850), 5 Cox, C. C. 115.—**IR.**

**g. Cross-examination by accused.]**—*R. v. MILLOY* (1883), 6 L. N. 95.—**CAN.**

**h. —.]**—At a preliminary inquiry before a magistrate on a charge of indecent assault on a female, the latter's depositions were taken, prisoner being represented by counsel, but before her cross-examination was concluded the proceedings were adjourned to a fixed date on account of her illness. On the day to which adjournment had been made, the magistrate went out to the residence of the witness, & obtained her signature to her

*Sect. 7.—The hearing: Sub-sect. 7, E. (a), (b) & (c) i.]*

**accused with imperfect knowledge of language.]—***R. v. JONES* (1885), 49 J. P. 728.

**2888. — Criminal Law Amendment Act, 1867 (c. 35), s. 6, not complied with.]—***R. v. SIMPSON* (1898), 62 J. P. 825.

*Annotation:—***Reid.** *R. v. Holloway* (1901), 65 J. P. 712.

**2889. —**—A deposition of a dying person was taken by a magistrate at a hospital in the presence of the accused person, & all the requirements of Indictable Offences Act, 1848 (c. 42), s. 17, were complied with:—**Held:** that deposition was admissible in evidence on the trial of the accused person for murder, although the requirements of Criminal Law Amendment Act, 1867 (c. 35), s. 6, had not been complied with.—*R. v. KATZ* (1900), 64 J. P. 807; 17 T. L. R. 67.

*Annotations:—***Reid.** *R. v. Lees* (1907), 71 J. P. Jo. 342; *R. v. Bros* (Metropolitan Police Mag.), *Ex p. Hardy* (1910), 27 T. L. R. 41; *R. v. Harris* (1918), 82 J. P. 196.

**2890. — Place where evidence taken omitted.]—**A deposition of a dying person taken under Criminal Law Amendment Act, 1867 (c. 35), s. 6, is not admissible in evidence unless it states the place where it is taken.—*R. v. CURTIS* (1904), 21 T. L. R. 87.

**2891. Necessity for notice to accused—Criminal Law Amendment Act, 1867 (c. 35), s. 6.]—**Q. was charged on an indictment with the wilful murder of D., his wife. The injuries which resulted in the death of D. were inflicted by prisoner on Dec. 18, 1867; D., his wife, died on Dec. 23; but Q., prisoner, was not taken into custody till Jan. 3, 1868. On Dec. 22, 1867, the day before D., the wife, died, D. made a statement which was taken down in writing in the presence of the magistrate.

At the trial it was proposed on behalf of the prosecution to give this statement in evidence under above Act, which section provides that whenever it is made to appear to the satisfaction of a magistrate that any person dangerously ill, & in the opinion of a registered medical man not likely to recover, is able to give material information, & it shall not be practicable to take the examination in accordance with Indictable Offences Act, 1848 (c. 42), s. 17, it shall be lawful for the justice to take in writing the statement on oath of such person, etc., & if on the trial such person be dead, it may be read, provided it be proved to the satisfaction of the ct. that notice of the intention to take such statement has been served upon the person against whom it is proposed to be read in evidence, & he had, or might have had, an opportunity of cross-examining the deceased person who made the statement:—**Held:** the proviso overrode

the whole section, & the statement could not be read in evidence without proof of notice having been given to the accused, before it was taken; & the statute could have no operation in the case of a deposition taken while the accused person was keeping out of the way, as the notice was required to be given to the accused before the taking of the statement, & not simply before the reading of it.—*R. v. QUIGLEY* (1868), 18 L. T. 211.

**2892. — Notice in writing.]—**The above sect. provides in cases of indictable offences for the taking of the statements on oath or affirmation of persons dangerously ill & not likely to recover, & for the reading of the same in evidence under certain circumstances, "provided it be proved to the satisfaction of the ct., *inter alia*, that reasonable notice of the intention to take such statement has been served upon the person, whether prosecutor or accused, against whom it is proposed to be read in evidence:—**Held:** the notice intended by the sect. is a notice in writing, & such a statement was inadmissible against a prisoner where he had only had oral notice of the intention to take the same, although he was present when the statement was taken.—*R. v. SIURMER* (1886), 17 Q. B. D. 323; 55 L. J. M. C. 153; 55 L. T. 126; 50 J. P. 743; 34 W. R. 656; 2 T. L. R. 737; 16 Cox, C. C. 94, C. C. R.

*Annotation:—***Reid.** *R. v. Harris* (1918), 82 J. P. 196.

**2893. Inadmissible evidence—To be omitted.]—**When a deposition contains statements that are not evidence, the ct. may, on such deposition being put in & read at the trial, order such parts as contain such inadmissible statements to be excluded & not read to the jury.

Where deft. gives evidence on his own behalf, counsel for another deft. cannot ask him further questions on behalf of his client without giving the prosecution the right of reply. But if the evidence given by the witness has been hostile to another deft.; counsel for such deft. has the right to cross-examine without giving such right of reply.—*R. v. PAGET* (1900), 64 J. P. 281.

**2894. —**—On Dec. 5, 1906, a coroner's jury returned a verdict of wilful murder against prisoner. A witness called before the coroner committed suicide immediately after the inquest, & before the preliminary inquiry before the magistrates, which took place on Dec. 11, 1906, when the accused was committed for trial on the charge of wilful murder.

Prisoner had been present at the coroner's inquest & had been represented there by a solr., who had cross-examined the witness in question. The deposition of this witness as taken by the coroner contained statements made to the witness

depositions as already taken, neither prisoner nor his counsel being present, & afterwards resumed the inquiry at his own office, prisoner being present, but not the witness, & on the evidence already taken prisoner was committed for trial. At the trial the witness was proved to be too ill to attend, & her depositions taken as above were tendered by the Crown & admitted:—**Held:** the depositions were improperly received in evidence, prisoner's counsel not having had a full opportunity of cross-examining the witness.—*R. v. TREVANNE* (1902), 22 C. L. T. 385; 4 O. L. R. 475; 1 O. W. R. 587; 6 Can. Crim. Cas. 124.—**CAN.**

**k. Accused not assisted by counsel.]—**Where the accused was not assisted by counsel when the deposition was taken:—**Held:** it would not properly be received in evidence against him & as there was no other evidence nothing was to be gained by requiring another

trial.—*R. v. SNELGROVE* (1906), 39 N. S. R. 400.—**CAN.**

**l. Where no objection by defence—Duty of judge.]—**Prisoner was tried with a jury upon an indictment for rape, & seduction. After giving evidence at the preliminary hearing the girl upon whom the crime was alleged to have been committed died. On the trial, counsel for the Crown, without proving the evidence of the girl taken on the preliminary hearing, & without objection from counsel for prisoner, read to the jury from his brief what purported to be a copy of the girl's evidence. The jury found prisoner guilty on the first count. On a stated case as to whether the trial judge should have allowed the girl's evidence to be read:—**Held:** though counsel for prisoner neglects to object, it is the duty of the judge in a criminal case to see that proper evidence only is before the jury, & the prisoner

should be discharged.—*R. v. POWELL* (1919), 27 B. C. R. 252.—**CAN.**

**m. Sufficiency of deposition—On more serious charge.]—**Accused was charged with a certain offence at a police ct. & was then brought to a room where a witness was lying dangerously ill & was again charged & informed that witness was about to give evidence. The deposition of the witness was then taken. Subsequently accused was committed for trial on the offence charged before the same justice:—**Held:** the deposition was taken on a preliminary or other investigation within Justices Act, 1902, s. 409 (3), & was admissible in evidence on the trial of the accused for an offence of a more serious nature.—*A.-G. of NEW SOUTH WALES v. JACKSON* (1906), 3 C. L. R. 730.—**AUS.**

**n. Evidence in preliminary trial—Subsequent death of witness.]—**In the proceedings before a magistrate on a



in prisoner's absence:—*Held*: on proof of the death of such witness & that such deposition had been duly signed both by the coroner & the witness, & that prisoner was present & had full opportunity of cross-examining such witness by her solicitor, the deposition was admissible at the subsequent trial of prisoner at assizes, but such portions as were obviously hearsay, or on other grounds inadmissible as legal evidence, should not be read to the jury.—*R. v. COWLE* (1907), 71 J. P. 152.

*Annotation*:—*Refd.* *R. v. Black* (1909), 74 J. P. 71.

**2895. Consent of prosecutor necessary—To reading of deposition.**—The deposition of a witness for the prosecution, who has gone to sea, cannot be read in evidence on the part of prisoner, without consent on the part of the prosecutor, but with such consent it may be.—*R. v. HAGAN* (1837), 8 C. & P. 167.

*Annotations*:—*Folld.* *R. v. Hunt* (1847), 2 Cox, C. C. 261. *Consd.* *R. v. Austen* (1856), 7 Cox, C. C. 55.

**2896. Mere absence insufficient.**—If the deposition of a witness on charge of an indictable offence has been regularly taken before a magistrate, & at the time of trial such witness is dead or so ill as not to be able to travel, the deposition may be read as evidence against prisoner. So also if it be proved that the witness is kept away by prisoner's procurement. But such deposition is not admissible on the ground, merely, that the prosecutor, after using every possible endeavour, cannot find the witness. If procurement of the absence be shown, & there are several prisoners, the deposition is evidence against those only who are proved to have procured the absence.—*R. v. SCAIFE* (1851), 17 Q. B. 238; 2 Den. 281; 4 New Sess. Cas. 731; 20 L. J. M. C. 229; 17 L. T. O. S. 152; 15 J. P. 581; 15 Jur. 607; 5 Cox, C. C. 243; 117 E. R. 1271.

*Annotations*:—*Refd.* *R. v. Bertrand* (1867), L. R. 1 P. C. 520; *R. v. Murphy* (1869), L. R. 2 P. C. 535; *R. v. Duncan* (1881), 7 Q. B. D. 198; *R. v. Hampshire* (1887), 3 T. L. R. 712; *R. v. Simpson, Ex p. Smithson* (1913), 110 L. T. 67.

**2897.**—*]*—A deposition taken before a magistrate on a charge of felony against prisoner, cannot be read in evidence against him on his trial, merely because the witness is absent, & resident in a foreign country.—*R. v. AUSTIN* (1856), Dears. C. C. 12; 25 L. J. M. C. 48; 26 L. T. O. S. 261; 20 J. P. 54; 2 Jur. N. S. 95; 4 W. R. 237; 7 Cox, C. C. 55, C. C. R.

charge of causing grievous hurt, two witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. Prisoners were committed for trial. Subsequently the person assaulted died in consequence of the injuries inflicted on him. At the trial, before the judge, charges of murder & of culpable homicide not amounting to murder were added to the charge of grievous hurt. The deposition of the deceased witness was put in & read at the Sessions trial:—*Held*: the evidence was admissible, notwithstanding the additional charges before the Sessions Ct.—*Re ROCHIA MOHATO*, *R. v. ROCHIA MOHATO* (1881), 1 L. R. 7 Calc. 42; 8 C. L. R. 273.—**IND.**

**o.** ———. *]*—Where a witness for the prosecution was examined before a committing magistrate, but was not cross-examined, & then died before the case came on for trial to the Sessions Ct., & his deposition was tendered in evidence at the trial:—*Held*: the deposition was admissible.—*R. v. BASVANTA* (1900), 1 L. R. 25 Bom. 168.—**IND.**

**p.** ———. *Witness abroad.*—If it can be satisfactorily proved that a Crown

witness is out of Canada his depositions on a preliminary inquiry are admissible under Criminal Code, s. 999, & may constitute the corroboration of a charge required under sect. 1002.—*R. v. BERRY* (1922), 39 Can. Crim. Cas. 127; 55 N. S. R. 247.—**CAN.**

#### PART VII. SECT. 7, SUB-SECT. 7.— E. (b).

**q. General rule.**—When the admissibility of a deposition is in question at a criminal trial, all relevant questions of fact are to be determined by the presiding judge, & his decision is conclusive unless it is manifestly not warranted by the evidence.—*A.-G. of NEW SOUTH WALES v. JACKSON* (1906), 3 C. L. R. 730.—**AUS.**

**2899 i. Discretion is absolute.**—Upon a prosecution for uttering forged notes, the deposition of one S., taken before the police magistrate on the preliminary investigation was read, upon proof that S. was absent from Canada:—*Held*: the admissibility of the deposition was in the discretion of the judge at the trial.—*R. v. NELSON* (1882), 1 O. R. 500.—**CAN.**

**2899 ii.** ———. *]*—Where a witness could not be found after diligent search, the

#### (b) Discretion of Judge.

**2898. General rule—May postpone trial.**—Where in a criminal case a witness for the prosecution is so ill as not to be able to travel, the judge may, at his discretion, permit the deposition to be read to the jury, under Indictable Offences Act, 1848 (c. 42), s. 17, or postpone the trial to the next assizes.—*R. v. TAIT* (1861), 2 F. & F. 553.

**2899. Discretion is absolute.**—*R. v. STEPHENSON*, No. 2907, *post*.

#### (c) Absence caused by Illness.

##### i. In General.

*See* Indictable Offences Act, 1848 (c. 42), s. 17.

**2900. Sufficiency of reason—Inability to attend assizes—Bedridden.**—On the trial of a case of felony where the prosecutor is bedridden & not likely to be ever able to attend the assizes his dispositions taken by the committing magistrate in the presence of the prisoner may be given in evidence.—*R. v. WILSHAW* (1841), Car. & M. 145.

**2901.** ———. *Danger to life sufficient.*—*R. v. DAY*, No. 2879, *ante*.

**2902.** ———. *]*—A witness, who had been examined before the committing magistrate, came to the assize town where the ct. was sitting, but before the trial came on returned to his home by the advice of a medical man, who deposed that in his judgment it would have been highly dangerous for the witness to remain. While the trial was going on the witness was on his way home:—*Held*: the witness was "unable to travel" within the meaning of Indictable Offences Act, 1848 (c. 42), s. 17, & consequently his deposition before the committing magistrate might be read in evidence.—*R. v. WICKER* (1854), 18 Jur. 252.

**2903.** ———. *Too ill to give evidence—Not too ill to travel.*—If a witness has had an attack of paralysis & is unable to hear or speak or give evidence, & his physician does not permit him to go about, his deposition may be read under Indictable Offences Act, 1848 (c. 42), s. 17, though it would not endanger his life to travel or be brought into ct.—*R. v. COCKBURN* (1857), Dears. & B. 203; 26 L. J. M. C. 136; 29 L. T. O. S. 114; 21 J. P. 358; 3 Jur. N. S. 447; 5 W. R. 570; 7 Cox, C. C. 265, C. C. R.

**2904.** ———. *]*—A witness who had been examined, before the magistrate, & whose deposition was returned, was at the trial, said to be too

ct. in a trial for murder refused to allow the witness's depositions, which contained evidence of an alleged conversation to be read to the jury, although in the ct. below accused had been legally represented & the witness had been cross-examined at considerable length.—*R. v. BALFOUR*, [1918] C. P. D. 386.—**S. AF.**

#### PART VII. SECT. 7, SUB-SECT. 7.— E. (c) i.

**r. Sufficiency of reason—Benefit of health.**—The depositions, taken before justices, of a medical witness, who was absent from the trial of a prisoner on account of having to go to Sydney for the benefit of his health:—*Held*: admissible.—*R. v. PENN* (1871), 2 Q. S. C. R. 177.—**AUS.**

**2901 i.** ———. *Danger to life sufficient.*—On the evidence of a medical man that a witness, who lived 40 miles from the ct. expected her confinement, & that it would be dangerous to her life to attend ct., her deposition was admitted in evidence:—*Held*: it was rightly received.—*R. v. WEBSTER & WELLS* (1880), 1 N. S. W. L. R. 331.—**AUS.**



*Sect. 7.—The hearing: Sub-sect. 7, E. (c) i. & ii., (d) & (e).]*

ill to give evidence, though not too ill to be able to travel. His deposition was read.—*R. v. WILSON* (1861), 8 Cox, C. C. 453.

**2905. Sufficiency of evidence—Whether medical evidence essential.**—Where in a criminal case a witness is ill, & is attended by a surgeon, the judge at the trial will not receive the witness's deposition in evidence under Indictable Offences Act, 1848 (c. 42), s. 17, unless the surgeon attend at the trial to prove that the witness is unable to travel. But where a witness is permanently disabled & is not attended by a surgeon, other evidence that the witness is unable to travel may be sufficient.—*R. v. RILEY* (1851), 3 Car. & Kir. 116.

**2906.** ———.]—In the absence of medical evidence, deposition not allowed to be read.—*R. v. WELTON* (1862), 27 J. P. 24; 9 Cox, C. C. 296.  
*Annotation:—Consd. R. v. Noakes, [1917] 1 K. B. 581.*

**2907.** ———.]—Upon the trial of prisoner for obtaining money by false pretences, it was proved, by a female servant & the brother of the prosecutrix, that she was daily expecting her confinement, & the latter stated that she was "poorly otherwise," & was, therefore, too ill to travel.—*Held:* upon this evidence Indictable Offences Act, 1848 (c. 42), s. 17, authorised the presiding judge to receive the depositions of the prosecutrix taken before the committing magistrate. There may be incidents, with regard to parturition, to bring the case within the statute. It is in the discretion of the presiding judge to determine whether the evidence of illness is sufficient. It is not necessary in such case to produce medical evidence.—*R. v. STEPHENSON* (1862), Le. & Ca. 165; 31 L. J. M. C. 147; 6 L. T. 334; 26 J. P. 484; 10 W. R. 546; 9 Cox, C. C. 156; *sub nom. R. v. STEVENSON*, 8 Jur. N. S. 522, C. C. R.  
*Annotation:—Apld. R. v. Noakes, [1917] 1 K. B. 581.*

**2908.** ———.]—The deposition of a married woman was allowed to be read on the trial of a case of felony, on the evidence of her husband, without medical evidence, that she was, from pregnancy, unable to travel.—*R. v. CROUCHER* (1862), 3 F. & F. 285.

**2909.** ———.]—Indictable Offences Act, 1848 (c. 42), s. 17, provides that, if upon the trial of an indictment it shall be proved by "any credible witness" that a person whose deposition shall have been taken before a justice is "so ill as not to be able to travel," the deposition may be read as evidence in the prosecution.—*Held:* the credible witness need not be a medical man.—*R. v. NOAKES*, [1917] 1 K. B. 581; 86 L. J. K. B. 594; 116 L. T. 705; 81 J. P. 140; 33 T. L. R. 201; 61 Sol. Jo. 284; 25 Cox, C. C. 722; 12 Cr. App. Rep. 204, C. C. A.

**2910.** ———.]—**No evidence as to nature of illness.**—A superintendent of police, having seen a policeman, a material witness, in bed two days before the trial, & stating that he appeared ill, & so weak that he could not get out of bed:—*Held:* this, without medical evidence, or any evidence as to the nature of the illness, was not sufficient to admit the policeman's deposition.—*R. v. WILLIAMS* (1865), 4 F. & F. 515.

**2911.** ———.]—**Evidence must be recent.**—Upon the trial of a prisoner it was proposed to put in evidence the deposition of a witness absent through

illness. The evidence that he was unable to travel was that of a medical man, who last saw the witness on the Monday previous to the trial, which took place on Wednesday:—*Held:* this was not sufficient, & the deposition was rejected.—*R. v. BULL* (1871), 12 Cox, C. C. 31.

**2912.** ———.]—*R. v. FARRELL*, No. 2930, *post*.

**2913.** ———.]—**Evidence given before coroner—Admissibility of coroner's depositions.**—(1) Where a medical man testified that the attendance of a witness aged eighty-seven, who had given evidence before a coroner, would be dangerous to her life & that he would not answer for the consequences if she were required to appear in ct., but that she is suffering from no illness beyond great nervousness which may bring on a fit of apoplexy if she has publicly to give her evidence:—*Held:* her deposition taken before the coroner was not admissible.

(2) Where the deceased made certain statements first to a doctor & then to a nurse, both in the absence of prisoner, of a directly contradictory nature but both relating to certain wounds upon the deceased, which ultimately caused her death:—*Held:* although the names of both the witnesses were in the back of the indictment & both had been called before the grand jury, the prosecution were not bound to call such witnesses simply because their names were in the back of the indictment, & if the defence insisted on having the statement from the nurse which was favourable to prisoner's version of the affair given in evidence, the prosecution would then be entitled to give the other statement, the one to the doctor, in reply, as rebutting evidence.—*R. v. THOMPSON* (1876), 13 Cox, C. C. 181.

**2914.** ———.]—Proof by a police sergeant that a witness is apparently very close indeed to her confinement is not sufficient evidence of her inability to attend the ct. so as to allow her depositions taken before the coroner to be read. Coroner's depositions stand on the same footing as depositions taken before magistrates, & the provisions of Indictable Offences Act, 1848 (c. 42), apply.—*R. v. BUTCHER* (1900), 64 J. P. 808.

## ii. Particular Illnesses.

**2915. Pregnancy.**—The deposition of a witness who is so far advanced in pregnancy as to make her unfit to travel to the assize town cannot be read in evidence under Indictable Offences Act, 1848 (c. 42), s. 17, which makes the deposition admissible if it be proved that the person whose deposition shall have been taken "is so ill as not to be able to travel."—*R. v. OMANT* (1854), 6 Cox, C. C. 466.

**2916.** ———.]—*Qu.*: whether pregnancy & a confinement of women is an "illness" within the meaning of Indictable Offences Act, 1848 (c. 42), s. 17, so as to excuse their absence as witnesses if unable from that cause to travel, & enable their depositions to be read.—*R. v. WALKER* (1857), 1 F. & F. 534.

**2917.** ———.]—*R. v. STEPHENSON*, No. 2907, *ante*.

**2918.** ———.]—*R. v. PARKER & ASHWORTH* (1862), Archbold's Criminal Pleading, Evidence & Practice, 22nd ed. 342.

**2919.** ———.]—*R. v. CROUCHER*, No. 2908, *ante*.

**2920.** ———.]—It was proposed to read, on the trial at the assizes, the deposition of a witness called before the magistrates, on the same charge,

## PART VII. SECT. 7, SUB-SECT. 7.— E. (c) ii.

**2915 i. Pregnancy.**—The words "so ill as not to be able to travel" include

the case of a woman sworn by her husband to be not in a fit state to travel on account solely of approaching confinement, & a conviction supported

by the depositions of such an absent woman was affirmed by the ct.—*R. v. AH POCK* (1864), 1 W. W. & A'B. 127.—**AUS.**

now absent by reason of pregnancy. Evidence given by a doctor on Feb. 5, that he had last seen the witness on Jan. 29, & that she was then daily expecting her confinement, which had not yet taken place, was held to be sufficient to entitle deposition to be read at the trial on Feb. 5.—*R. v. HEESON* (1878), 14 Cox, C. C. 40.

**2921.** —.]—Pregnancy may create an "illness" within the meaning of Indictable Offences Act, 1848 (c. 42), s. 17, so as to give the presiding judge discretionary power to admit in evidence upon a criminal trial the deposition of a witness, duly taken, who owing to pregnancy is proved to be unable to travel.—*R. v. WELLINGS* (1878), 3 Q. B. D. 426; 47 L. J. M. C. 100; 38 L. T. 652; 42 J. P. 615; 26 W. R. 592; 14 Cox, C. C. 105, C. C. R.

**2922.** —.]—Pregnancy alone may be ground for the admission of a deposition.—*R. v. GOODFELLOW* (1879), 14 Cox, C. C. 326.

*Annotation:—Folld. R. v. Marsella* (1900), 17 T. L. R. 164.

**2923.** —.]—*R. v. BUTCHER*, No. 2914, *ante*.

**2924. Recent confinement.**—A witness who had been examined before the magistrates was absent, & it was proved that one week ago she had been delivered of a child & was still unable to travel:—*Held*: under Indictable Offences Act, 1848 (c. 42), s. 17, the deposition of such witness was admissible.—*R. v. HARVEY* (1850), 16 L. T. O. S. 513; *sub nom. R. v. HARNEY*, 14 J. P. 592; 4 Cox, C. C. 441.

**2925.** —.]—It must not be supposed that the fact of a woman having been delivered nine days ago constitutes an illness within the meaning of Indictable Offences Act, 1848 (c. 42), s. 17, but we have it in evidence that she was delivered of a dead child, which would tend to produce a morbid state of body, & her deposition may be read (*WILLES, J.*).—*R. v. WILTON* (1858), 1 F. & F. 309.

*Annotation:—Refd. R. v. Walker* (1859), 1 F. & F. 534.

**2926.** —.]—A recent confinement of a woman, which renders her unable to travel, is an illness within Indictable Offences Act, 1848 (c. 42), s. 17, so as to empower the judge at the trial to allow her deposition taken at the police ct. to be read.—*R. v. MARSELLA* (1900), 17 T. L. R. 164.

**2927. Bowel complaint.**—A witness, who had been examined before the magistrate, came up five miles from the country & gave her evidence before the grand jury. She went back at night & returned in the morning for two days, during which she was waiting for the trial to come on. At the trial, on the third day, it was proved that she had been attacked that morning with a bowel complaint, & that when the policeman left her residence early on that day, she was unable to travel:—*Held*: her evidence was not admissible, as the Common Sergeant was not satisfied that the witness was so ill as to be unable to travel.—*R. v. HARRIS* (1850), 16 L. T. O. S. 513; 14 J. P. 592; 4 Cox, C. C. 440.

**2928. Cold & inflammation.**—A witness who had been examined before the magistrate was proved, at the trial, to have been in bed the night before with a cold & inflammation, & that on a person calling at his house that morning he had been told that he was very bad:—*Held*: the deposition could not be read.—*R. v. ULMER & HOOPER* (1850), 16 L. T. O. S. 513; 4 Cox, C. C. 442; *sub nom. R. v. ULMER*, 14 J. P. 689.

**2929. "Usual winter complaint."**—A witness in bed a few days before the trial having, as he said, "his usual winter complaint," there being no evidence what that was, & whether it was more than a mere cold, & whether it still subsisted, or

would render it unsafe for him to travel, & no medical witness called, though a medical certificate, that a few days ago the witness was not in a fit state to attend proffered in evidence:—*Held*: there was not sufficient evidence within Indictable Offences Act, 1848 (c. 42), s. 17, that the witness was too ill to travel at the time of the trial.—*R. v. DENNIS* (1862), 3 F. & F. 502.

**2930. Nervousness.**—At the trial of an indictment it was proposed to read the deposition of a witness on the ground that the witness was so ill as not to be able to travel. The evidence upon that point was as follows: The medical attendant of the witness was called & said, "I know M. L. She is very nervous, & seventy-four years of age. I think she would faint at the idea of coming into ct., but I think that she could go to London to see a doctor without difficulty or danger. I think the idea of seeing so many faces would be dangerous to her, & that she is so nervous that it might be dangerous to her to be examined at all. I think she could distinguish between the ct. going to her house & she herself coming to the ct." The witness whose deposition it was proposed to read lived not far from the ct.:—*Held*: the deposition was not admissible.—*R. v. FARRELL* (1874), L. R. 2 C. C. R. 116; 43 L. J. M. C. 94; 30 L. T. 404; 38 J. P. 390; 22 W. R. 578; 12 Cox, C. C. 605, C. C. R.

*Annotation:—Folld. R. v. Thompson* (1876), 13 Cox, C. C. 181.

**2931.** —.]—*R. v. THOMPSON*, No. 2913, *ante*.

#### (d) *Insanity of Witness.*

**2932. General rule.**—*Qu.*: whether evidence of declarations of a pauper, dead or insane, relative to his settlement, be admissible?

In the two cases alluded to it was held that, when he is dead, his declarations may be received in evidence; & the being in a state of insanity, which introduces the same impossibility of producing him as if he were dead, makes the evidence equally admissible (*ASHURST, J.*).—*R. v. ERISWELL (INHABITANTS)* (1790), 3 Term Rep. 707; 100 E. R. 815.

*Annotations:—Consd. R. v. Hill* (1851), 2 Den. 254; *Haines v. Guthrie* (1884), 13 Q. B. D. 818. *Refd. R. v. Ferry Frystone* (1801), 2 East, 54; *Flgg v. Wedderburne* (1841), 11 L. J. Q. B. 45. *Mentd. Smith v. Edge* (1796), 6 Term Rep. 562; *Johnson v. Lawson* (1824), 2 Bing. 86; *Wright v. Doe d. Tatham* (1838), 7 L. J. Ex. 340; *R. v. Walsh* (1850), 5 Cox, C. C. 115; *Bird v. Keep*, [1918] 2 K. B. 692.

**2933.** —.]—*R. v. FERRY FRYSTONE (INHABITANTS)* (1801), 2 East, 54; 102 E. R. 289.

*Annotation:—Refd. R. v. Addingham* (1848), 12 Q. B. 63.

**2934.** —.]—If a witness is actually insane at the time of the trial of an indictment for a misdemeanour, his deposition, taken before the committing magistrate, is receivable in evidence, the same as if the witness were dead, although the insanity of the witness may be only temporary; but if it appear that the witness be not insane, but that the witness has been suffering from delirium & depression of spirits, in consequence of a blow on the head, & that his intellects are affected by the injuries he has received, but it be the opinion of his physician that he will recover, the deposition of the witness, taken before the committing magistrate, is not receivable in evidence.—*R. v. MARSHALL* (1841), Car. & M. 147.

#### (e) *Witness kept away by Accused.*

**2935. General rule.**—*R. v. MORLEY (LORD)* (1866), 6 State Tr. 770; Kel. 53; 1 Sid. 277; 84 E. R. 1079.

*Annotations:—Refd. R. v. Sealife & Rooke* (1851), 2 Den. 281. *Mentd. R. v. Mawgridge* (1706), Kel. 119; *R. v. Oneby* (1727), 1 Barn. K. B. 17.

*Sect. 7.—The hearing: Sub-sect. 7, E. (e), (f) & (g)*

**2936.** —.]—*R. v. HARRISON* (1692), 12 State Tr. 833.

*Annotations:—*Refd. *R. v. Scaife & Rooke* (1851), 2 Den. 231. *Mentd. R. v. Ball* (1910), 5 Cr. App. Rep. 238.

**2937.** —.]—In a case of rape, if it were proved on the part of the prosecution that the party alleged to have been ravished had been kept out of the way by the prisoners, the judge would allow her deposition before the magistrate to be given in evidence.—*R. v. GUTTRIDGE* (1840), 9 C. & P. 471.

*Annotations:—*Consd. *R. v. Lillyman*, [1896] 2 Q. B. 167. *Mentd. R. v. St. George* (1840), 9 C. & P. 483; *R. v. Scaife* (1841), 9 Dowl. 555; *R. v. Bird* (1851), 2 Den. 94.

**2938.** —.]—*R. v. SCAIFE*, No. 2896, *ante*.

(f) *Depositions before Coroners.*

See CORONERS, Vol. XIII., pp. 245, 256–258.

(g) *Deposition taken on a Different Charge.*

**2939. Charge on trial different from charge before justices—Same transaction—General rule.]**

—A deposition properly taken under Indictable Offences Act, 1848 (c. 42), before a magistrate against a prisoner on a charge of assault, is not receivable in evidence against him on a trial for feloniously wounding, although on both charges the transaction be the same, & the witness be too ill to attend the trial for the felony.

Such a deposition is only receivable in evidence where the indictment is for the same identical offence as that charged before the justice, & upon which such deposition was taken.—*R. v. LEDBETTER, JENKINS, BRAIN & GOODE* (1850), 3 Car. & Kir. 108.

*Annotations:—*Consd. *R. v. Dilmore* (1852), 19 L. T. O. S. 50; *R. v. Beeston* (1854), Dears. C. C. 405. *Refd. R. v. Paul* (1890), 25 Q. B. D. 202.

**2940. — Trial for murder—Deposition taken on less serious charge.]**—A deposition of the deceased was admissible in a case of murder, although taken when prisoner was charged with another offence.—*R. v. SMITH* (1817), Holt, N. P. 614; *Russ. & Ry.* 339; 2 Stark. 208, C. C. A.

*Annotations:—*Consd. *R. v. Hake* (1845), 1 Cox, C. C. 226; *R. v. Walsh* (1850), 5 Cox, C. C. 115; *R. v. Beeston* (1854), Dears. C. C. 405. *Refd. R. v. Christopher* (1850), 4 Cox, C. C. 76. *Mentd. Ex p. Bottomley*, [1909] 2 K. B. 14.

**2941. — — — —.]—Qu.: whether the deposition of a deceased person on a charge against prisoner of stabbing him can be read on a trial for the murder or manslaughter of the deceased.**—*R. v. DILMORE* (1852), 19 L. T. O. S. 50; 6 Cox, C. C. 52.

*Annotation:—*Refd. *R. v. Beeston* (1854), Dears. C. C. 405.

**2942. — — — —.]**—Prisoner was charged before a magistrate with feloniously wounding A. with intent to do him grievous bodily harm, & the deposition of A. was taken under Indictable Offences Act, 1848 (c. 42), s. 17. A. subsequently died of the wound, & prisoner was indicted for his murder:—*Held*: on the trial of prisoner for the murder the deposition of A. might be read in evidence; as, although the deposition was not taken

on the same technical charge as that for which the prisoner was indicted, it was in fact the same case, & prisoner had had full opportunity for cross-examination.

*Semble*: if the charge on the two occasions had been substantially different the deposition would not have been admissible.—*R. v. BEESTON* (1854), Dears. C. C. 405; 24 L. J. M. C. 5; 24 L. T. O. S. 100; 18 J. P. 728; 18 Jur. 1058; 3 W. R. 56; 3 C. L. R. 82; 6 Cox, C. C. 425, C. C. R.

*Annotations:—*Consd. *R. v. Galvin* (1865), 10 Cox, C. C. 198. *Foldd. R. v. Edmunds* (1909), 25 T. L. R. 658.

**2943. — — — —.]**—*R. v. LEE*, No. 2884, *ante*.

**2944. — — — —.]**—Prisoner was indicted for murder, & it was suggested by the prosecution that the motive of prisoner was to get rid of the deceased, who was a witness against him for an assault for which he had been committed for trial, but acquitted, in consequence of the absence of the deceased. The deposition of the deceased taken upon the original charge of assault was tendered, in order to show that the deceased was a material witness:—*Held*: the deposition being taken prior to the passing of Indictable Offences Act, 1848 (c. 42), s. 17, was not admissible.—*R. v. SHIPPEY* (1871), 12 Cox, C. C. 161.

**2945. — — — —.]**—In order to prove malice or motive against the accused, the deposition of the accused against him, taken before the magistrates on another charge & for which he was afterwards convicted, was tendered in evidence:—*Held*: admissible.—*R. v. BUCKLEY* (1873), 13 Cox, C. C. 293.

**2946. — — — —.]**—Prisoner was indicted for the murder of a woman. At his trial the deposition of the woman, which was taken at a time when it was expected that she would recover & prisoner was being charged with attempted murder, was given in evidence:—*Held*: the deposition was properly admitted.—*R. v. EDMUNDS* (1909), 25 T. L. R. 658; 2 Cr. App. Rep. 257, C. C. A.

**2947. — Trial for uttering forged document—Deposition taken on charge of obtaining money by false pretences.]**—Where a prisoner is charged before a magistrate with obtaining money by false pretences, & afterwards indicted for uttering a forged promissory note, the charges arising out of one & the same transaction & being in fact identical, & prisoner having had the opportunity of cross-examination before the magistrate:—*Held*: the deposition of a witness taken at such hearing, & who was afterwards unfit to travel to give evidence, was admissible & might be read at the trial for uttering the forged promissory note.—*R. v. WILLIAMS* (1871), 12 Cox, C. C. 101.

#### *F. Statement of the Accused at Preliminary Examination.*

See Indictable Offences Act, 1848 (c. 42).

**2948. General rule—Put in by prosecution.]**—(1) Where upon a criminal trial counsel for the defence calls prisoner as a witness under the provisions of Criminal Evidence Act, 1898 (c. 36),

their consideration upon the question of the existence of a motive:—*Held*: the documents were properly admitted in evidence for that purpose.—*R. v. LYDANE* (1858), 8 Cox, C. C. 38.—*IR.*

#### **PART VII. SECT. 7, SUB-SECT. 7.—F.**

*t. When not in writing—Admissibility of parol evidence.]*—If prisoner's declaration before a magistrate has not been taken in writing, parol evidence of it is admissible.—*R. v.*

#### **PART VII. SECT. 7, SUB-SECT. 7.—E. (g).**

*s. Former charge quite distinct.]*—Prisoner was tried in 1858, for the murder of M. in 1857. In 1856, M. had sworn informations against prisoner for rape. It was proved at the trial that the informations were sworn by her, & subscribed by her in the presence of prisoner, & that then a recognisance was executed for prisoner to appear at the Assizes, 1856.

Prisoner married M. before the Assizes, & consequently the charge was not proceeded with. At the trial in 1858, the informations so sworn, & the recognisances, were offered in evidence by the Crown. The judge received them, telling the jury that they were to regard them, not as evidence of the truth or falsehood of the charge so made, but as evidence of the fact of a charge having been made; & that the facts evinced by the mere existence of those documents might be taken into

but calls no other evidence, the right of the prosecuting counsel to sum up the evidence against prisoner is not extinguished, but is merely postponed until after prisoner has given his evidence. In exercising his right of summing up, the counsel for the prosecution is entitled to comment upon the evidence given by prisoner.

(2) Under the provisions of Indictable Offences Act, 1848 (c. 42), prisoner charged with an indictable offence is cautioned, & any statement made by him after such caution is taken down, & it is the invariable course at his subsequent trial, whether such statement tells for him or against him, to put it in as part of the case for the prosecution, treating it not as evidence, but as a statement made by the prisoner; & it is further a most ordinary thing for counsel to point out inconsistencies apparent in the statement (LORD RUSSELL, C.J.).—*R. v. GARDNER*, [1899] 1 Q. B. 150; 68 L. J. Q. B. 42; 79 L. T. 358; 62 J. P. 743; 47 W. R. 77; 15 T. L. R. 26; 43 Sol. Jo. 30; 19 Cox, C. C. 177, C. C. R.

**2949. Admissibility—Whether further proof necessary.**—The prosecutor proved, that when prisoner was before the magistrate she was duly cautioned, & that she made a statement, which was taken down & read over to her, to which she made her mark, the magistrate also signing it. The prosecutor identified the paper by his own signature to his own deposition, being on the same sheet of paper:—*Held*: prisoner's statement might be given in evidence without examining either the magistrate or his clerk.—*R. v. HEARN* (1841), Car. & M. 109.

**2950.** ———.]—*Semble*: the statement before the magistrate of an accused person, though taken in the form given in Indictable Offences Act, 1848 (c. 42), is not admissible without further proof under sect. 18 of that statute, unless the requisites contained in the proviso to that section have been inserted in the form, or proved to have been fulfilled.—*R. v. KIMBER* (1849), 13 J. P. 122; 3 Cox, C. C. 223.

*Annotation*:—*Refd.* *R. v. Sansome* (1850), 1 Den. 545.

**2951.** ———.]—*Semble*: before a statement made by a prisoner in the presence of & duly signed by the committing magistrate can be received in evidence against him, proof must be given that he was cautioned in the manner provided by Indictable Offences Act, 1848 (c. 42), s. 18, *dehors* any declaration to that effect contained in the caption of the statement itself.—*R. v. HIGSON* (1849), 2 Car. & Kir. 769.

**2952.** ———.]—Where a statement made by a prisoner before the committing magistrates appears on the face of it to have been duly taken under Indictable Offences Act, 1848 (c. 42), s. 26, & is at the trial produced from the depositions of the witnesses taken at the same time, & appears to have been transmitted with them, it is receivable in evidence without further proof.—*R. v. HARRIS* (1849), 13 L. T. O. S. 509; 4 Cox, C. C. 147.

**2953.** ———.]—You ask me for the statement; I hand it down, taking notice that it is in the proper form & that it has been duly transmitted by the justices to the proper officer of the ct.; for if it appears to have been so transmitted, & there is nothing shown to the contrary, then it is to be assumed to have been duly taken according to, & within the meaning of, the recent statute, & therefore no further evidence is necessary (ERLE,

J.).—*R. v. HUNT* (1849), 13 L. T. O. S. 509; 4 Cox, C. C. 149, n.

**2954.** ———.]—The examination of prisoner taken by the magistrate in form 11, given in the schedule to Indictable Offences Act, 1848 (c. 42), & duly returned to the ct., is admissible without proof of the signature of the magistrate, or of compliance with the proviso in sect. 18 of that statute.—*R. v. STEEL* (1849), 13 J. P. 606.

*Annotation*:—*Refd.* *R. v. Sansome* (1850), 3 Car. & Kir. 332.

**2955.** ———.]—On Oct. 24 prisoner, when before the committing magistrate, & after being cautioned by him in the manner prescribed by Indictable Offences Act, 1848 (c. 42), s. 18, made a statement, which was taken down in writing, but not signed by him or by the magistrate. He was remanded, & on Oct. 31 brought again before the magistrate; no new witnesses were examined, but prisoner's attorney put some questions to a witness who had been examined before. Prisoner was again cautioned, but declined to make any statement:—*Held*: the statement made on Oct. 24 was admissible in evidence at the trial.—*R. v. BOND* (1850) 1 Den. 517; 3 Car. & Kir. 337, n.; T. & M. 242 4 New Mag. Cas. 133; 4 New Sess. Cas. 143 19 L. J. M. C. 138; 13 J. P. 796; 14 J. P. 288; 14 Jur. 399; 4 Cox, C. C. 231, C. C. R.

*Annotations*:—*Refd.* *R. v. Thomas* (1850), 14 J. P. 513.

*Mentd.* *R. v. Faderman* (1850), 4 Cox, C. C. 359.

**2956.** ———.]—A statement made by a prisoner before a committing magistrate, & signed by prisoner & the magistrate, if taken in the form prescribed by the schedule to Indictable Offences Act, 1848 (c. 42), is admissible in evidence against him at his trial at common law; & *semble*: under above statute, without proof of the magistrate's signature.—*R. v. SANSOME* (1850), 3 Car. & Kir. 332; 1 Den. 545; T. & M. 260; 4 New Mag. Cas. 80; 4 New Sess. Cas. 152; 19 L. J. M. C. 143; 15 L. T. O. S. 119; 14 J. P. 273; 14 Jur. 466; 4 Cox, C. C. 203, C. C. R.

*Annotation*:—*Refd.* *R. v. Hertfordshire JJ.* (1910), 80 L. J. K. B. 437.

**2957.** ———.]—**Statement made without previous caution.**—A statement elicited from a prisoner by questions put to him without any previous caution by a magistrate, before whom he is brought in custody upon a criminal charge is not admissible against him in evidence at his trial.—*R. v. PETTIT* (1850), 4 Cox, C. C. 164.

*Annotation*:—*Refd.* *Ibrahim v. R.*, [1914] A. C. 599.

**2958.** ———.]—**Statement in answer to question by magistrate.**—After the investigation before a magistrate on a charge of concealment of birth & after the accused had been cautioned in the usual manner & had stated that she had nothing to say, but before her actual committal, the presiding magistrate asked her what she had done with the body of the child:—*Held*: her statement in answer was not admissible.—*R. v. BERRIMAN* (1854), 6 Cox, C. C. 388.

*Annotation*:—*Refd.* *Ibrahim v. R.*, [1914] A. C. 599.

**2959.** ———.]—**To contradict defence set up on trial.**—Prisoner made his defence before the committing magistrate, & on his trial he relied on matter of excuse wholly repugnant to his former statement. That former statement had not been given in evidence in the case for the prosecution, & therefore the ct. would not allow it to be read afterwards to contradict the defence set up on trial.—*R. v. POWELL* (1842), Car. & M. 500.

**2960. Whether evidence.**—The reading, on the part of the prosecution, of prisoner's statement,

FARRELL (1841), Arm. M. & O. 72.—*IR.*  
u. Prisoner's signature—In forgery.]

—The signature of a prisoner to the Statement of Accused at the preliminary hearing may be tendered as

evidence against him at his trial on a charge of forgery.—*It. v. GOLDEN* (1905), 11 B. C. R. 349.—CAN.

*Sect. 7.—The hearing: Sub-sect. 7, F.; sub-sect. 8,*

returned by the magistrate at the end of the depositions, does not give prisoner the right to consider the depositions as in evidence on the part of the prosecution, though it appear that they were all taken before the statement was made; but if prisoner wishes to have the whole or any particular part of the depositions read, he must read it as his evidence.—*R. v. PEARSON & BROOKS* (1837), 7 C. & P. 671.

**2961.** —.]—Prisoner's statement before the magistrate cannot, when tendered generally, be received as evidence on his behalf. Prisoner's statement is evidence against him, but not for him. But what he said, before the magistrate, he may repeat through his counsel.—*R. v. HAINES* (1858), 1 F. & F. 86.

#### SUB-SECT. 8.—THE DEFENCE.

##### A. Order.

**2962. Joint indictment.]**—When several prisoners are defended by different counsel, the order of their defences is not to be determined by the seniority of their counsel at the bar, but on the precise offence charged against each; & in a well-drawn indictment, the order in which the prisoners should be called on for their defence usually coincides with the order of their names in the indictment.—*R. v. MEADOWS* (1856), 2 Jur. N. S. 718.

**2963.** —.]—Where several persons are indicted for the same offence, the order in which they should be called on to make their defence is not determined by the order in which their names stand in the indictment.—*R. v. HOLMAN & POPLETT* (1857), 3 Jur. N. S. 722.

**2964.** —.]—Where two prisoners were indicted for the same offence, with a second count charging one of them as accessory after the fact, the prisoner named first in the indictment, though he had no counsel, was heard in his defence before the other prisoner, who was defended by counsel.—*R. v. THOMAS & HARRIS* (1857), 3 Jur. N. S. 272.

**2965.** —.]—Where two prisoners were indicted, one for larceny, & the other as receiver of the stolen property, the latter of whom was defended by counsel, & the former not:—*Held*: the counsel for the receiver should make his defence first.—*R. v. BELTON & GREENGOW* (1859), 5 Jur. N. S. 276.

**2966. Order of speeches for defence—Where more than one accused—In discretion of judge—Not by seniority of counsel.]**—On the trial of a cause it is in the discretion of the judge to say

in what order the counsel for different defts., having different interests shall cross-examine & address the jury. The order of seniority is not imperative.—*FLETCHER v. CROSBIE* (1842), 2 Mood. & R. 417, N. P.

**2967.** — — — **Order of names in indictment.]**—Where the counsel for several prisoners cannot agree as to the order in which they are to address the jury, the ct. will call upon them, not in the order of their seniority, but in the order in which the names of the prisoners stand in the indictment. But where the counsel for one prisoner has witnesses to fact to examine, the counsel for another cannot be allowed to postpone his address to the jury until after those witnesses have been examined.—*R. v. BARBER* (1844), 1 Car. & Kir. 434; 8 J. P. 644; *sub nom.* *R. v. RICHARDS, BARBER, FLETCHER & DOREY*, 3 L. T. O. S. 142; 1 Cox, C. C. 62.

*Annotation*:—*Refd.* *R. v. Rowlands* (1851), 5 Cox, C. C. 436.

**2968.** — — — **Order of professional standing.]**—*R. v. ESDAILE* (1858), 1 F. & F. 213.

*Annotation*:—*Mentd.* *R. v. Charlesworth* (1861), 1 B. & S. 460.

**2969.** — — — **One of two undefended—Undefended prisoner first.]**—If two defts. are indicted for a conspiracy, the judge will, under certain circumstances, permit one of defts., who conducts his own case, to cross-examine before the counsel for the other deft., & after the conclusion of prosecutor's case, to address the jury & call his witnesses, before the counsel for other deft. opens his case.

A witness who is subpoenaed by a deft. indicted for a conspiracy, is compellable to give evidence, though such deft. refuses to pay his expenses; & the indictment having been removed by *certiorari*, & coming down to the assizes as a civil record, does not make any difference as to this.—*R. v. COOKE & JENKINSON* (1824), 1 C. & P. 321.

**2970.** — — — —.]—Where one prisoner was indicted for stealing, & the other for receiving, & the receiver was defended by counsel, but the principal felon was undefended, the ct. called upon the principal to make his statement to the jury before the counsel for the receiver was permitted to address them.—*R. v. MARTIN & BUTT* (1848), 3 Cox, C. C. 56.

**2971.** — — — **Defended prisoner first.]**—Where two prisoners are jointly indicted, & the second in the indictment only is defended by counsel, the latter will be permitted to address the jury before the other makes his statement, notwithstanding the rule established in *R. v. Barber*, No. 2967, *ante*.—*R. v. HAZELL & BIRD* (1847), 2 Cox, C. C. 220.

**2972.** — — — —.]—*R. v. BALFOUR* (1895), *Times*, Oct. 29.

#### PART VII. SECT. 7, SUB-SECT. 8.—A.

**v. Where three defended—Counsel for two ignorant of form of accusations.]**—A., B. & C. were charged on a joint presentment with conspiracy to defraud. A. gave evidence on his own behalf & called witnesses. B. gave evidence on his own behalf, but called no witnesses & did not cross-examine any of A.'s witnesses. C. gave no evidence & called no witnesses, & made at the trial no unworn statement, but did ask a few questions of one of A.'s witnesses. The evidence given affected all the accused, who were separately represented by counsel. On the point of order in which, after the close of the evidence, counsel should address the jury:—*Held*: the general rule that where upon a joint presentment

one prisoner calls evidence which is applicable to the others, the Crown has a right of general reply, is correct, & should usually be adhered to, but the rule is not inflexible &, in the peculiar circumstances of this case, counsel for B. & C. being really unaware of the way in which the facts would be presented against their respective clients counsel for A. should first address the jury followed by counsel for the Crown, counsel for B. & counsel for C. in that order.—*R. v. ORTON*, [1922] V. L. R. 469.—**AUS.**

**a. Where one accused calls no witnesses.]**—A. & B., being jointly charged with intent to commit a felony, A. was represented by counsel but B. was not. The Crown evidence was that A. & B. had committed the

offence in company, A. having a revolver at the time. A. gave evidence in his own behalf in support of an *alibi*, but was the only witness called by the defence in his own case. B. & B.'s wife both gave evidence on B.'s behalf in support of an *alibi*. A. counsel elicited from B. in cross-examination the statement that A. & B. were not in company at the time of the alleged joint offence, & from B. wife the statement that A. had openly shown to various persons a revolver which was found at his residence, which it was suggested might be the revolver above referred to:—*Held* the order of the concluding address should be: First, B.; secondly, prosecutor for the King; thirdly, counsel for A.—*R. v. CANAN*, [1918] V. L. R. 390. **AUS.**

*B. Conduct of Defence in General.*

**2973. Opening the case—Counsel calling witnesses has right to open his case.]**—Counsel who intends to call witnesses for the defence other than deft. has an absolute right to open his case to the jury.—*R. v. HILL* (1911), 7 Cr. App. Rep. 1, C. C. A.

**2974. Right to cross-examine co-defendant—Right of reply by prosecution.]**—*R. v. PAGET*, No. 2893, ante.

**2975. —.]**—When one prisoner gives evidence on oath inculcating another charged on a joint indictment, he is liable to be cross-examined by or on behalf of that other.—*R. v. HADWEN*, [1902] 1 K. B. 882; 71 L. J. K. B. 581; 86 L. T. 601; 66 J. P. 456; 50 W. R. 589; 18 T. L. R. 555; 46 Sol. Jo. 464; 20 Cox, C. C. 206, C. C. R.

*Annotations:—***Reid.** *R. v. Hunting & Ward* (1908), 1 Cr. App. Rep. 177; *R. v. Macdonnell* (1909), 2 Cr. App. Rep. 322; *R. v. Paul*, *R. v. McFarlane*, [1920] 2 K. B. 183.

**2976. Right to cross-examine witnesses for co-defendant.]**—Upon the trial of A., B. & C. for a conspiracy, where after the case on the part of the prosecution is closed, C. only calls witnesses & examines as to a conversation between himself & A., the counsel for the Crown may cross-examine such witnesses as to any other conversation between A. & C., although the evidence tend chiefly to criminate A.—*R. v. KROEHL* (1818), 2 Stark. 343.

**2977. — No right of defence to reply.]**—If one of two joint defts. calls witnesses, the counsel for the other deft. may cross-examine such witnesses, & then the counsel for the prosecution may cross-examine them. But the counsel for the other deft. cannot again address the jury upon such evidence.—*R. v. PAINTER & DAVIS* (1849), 13 J. P. 381.

**2978. — Right of defence to reply.]**—On the trial of two prisoners, jointly indicted for manslaughter, & separately defended, witnesses were called on the part of one of the prisoners, for the purpose of showing that the death of the deceased had been caused by the act of the other:—**Held:** the counsel for the latter had a right both to cross-examine such witnesses, & to reply upon their evidence.—*R. v. WOOD* (1853), 6 Cox, C. C. 224; 17 J. P. 714.

*Annotation:—***Consd.** *R. v. Hadwen*, [1902] 1 K. B. 882.

**2979. —.]**—Where two prisoners are jointly indicted, & a witness called by one of them, gives evidence criminatory of the other, the latter has a right, by himself or his counsel, to cross-examine that witness & address the jury in reply upon the evidence so given.—*R. v. BURDETT* (1855), *Dears.* C. C. 431; 24 L. J. M. C. 63; 6 Cox, C. C. 458; *sub nom.* *R. v. LUCK*, 24 L. T. O. S. 280; 19 J. P. 87; 1 Jur. N. S. 119; 3 W. R. 246; 3 C. L. R. 440, C. C. R.

*Annotations:—***Consd.** *R. v. Hadwen*, [1902] 1 K. B. 882.

**Reid.** *Allen v. Allen*, [1894] P. 248. **Mentd.** *Parnell v. G. W. Ry.* (1876), 34 L. T. 126.

**PART VII. SECT. 7, SUB-SECT. 8.—B.**

**b. Opening the case—Must address jury before witnesses examined.]**—Prisoner's counsel must, if at all, address the jury before he examines witnesses for the defence, & cannot be allowed to do so afterwards.—*MANNIX'S CASE* (1841), *Ir. Clr. Rep.* 163.—**IR.**

**c. — Right to address jury—After right waived.]**—Prisoner's counsel held entitled to address the jury after having gone into his defence, the Crown having produced a witness to contradict the testimony of one of prisoner's witnesses, although, when the case for the Crown had closed, he had waived his right to address the jury.—*MURPHY'S CASE* (1841), *Ir.*

*Clr. Rep.* 117.—**IR.**

**d. Right to alternative defence.]**—There is nothing in law to prevent a man on his trial on a charge of culpable homicide from setting up an alternative defence.—*It. v. YUSUF HUSAIN* (1918), 1 L. R. 40 All. 284.—**IND.**

**e. Accused undefended—Jury addressed by accused.]**—Where an accused is undefended at the trial, the judge must be careful to point out to the jury the leading points in favour of the defence, but where the accused has himself made an elaborate address to the jury & has refused throughout a long trial to have counsel an Appellate Ct. should not be astute in finding points overlooked by the trial judge in his charge.—*R. v. KELLY* (1916),

**2980. —.]**—*R. v. COPLEY*, No. 3109, *post*.

**2981. —.]**—The evidence of one party cannot be received as evidence against another party in the same litigation unless the latter has had an opportunity of testing it by cross-examination.

It appears to us to be contrary to all rules of evidence, & opposed to natural justice, that the evidence of one party should be received as evidence against another party, without the latter having an opportunity of testing its truthfulness by cross-examination. In the case of prisoners jointly charged with an offence, the jury are always most carefully warned that what one may say inculcating the other, is not evidence against that other. The reason is because one prisoner cannot cross-examine another, & therefore, their statements condemnatory of each other, unassailable by cross-examination, would be valueless. But when two prisoners are jointly indicted, & a witness called by one gives evidence criminatory of the other, the latter has a right by himself or his counsel to cross-examine that witness (*LOPES, L.J.*).—*ALLEN v. ALLEN*, [1894] P. 248; 63 L. J. P. 120; 70 L. T. 783; 42 W. R. 549; 10 T. L. R. 456; 6 R. 597, C. A.

*Annotations:—***Consd.** *R. v. Hadwen*, [1902] 1 K. B. 882; *Brown v. Brown*, [1915] P. 83. **Reid.** *Hensley v. Hensley & Nevins* (1920), 122 L. T. 814; *Mourilyan v. Mourilyan*, *Mourilyan v. Mourilyan & Fazil* (1922), 127 L. T. 403. **Mentd.** *De Gasquet James v. Mecklenburg-Schwerin*, [1914] P. 53.

**2982. Witness for prosecution recalled—Right to cross-examine.]**—Where, after the examination of witnesses to fact on behalf of a prisoner, the judge, there being no counsel for prosecution, calls back & examines a witness for the prosecution, the prisoner's counsel has a right to cross-examine again if he thinks it material.—*R. v. WATSON* (1834), 6 C. & P. 653.

**2983. Taking objections—Technical objections must be taken at the trial.]**—Technical objections must be taken at the trial.—*R. v. PAYNE* (1909), 3 Cr. App. Rep. 259, C. C. A.

**2984. Defence of insanity—Must be raised at the trial.]**—*R. v. ATHERLEY*, [1909] 3 Cr. App. Rep. 165, C. C. A.

**2985. —.]**—Where deft. deliberately refuses to raise the defence of insanity at the trial the ct. will not allow him to raise it on appeal.—*R. v. SIMPSON* (1910), 75 J. P. 56; 5 Cr. App. Rep. 217, C. C. A.

**2986. — Counsel must not quote opinions of medical men from books.]**—Where a plea of insanity is set up, the prisoner's counsel has no right in his address to the jury to quote the opinions of medical men as given in their works.—*R. v. CROUCH* (1844), 3 L. T. O. S. 186; 9 J. P. 10; 1 Cox, C. C. 94.

**2987. Conduct of counsel for defence—Jury to**

35 W. L. R. 46; 11 W. W. R. 46.—**CAN.**

**f. Discretion of judge—Postponement of cross-examination.]**—A judge in a criminal case may in his discretion postpone the cross-examination of a witness.—*It. v. CHUBB* (1863), 2 N. S. W. S. C. R. 282.—**AUS.**

**g. Taking objections.]**—Where prisoner is defended by counsel, any objection to the charge of the presiding judge, either for non-direction or for misdirection, must be taken at the trial, & if not then taken it cannot be afterwards raised, especially where the evidence fully sustains the verdict.—*R. v. FICK* (1866), 16 C. P. 379.—**CAN.**

**h. Names of witnesses—Should be lodged in court.]**—The name & designa-



*Sect. 7.—The hearing: Sub-sect. 8, B., C., D. & E.]*

**take law from judge.]**—The jury should take the law from the judge; & therefore, where cases had been cited to the judge on a legal argument, & he had given an opinion on them, they were not allowed to be read to the jury in the address of the prisoner's counsel to them.—*R. v. PARISH* (1837), 8 C. & P. 94.

**2988. Must not suggest recommendation to mercy.]**—It is improper for counsel for a prisoner to suggest to a jury to recommend a prisoner to mercy.—*R. v. MCINTYRE* (1847), 2 Cox, C. C. 379.

**2989. Discretion of counsel—When instructed to set up two inconsistent defences.]**—If counsel is instructed to set up two inconsistent defences, he is entitled to use his discretion as to which he will put forward.—*R. v. DENOEL* (1916), 85 L. J. K. B. 1756; 114 L. T. 1215; 32 T. L. R. 473; 25 Cox, C. C. 429; 12 Cr. App. Rep. 49, C. C. A.

**2990. Summing up by counsel—Right to make observations on whole case.]**—*R. v. WAINWRIGHT* (1875), 13 Cox, C. C. 171.

*Annotation:—Refd. R. v. Christie, [1914] A. C. 545.*

#### *C. No Evidence to go to Jury.*

**2991. Meaning of "evidence to go to jury."]**—The meaning of the phrase "evidence to go to the jury" is such evidence that if the jury found in favour of the party for whom it was offered, the ct. would not upset the judgment.—*PARRATT v. BLUNT & CORNFOT* (1847), 9 L. T. O. S. 103; 2 Cox, C. C. 242.

**2992. Duty of defending counsel—To make submission in a proper case.]**—In a proper case counsel for the defence ought to submit, at the close of the case for the Crown, that there is no evidence to go to the jury.—*R. v. WHITE* (1918), 13 Cr. App. Rep. 211, C. C. A.

**2993. Duty of judge—To withdraw case on submission—If no case.]**—When at the close of the evidence for the prosecution there is no case to go to the jury, the ct. on a submission, ought to withdraw the case from them.—*R. v. LEACH* (1909), 2 Cr. App. Rep. 72, C. C. A.

**2994. May withdraw case where no submission made.]**—(1) Prisoner was convicted on an indictment charging him with burglary, larceny, & receiving, & sentenced to twelve months' imprisonment with hard labour. On an appeal from the conviction:—*Held*: as the evidence only justified a verdict of guilty on the count for receiving, the ct. would reduce the sentence to six months, as it could not feel confident that the sentence of twelve months would have been imposed had the jury found the prisoner guilty of receiving only.

(2) If at the close of the case for the prosecution the judge considers that there was no evidence to go to the jury, he might, on his own initiative, stop the case, but, in the absence of a submission on behalf of prisoner that the case ought not to go to the jury, he was not in law bound to stop it.

(3) Where the case proceeds & evidence is given for the defence which is evidence against the prisoner, & on which he is convicted the ct. will not quash the conviction on the ground that there was no evidence against the prisoner in the case for the prosecution.—*R. v. GEORGE* (1908),

73 J. P. 11; 25 T. L. R. 66; 1 Cr. App. Rep. 168, C. C. A.

*Annotations:—As to (2) Refd. R. v. Leach* (1909), 2 Cr. App. Rep. 72. *As to (3) Follid. R. v. Jackson* (1910), 74 J. P. 352. *Refd. R. v. Fraser* (1911), 76 J. P. 168; *R. v. Power*, [1919] 1 K. B. 572.

**2995. ———.]**—J. was indicted for stealing. At the close of the case for the Crown there was no evidence against him, but he made no submission to that effect, & the judge who tried the case did not withdraw it from the jury. J. then called evidence on behalf of the defence, which afforded evidence of his guilt, & he was convicted.—*R. v. JACKSON* (1910), 74 J. P. 352; 5 Cr. App. Rep. 22, C. C. A.

**2996. Where case left to jury—Although no evidence to go to jury—Whether evidence called for defence can be regarded.]**—*R. v. GEORGE*, No. 2994, *ante*.

**2997. ———.]**—J., who was a breeder of pheasants, left his cottage on Dec. 28, at 3.15 a.m., with nothing in his hands. Three hours later he returned carrying a sack containing eleven tame pheasants. J. was tried for larceny, & the case for the prosecution consisted of the above facts given in evidence by the police who were watching J.'s cottage. No one was called to prove that he had lost any live tame pheasants. J.'s counsel submitted that there was no evidence of larceny to go to the jury; but this contention was overruled & J. was convicted:—*Held*: (1) there was no evidence of larceny to go to the jury; (2) counsel for prisoner having taken the point, at the close of the case for the prosecution, that there was no evidence to go to the jury, the Ct. of Criminal Appeal would not look to see whether any evidence of larceny was elicited subsequently in the case for the defence.—*R. v. JOINER* (1910), 74 J. P. 200; 26 T. L. R. 265; 4 Cr. App. Rep. 64, C. C. A.

*Annotations:—N.F. R. v. Fraser* (1911), 7 Cr. App. Rep. 99; *R. v. Power*, [1919] 1 K. B. 572.

**2998. ———.]**—*R. v. JACKSON*, No. 2995, *ante*.

**2999. ———.]**—There was no sufficient evidence when the case for the prosecution closed to be left to the jury. . . . Of course, if the evidence for the defence supported what was wanting the ct. would not interfere (*LORD ALVERSTONE, C.J.*).—*R. v. PEARSON* (No. 1) (1908), 72 J. P. 449; 1 Cr. App. Rep. 77, C. C. A.

*Annotations:—Refd. R. v. Howells & Allen* (1908), 1 Cr. App. Rep. 197; *R. v. Fraser* (1911), 7 Cr. App. Rep. 99; *R. v. Power*, [1919] 1 K. B. 572.

**3000. ———.]**—Where an objection is taken by counsel unsuccessfully, & he then calls evidence, this ct. is not bound to disregard the effect of that evidence (*LORD ALVERSTONE, C.J.*).—*R. v. FRASER* (1911), 76 J. P. 168; 7 Cr. App. Cas. 99, C. C. A.

*Annotation:—Follid. R. v. Power*, [1919] 1 K. B. 572.

**3001. ———.]**—Where at the close of the case for the prosecution it is submitted that there is no evidence to support the charge, but the judge rules that there is a case to answer & evidence adversely affecting the prisoner is then given for the defence, the Ct. of Criminal Appeal, even if they consider that the judge's ruling was wrong, are not bound to disregard the effect of the evidence for the defence, & will not quash the conviction on the ground that the evidence for the prosecution

tion of every witness to be examined for the defence must be duly lodged with the Clerk of Justiciary, & notice by letter to the Crown officers of the intention to examine such witnesses is not sufficient.—*H.M. ADVOCATE v.*

*MUR (or MURE)* (1858), 3 Irv. 280.—**SCOT.**

#### **PART VII. SECT. 7, SUB-SECT. 8.—C.**

**k. Duty of judge—To withdraw**

case.]—A judge has no power, in the absence of statutory authority, to withdraw a case from the hands of the jury after prisoner has been arraigned.—*R. v. LAMBERT & HAYWARD* (1915), S. R. 213.—**S. AF.**



disclosed no case if it has been sufficiently supplemented by the evidence for the defence.—*R. v. POWER*, [1919] 1 K. B. 572; 88 L. J. K. B. 593; 120 L. T. 577; 83 J. P. 124; 35 T. L. R. 283; 26 Cox, C. C. 399; 14 Cr. App. Rep. 17, C. O. A.

**3002.** ———.—*R. v. HOGAN*, No. 1937, ante.

**3003. Joint trial—Submission upheld as to one accused—Time for acquittal & discharge.]**—In an action of tort against several, if there be evidence against some only, & none against others, it is discretionary with the judge at *nisi prius*, whether he will direct the acquittal of such defts., against whom there is no evidence, at the close of pltf.'s case, for the purpose of making them witnesses for co-defts. But such an intermediate acquittal is not a matter which defts.' counsel can claim of right.—*DAVIS v. LIVING* (1816), Holt, N. P. 275, N. P.

**3004.** ———.—*A co-deft. against whom pltf. has given no evidence, has no right to an acquittal to be made a witness, until all the other evidence for defts. is finished.*—*WRIGHT v. PAULIN* (1824), Ry. & M. 128, N. P.

**3005.** ———.—*CARPENTER v. JONES* (1828), Mood. & M. 198, n.

*Annotation:—Refd. Leach v. Wilkinson* (1836), 1 Mood. & R. 537.

**3006.** ———.—*A person jointly indicted with another under Prevention of Cruelty to, & Protection of, Children Act, 1889 (c. 44), s. 7, but against whom no case is made out, is, nevertheless, not entitled to be discharged at the close of the case for the prosecution where the other person charged elects to give evidence.*—*R. v. MARTIN* (1889), 17 Cox, C. C. 36.

#### *D. Accused as a Witness.*

**3007. Should be informed of right to give evidence.]**—A prisoner ought to be distinctly told that he has a right to give evidence on his own behalf.—*R. v. WARREN* (1909), 73 J. P. 359; 25 T. L. R. 633; 2 Cr. App. Rep. 194, C. O. A.

*Annotation:—Refd. R. v. Graham* (1922), 17 Cr. App. Rep. 40.

**3008. — Whether omission to do so ground for quashing conviction.]**—An undefended prisoner should always be informed of his right to give evidence on oath or to make an unsworn statement to the ct., but a mere omission on the part of the judge to inform him of this right is not a ground for quashing a conviction.—*R. v. YELDHAM* (1922), 128 L. T. 28; 27 Cox, C. C. 315; 17 Cr. App. Rep. 18, C. C. A.

**3003 i. Joint trial—Submission upheld as to one accused—Time for acquittal & discharge.]**—Where no evidence appears against one of several prisoners he ought to be acquitted at the close of prosecutor's case.—*R. v. HAMBLEY* (1859), 16 U. C. R. 617.—**CAN.**

**1. — Discretion of judge.]**—The judge is not bound to order acquittal of one of prisoners joined in an indictment at the close of the case for the Crown, where evidence is to be adduced on behalf of the other prisoners.—*R. v. KENNEDY* (1856), 3 N. S. R. (2 Thom.) 203.—**CAN.**

**m. Where prosecution defective—Evidence of accused.]**—Though the case for the prosecution may be defective through insufficient evidence, but the trial proceeds, & evidence is given on behalf of accused, the latter evidence may be taken advantage of to establish accused's guilt.—*R. v. HUGHES*, [1921] 1 W. W. R. 119; 55 D. L. R. 697; 35 Can. Crim. Cas. 103.—**CAN.**

#### **PART VII. SECT. 7, SUB-SECT. 8.—D.**

**n. Should be called as first witness**

*for defence—No fixed rule.]*—There is no rule of law which prevents an accused person giving evidence even after he has called other witnesses for the defence. It is desirable that he should be the first witness called where witnesses are ordered out of ct. This rule does not apply to an accused person who makes a statement.—*R. v. RICHARDS, McDONALD & AUNGER* (1918), S. A. L. R. 315.—**AUS.**

**3011 i. Liability to cross-examination.]**—If accused makes a statement & afterwards testifies on oath as a witness the only limit of his liability to be cross-examined is that contained in Crimes Act, 1900, s. 407 (1) (b).—*BROWN v. R.* (1913), 17 C. L. R. 570.—**AUS.**

**3011 ii. —.]**—An accused giving evidence must submit it to cross-examination.—*R. v. GRAVEL*, [1918] Q. R. 28 K. B. 146.—**CAN.**

**o. — By co-defendant.]**—Where two prisoners are jointly indicted & one of them gives evidence which does not incriminate the other, the latter

**3009. — — —.]**—Neglect to inform a deft. on trial that he is entitled to give evidence on oath & to call witnesses may be a ground for quashing a conviction.—*R. v. GRAHAM* (1922), 17 Cr. App. Rep. 40, C. C. A.

**3010. Should be called as first witness for defence.]**—*R. v. MORRISON* (1911), 6 Cr. App. Rep. 159, C. C. A.

**3011. Liability to cross-examination.]**—Where a prisoner is on his trial for an offence in which he may & does give evidence, he may be cross-examined to the same extent as in the case of an ordinary witness.—*R. v. GAWTHROP* (1895), 59 J. P. 377.

As to limits of cross-examination, see Part VI., Sect. 3, sub-sect. 2.

**Failure of accused to give evidence—Comment by judge.]**—See Sect. 7, sub-sect. 12, C., *post*.

**Evidence of accused.]**—See Part VI., Sect. 3, sub-sect. 2, *post*.

#### *E. Statement by Accused.*

**3012. Statement by accused through his counsel—Not permitted as to facts.]**—A prisoner's counsel, in addressing the jury, will not be allowed to state anything which he is not in a situation to prove by evidence, or which is not already in proof, & the counsel for the prisoner will not be allowed to state prisoner's story, unless he is able to confirm it by evidence.—*R. v. BEARD* (1837), 8 C. & P. 142. *Annotation:—Refd. R. v. Burrows* (1838), 2 Mood. & R. 124.

**3013. — If made gives right of reply.]**—Counsel for prisoners in felony have no right to give the prisoners' statement of the facts. A statement of facts not intended to be proved gives a reply to the counsel for the prosecution.—*R. v. BUTCHER* (1839), 2 Mood. & R. 228.

**3014. — — —.]**—A prisoner on his trial defended by counsel is not entitled to have his explanation of the case to the jury made through the mouth of his counsel, but may, at the conclusion of his counsel's address, himself address the jury & make such statement, subject to this, that what he says will be treated as additional facts laid before the ct., & entitling the prosecution to the reply.—*R. v. SHIMMIN* (1882), 15 Cox, C. C. 122.

**3015. — Statement before magistrate read.]**—*R. v. HAINES*, No. 2961, ante.

**3016. — Statement permitted as to accused's intention.]**—Prisoner's counsel allowed to make a statement on the part of prisoner to show that the trigger of the gun was pulled without any intention

has no right to cross-examine the former.—*R. v. MUTCH* (1894), 15 N. S. W. L. R. 226.—**AUS.**

**p. Failure of accused to give evidence—Comment by counsel.]**—Counsel are not allowed to comment on fact of prisoner refraining from going into the witness box.—*R. v. LYNCH*, [1919] S. A. L. R. 325.—**AUS.**

#### **PART VII. SECT. 7, SUB-SECT. 8.—E.**

**q. Statement by accused through his counsel—Not to include inadmissible evidence.]**—Counsel for prisoner may open to the jury the facts which prisoner intends to include in his statement to the jury, but counsel must not open such facts to the jury as the evidence which he proposes to adduce at the trial if such evidence has been ruled to be inadmissible.—*R. v. MAHON* (1891), 17 V. L. R. 335.—**AUS.**

**r. Whether in lieu of evidence.** Prisoner is not entitled to make statement to the jury in lieu of giving

*Sect. 7.—The hearing: Sub-sect. 8, E. & F.; sub-sect. 9, A.]*

of firing it.—*R. v. WESTON* (1879), 14 Cox, C. C. 346.

**3017. Irrelevant & irregular statement by accused—Power of judge to refuse to allow.]**—

A judge has the right to refuse to allow a prisoner on his defence to make a statement irrelevant to the issue or subversive of law.—*R. v. DUNN & O'SULLIVAN* (1922), 91 L. J. K. B. 863; 38 T. L. R. 907; 67 Sol. Jo. 49; *sub nom. R. v. DUNN*, *R. v. O'SULLIVAN*, 128 L. T. 27; 27 Cox, C. C. 312; 17 Cr. App. Rep. 12, C. C. A.

**3018. Right to make statement on oath—Effect of irregularity—Criminal Evidence Act, 1898 (c. 36), s. 1 (g), (h).]**—If the ct. allows deft. either, when he is on oath, to read a statement from the witness-box, or to have his statement read for him by some one else, this is by way of indulgence to him, & if there is any irregularity under Criminal Evidence Act, 1898 (c. 36), s. 1 (g) & (h), he cannot make it a ground of appeal.—*R. v. ELLIOTT* (1909), 100 L. T. 976; 2 Cr. App. Rep. 171, C. C. A.

*F. Right of Accused to address the Jury.*

**3019. When defended by counsel—Accused cannot address the jury in addition to his counsel.]**—

If a prisoner employs counsel to examine & cross-examine witnesses, he will not be allowed to do so himself in addition, but it will be at his option whether he or his counsel address the jury.—*R. v. REDHEAD (alias YORKE)* (1795), 25 State Tr. 1003.

**3020. ———.]**—If, in a case of felony, prisoner's counsel has addressed the jury, prisoner himself will not be allowed to address the jury also.—*R. v. BOUCHER* (1837), 8 C. & P. 141.

**3021. ———.]**—Where a prisoner is defended by counsel he has no right to make two statements to the jury, one by himself, the other by his counsel.—*R. v. BURROWS, HUDDY & DAY* (1838), 2 Mood. & R. 124.

**3022. ———.]**—A foreigner, indicted for felony, being unable to speak English, the proceedings were explained to him by an interpreter. He was defended by counsel, who cross-examined the witnesses for the prosecution, at the close of which the judge, through the interpreter, acquainted prisoner that he might choose whether he would make his defence himself or allow his counsel to make it for him, but that both could not be heard.—*R. v. TESTE* (1858), 4 Jur. N. S. 244.

**3023. ———.]**—A prisoner will be allowed to make his own statement to the jury, but his counsel cannot be permitted afterwards to address the jury for him.

The right of reply where no evidence is called for the defence, on behalf of the Crown in *Mint Cases*, not admitted.—*R. v. TAYLOR* (1859), 1 F. & F. 535.

**3024. ——— Except on charge of treason.]**—Prisoner, in a case of high treason, has a right to address the jury in addition to the speeches of his counsel.—*R. v. COLLINS* (1832), 5 C. & P. 305.

**3025. — Accused can address jury before his counsel—Where counsel only argues points of law.]**—

On the trial of a misdemeanour, deft. cannot have the assistance of counsel to examine the witnesses, & reserve to himself the right of

addressing the jury; but if he conducts his defence himself, & any point of law arises which he professes himself unable to argue, the ct. will hear this argued by his counsel.—*R. v. WHITE* (1811), 3 Camp. 98, N. P.

**3026. ———.]**—(1) On the trial of an indictment for perjury the judge will allow deft. to address the jury, & cross-examine the witnesses, & his counsel to argue points of law.—*R. v. PARKINS* (1824), 1 C. & P. 548; Ry. & M. 166, N. P.

**3027. ——— Only in special circumstances.]**—Although the judge will, under very peculiar circumstances, allow a prisoner, charged with felony, to make a statement before his counsel addresses the jury, this is not to be considered as a precedent with respect to the general practice in such cases.—*R. v. WALKLING* (1838), 8 C. & P. 243.

**3028. ———.]**—A prisoner charged with felony, who is defended by counsel, ought not to be allowed to make a statement in addition to the defence of counsel, unless under very particular circumstances, & the general rule ought to be, that a prisoner, defended by counsel, should be entirely in the hands of his counsel. That rule should not be infringed on, except in very special cases.—*R. v. RIDER* (1838), 8 C. & P. 539.

*Annotation:—N.F. R. v. Manzano* (1860), 6 Jur. N. S. 406.

**3029. ———.]**—On the trial of a case of shooting, with intent to do grievous bodily harm, there having been no person present at the time of the offence but the prosecutor & prisoner, the latter was, under these special circumstances, allowed to make a statement before his counsel addressed the jury.—*R. v. MALINGS* (1838), 8 C. & P. 242.

*Annotations:—Folld. R. v. Walkling* (1838), 8 C. & P. 243. *N.F. R. v. Taylor* (1859), 1 F. & F. 535. *Refd. R. v. Burrows* (1838), 2 Mood. & R. 124; *R. v. Manzano* (1860), 2 F. & F. 64.

**3030. ———.]**—The prisoner, in a case of murder, allowed to make a statement to the jury as to how he became possessed of the clothes.—*R. v. MANZANO* (1860), 2 F. & F. 64; 6 Jur. N. S. 406.

**3031. ———.]**—Even where prisoner is defended by counsel, he will be permitted to make a statement in his defence, & afterwards his counsel may address the jury & comment upon prisoner's statement, together with the evidence for the prosecution.—*R. v. DYER* (1844), 4 L. T. O. S. 196; 1 Cox, C. C. 113.

*Annotations:—Folld. R. v. Williams* (1846), 1 Cox, C. C. 363. *Refd. R. v. Taylor* (1859), 1 F. & F. 535.

**3032. ———.]**—The practice in *R. v. Dyer*, No. 3031, *ante*, permitting prisoner to state his defence to the jury before his counsel addresses them, is a proper practice & will be admitted.—*R. v. WILLIAMS* (1846), 1 Cox, C. C. 363.

**3033. ———.]**—Prisoners, who were defended by counsel, were indicted for maliciously shooting at the prosecutor, & at the conclusion of the evidence for the prosecution, without waiting for their counsel, they themselves addressed the jury in their defence. When they had concluded their observations, the judge permitted their counsel to address the jury in their behalf.—*R. v. STEPHENS* (1871), 11 Cox, C. C. 669.

**3034. ———.]**—A prisoner defended by counsel may make a statement to the jury, pro-

vided on oath.—*R. v. KRAFCHENKO* (1914), 28 W. L. R. 76.—**CAN.**

**s. Right to make unsworn statement**  
—*When defended by counsel.*—A prisoner defended by counsel has no right to make an unsworn statement.—

**CAMPBELL,** [1919] 1 W. W. R. —**CAN.**

**PART VII. SECT. 7, SUB-SECT. 8.—F.**  
**t. When defended by counsel—State-**  
**ment of facts.]**—A prisoner on his trial,

defended by counsel, may, at the conclusion of his counsel's address, himself make a statement of facts to the jury, but the prosecution will be entitled to reply.—*R. v. ROGERS* (1888), 1 B. C. R. pt. 11, 119.—**CAN.**

vided he does so before the speech of counsel for the defence.—*R. v. MASTERS* (1886), 50 J. P. 104.

**3035.** ———.]—*R. v. BLADES* (1880), Archbold's Criminal Pleading, Evidence & Practice, 26th ed. 203.

**3036.** ———.]—**Prosecution may reply.**—*R. v. DOHERTY*, No. 302, *ante*.

**3037.** ———.]—A prisoner, who is defended by counsel, can make a statement to the jury without being sworn before his counsel addresses the jury, instead of giving evidence under the Criminal Evidence Act, 1898 (c. 36).—*R. v. POPE* (1902), 18 T. L. R. 717.

**3038.** ———.]—**Not after summing up by prosecution.**—An unsworn statement made by a defended prisoner who calls no evidence must be made before & not after the speech made by counsel for the prosecution in summing up his evidence.—*R. v. SHERRIFF* (1903), 20 Cox, C. C.

*Annotation:—Mentd.* *Nye v. Niblett* (1917), 16 L. G. R. 57.

**3039.** ———.]—**Whether accused can address jury after his counsel—Right of prosecution to reply.**—*R. v. SHIMMIN*, No. 3014, *ante*.

**3040.** ———.]—**Where no witnesses called.**—*R. v. HULL & SMITH* (1880), Archbold's Criminal Pleading, Evidence & Practice, 26th ed. 203.

**3041.** ———.]—**Not if he calls witnesses.**—Upon the trial of a prisoner who is defended by counsel, prisoner, after his counsel's address to the jury will be allowed to make a statement of facts to the jury. But when it is proposed to call witnesses for the prisoner it will not be competent for him to make any statement to the jury in addition to his counsel's address.—*R. v. MILLHOUSE* (1885), 15 Cox, C. C. 622.

**3042.** ———.]—**Counsel not permitted to address jury & put in written statement by accused.**—On two persons being charged with robbery with violence, counsel for one of them proposed to put in a written statement of his client who had an impediment in his speech which made him unintelligible. He also claimed the right to address the jury on behalf of his client.—*Held*: he must elect either to put in prisoner's statement or make a speech, but could not do both.—*R. v. ATTWOOD & TATHAM* (1884), 29 Sol. Jo. 29.

**3043.** ———.]—**When not defended by counsel—Should be informed of right to address jury—Omission does not invalidate conviction.**—A person charged with an offence has no right to give evidence on his own behalf before the grand jury. The judge ought to inform an undefended prisoner of his right, on his trial, to address the jury on his own behalf, but the omission of the judge to do so does not invalidate the conviction.—*R. v. SAUNDERS* (1898), 63 J. P. 24; 15 T. L. R. 104, C. C. R. *Annotation:—Reftd.* *R. v. Yeldham* (1922), 128 L. T. 28.

**3044.** ———.]—*R. v. YELDHAM*, No. 3008, *ante*.

#### PART VII. SECT. 7, SUB-SECT. 9.—A.

**a.** *By prosecution.—To rebut fresh evidence elicited in cross-examination.*—Accused was charged on three counts with having obtained money from the Naval Department by false pretences. In the cross-examination of one of the witnesses for the Crown evidence was elicited to the effect that the accused had repaid to the department a sum of money.

The Crown called evidence to show that the repayment in question was in respect of alleged defalcations other than those charged.—*Held*: the evidence was properly admitted on the ground that where one party introduces in evidence part of a

transaction the other party may answer that evidence by proving the balance of the transaction, so as to show that the complexion sought to be given is not the right one.—*R. v. DONOGHUE*, [1917] V. L. R. 449.—**AUS.**

**b.** ———.]—On the trial of the master of a vessel for scuttling her, the principal witness for the Crown, who had himself done the act of scuttling the vessel at the instigation of prisoner, on his examination in chief stated that he bored auger holes in the air streak. On cross-examination he was asked how far below the water he bored, etc. On the part of the defence it was sworn by several witnesses that the air streak of the

#### SUB-SECT. 9.—PROCEEDINGS AFTER CLOSE OF DEFENCE

##### A. Calling further Evidence.

**3045.** **For defence—During final speech for prosecution.**—*R. v. MORRISON*, No. 3010, *ante*.

**3046.** ———.]—**When witness for prosecution recalled—Accused may give evidence in rebuttal.**—Where a witness is recalled after the summing-up & interrogated prisoner has a right to cross-examine him & to give evidence in rebuttal.—*R. v. HOWARTH* (1918), 82 J. P. 152; 13 Cr. App. Rep. 99, C. C. A.

**3047.** **By prosecution—To rebut evidence of good character of defendant.**—Where witnesses to character are called by prisoner, prosecutor may call others to contradict them, though, except in the case of a previous conviction, it is very uncommon to do so.—*R. v. HUGHES* (1843), 2 L. T. O. S. 247; 1 Cox, C. C. 44.

*Annotation:—Reftd.* *R. v. Rowton* (1865), 34 L. J. M. C. 57.

**3048.** ———.]—*Semble*: if witnesses to character are called for prisoner, witnesses may be called in reply on behalf of the prosecution, to show general or specific acts of bad conduct.—*R. v. LOVEJOY* (1850), 14 J. P. 592.

**3049.** ———.]—Where witnesses are called on the part of prisoner to give evidence of his general good character, it is not competent to the prosecution to call witnesses to give evidence of prisoner's general bad character.—*R. v. BURT* (1851), 5 Cox, C. C. 284.

*Annotation:—Dtd.* *R. v. Rowton* (1865), 13 W. R. 436.

**3050.** ———.]—*R. v. GERARD* (1852), T. & M. 631.

**3051.** ———.]—If a prisoner on his trial gives evidence that his character is good, it is open for the prosecution, by way of reply to prove that the prisoner's character is bad (*per* CUR. MARTIN, B. *dub.*).

Evidence of character must not be evidence of particular facts, but must be evidence of general reputation only, having reference to the nature of the charge (*per* CUR. ERLE, C.J. & WILLES, J. *diss.*).

A witness's individual opinion respecting the general character & disposition of the prisoner with reference to the charge is admissible, though such witness knows nothing of the prisoner's general reputation (ERLE, C.J. & WILLES, J.).—*R. v. ROWTON* (1865), Le & Ca. 520; 5 New Rep. 428; 34 L. J. M. C. 57; 11 L. T. 745; 29 J. P. 149; 11 Jur. N. S. 325; 13 W. R. 436; 10 Cox, C. C. 25, C. C. R.

**3052.** ———.]—**To rebut evidence of bad character of prosecutrix—On charge of rape.**—On a trial for rape witnesses may be called on prisoner's behalf to prove general indecency of the prosecutrix, & witnesses for the prosecution may then be called to rebut their testimony.—*R. v. TISSINGTON* (1843), 1 L. T. O. S. 458; 1 Cox, C. C. 48.

**3053.** ———.]—**To rebut statement of deceased**

vessel alleged to have been scuttled was above the load-line, & that if the holes were bored in the air streak they must have come out above the water. The Chief Justice allowed the Crown to call rebutting evidence for the purpose of showing that the air streak was below the load line.—*Held*: the evidence was properly allowed.—*R. v. TOWER* (1880), 20 N. B. R. 168.—**CAN.**

**c.** ———.]—On a trial for rape, prosecutrix was cross-examined by prisoner's counsel, as to statements made by her to one D., relating to the transactions in question. The cross-examination was for the purpose of showing that such statements varied from those made by prosecutrix on

[—*The hearing: Sub-sect. 9, A.*]

**Favourable to accused.]**—*R. v. THOMPSON*, No. 2913, *ante*.

**3054.** — **To disprove an alibi.]**—In a case of felony, where the defence was an alibi, the witnesses for prisoner stated that they respectively saw him at various places on his route from Gloucestershire to Warwickshire for two days before, & up to the time of the felony being committed:—*Held*: the counsel for the prosecution might call a witness in reply, to prove that the prisoner had said he was at home on those days.—*R. v. FINDON* (1833), 6 C. & P. 132.

**3055.** — **—.]**—When the defence sets up an alibi, it may be contradicted (even as to an immaterial date) by rebutting evidence. *Semble*: There is no objection to a prisoner being arraigned on an indictment under Prevention of Crimes Act, 1871 (c. 112), s. 7, alleging a previous conviction, after he has been tried on another indictment found at the same time.—*R. v. FROGGATT* (1910), 4 Cr. App. Rep. 115, C. C. A.

**3056.** — **To rebut unforeseen evidence called by accused.]**—Where prisoner calls evidence to prove new matter which could not be foreseen by the prosecution the prosecution is entitled to give evidence in reply to contradict it.—*R. v. FROST* (1840), 9 C. & P. 129; 4 State Tr. N. S. 85, 386; 1 Town. St. Tr. 1; Gurney's Reps. 749.

*Annotations:—Consd. R. v. Crippen*, [1911] 1 K. B. 149. *Mentd. R. v. O'Connell* (1844), 5 State Tr. N. S. 1; *R. v. Cuffey* (1848), 7 State Tr. N. S. 467; *R. v. Smith O'Brien* (1848), 7 State Tr. N. S. 1; *R. v. Duly* (1849), 7 State Tr. N. S. 795; *R. v. Bird* (1851), 5 Cox, C. C. 20; *Mansell v. R.* (1857), 8 E. & B. 34; *R. v. Bernard* (1858), 8 State Tr. N. S. 887; *R. v. Burke* (1867), 10 Cox, C. C. 519; *Dillon v. O'Brien & Davis* (1887), 16 Cox, C. C. 245; *R. v. Bliss Hill* (1918), 82 J. P. 194.

**3057.** — **—.]**—On the second trial of an indictment for perjury, fresh witnesses for the defence were called to prove facts confirming prisoner's alleged false statement. A witness called by prosecutor to contradict a fact deposed to by them, was allowed to prove that on the former trial a particular question was put to him on his cross-examination by prisoner's counsel, in order to show that at that time the prisoner's counsel had notice of the testimony now given, but did not venture to call the witnesses.—*R. v. COYLE* (1855), 26 L. T. O. S. 136; 7 Cox, C. C. 74.

**3058.** — **Must be confined to matters which negative case for defence.]**—On an indictment for

her direct examination:—*Held*: D. might be examined for the prosecution, as to the statements so made to her by prosecutrix.—*R. v. HAYES* (1840), 1 Craw. & D. 367.—*IR.*

**3054i.** — **To disprove alibi.]**—After the case for the Crown & accused was closed, the Crown called witness in reply whose evidence changed by a few minutes the exact time of the crime as stated by the Crown's previous witnesses, & which tended to weaken the alibi set up by the accused:—*Held*: to allow the evidence was entirely in the discretion of the judge, & there was no legal prejudice to the accused, as he was allowed an opportunity to cross-examine & meet the evidence.—*R. v. WONG ON & WONG GOW* (1904), 10 B. C. R. 555.—*CAN.*

**3054ii.** — **—.]**—After prisoner's case had closed, counsel for the Crown was allowed to give in evidence a statement of prisoner's to meet the case of an alibi set up for him.—*MOHIDE'S CASE* (1841), *Ir. Cir. Rep.* 40.—*IR.*

**3054iii.** — **—.]**—When a witness for the prosecution had deposed to having been present at the burning of a house, for which prisoners were

indicted, & evidence had been given on the part of prisoners to show that it was impossible that the witness could have been there:—*Held*: the Crown was then entitled to go into a rebutting case as to such evidence. Prisoners could not after the rebutting case had closed, give any further evidence to explain it.—*M'DOWAI'S CASE* (1842), *Ir. Cir. Rep.* 640.—*IR.*

**3054iv.** — **—.]**—Where evidence of an alibi was adduced for the defence, after the defence had closed, prosecutors were allowed to prove a statement of prisoner to rebut the alibi.—*R. v. REYNOLDS* (1844), 3 Craw. & D. 248.—*IR.*

**3054v.** — **—.]**—To an indictment for larceny prisoner pleaded not guilty, & was put upon his trial. The Crown having closed their case, prisoner set up the defence of insanity at the time of the commission of the offence:—*Held*: witness previously examined for the prosecution might be recalled, for the purpose of giving testimony as to the state of mind of the prisoner at the time of the commission of the offence.—*R. v. DANGAN* (1840), 2 Craw. & D. 67.—*IR.*

a larceny, if prosecutor rests his case on prisoner's recent possession of the goods, & prisoner call a witness to prove that he, prisoner, bought them of T.; if the prosecutor call T., he can only ask him as to such matters as go to negative prisoner's case, & cannot prove by him that he saw prisoner commit the theft.—*R. v. STIMPSON* (1826), 2 C. & P. 415.

*Annotation:—Refd. R. v. Crippen* (1910), 27 T. L. R. 69.

**3059.** — **Not to confirm original case.]**—Any evidence that is a confirmation of the original case, cannot be given as evidence in reply; & the only evidence that can be given in reply is that which goes to cut down the defence, without being any confirmation of the original case.—*R. v. HILDITCH* (1832), 5 C. & P. 299.

*Annotations:—Refd. R. v. Crippen* (1910), 5 Cr. App. Rep. 255. *Mentd. Budd v. Davison* (1880), 29 W. R. 192.

**3060.** — **Not for mere repetition of former evidence.]**—It is an abuse of the right of calling rebutting evidence to recall a witness merely to repeat his evidence in chief.—*R. v. SULLIVAN*, [1923] 1 K. B. 47; 91 L. J. K. B. 927; 126 L. T. 643; 86 J. P. 167; 27 Cox, C. C. 187; 16 Cr. App. Rep. 121, C. C. A.

**3061.** — **Evidence omitted per incuriam.]**—Where counsel for the prosecution intending to put in evidence to reply, begins his reply to the jury before doing so *per incuriam*—he ought not therefore to be debarred from the right to put in his evidence in the usual course.

In an indictment for highway robbery, accompanied by violence, witnesses were called for prisoner, to show that he had received certain marks of blood on his coat before the robbery:—*Held*: it was competent to the prosecution to put in the prisoner's statement before the magistrate, wherein he gave a different account of the same matter.—*R. v. WHITE* (1847), 9 L. T. O. S. 24; 11 J. P. 246; 2 Cox, C. C. 192.

*Annotation:—Refd. R. v. Crippen* (1910), 27 T. L. R. 69.

**3062.** — **Discretion of judge to allow—Surprise.]**—Applt. was convicted on an indictment charging him with receiving property knowing it to have been stolen. The indictment charged L. & B. with stealing three bags of wool, & also with receiving the wool, & applt. with receiving it. L. pleaded guilty to receiving, B. not guilty on both counts, & applt. not guilty.

After the case for the prosecution had closed, B. went into the box & gave evidence, & called witnesses on his own behalf, but not L. Counsel

**3054vi.** — **—.]**—It is competent for the Crown, with or without the instructions of the ct., but with its permission, to call evidence to rebut evidence given for the defence on some new point, upon which the Crown evidence is silent, & which could not have been foreseen by the prosecution.—*R. v. JILWANA*, [1917] E. D. L. 411.—*S. AF.*

**d. — Medical evidence.]**—Prisoner's witness having stated that death was caused by two blows from a stick of certain dimensions:—*Held*: a medical witness, previously examined for the Crown, was properly allowed to be recalled to state that, in his opinion, the injuries found on the body could not have been so occasioned.—*R. v. JONES* (1868), 28 U. C. R. 416.—*CAN.*

**e. — To supplement case for prosecution.]**—After the Crown have closed their case, & prisoner's counsel has addressed the jury, the Crown cannot call a witness to supply any defect or omission in their proofs.—*M'NAMARA'S CASE* (1842), *Ir. Cir. Rep.* 525.—*IR.*

**f. — Corroboration.]**—Counsel for

for applt. then called his own client, who said that he agreed to give a shilling & a halfpenny per pound for the wool, & that the payment of £41 was only on account. At the conclusion of his evidence, his counsel closed his case. Whereupon counsel for the Crown said that he had been taken by surprise, as he expected that the other prisoner, L., who was called for B. only before the justices, would have been called. He asked & obtained leave to call L., in spite of the protest of counsel for applt., who objected that in no circumstances could L. be called for the Crown against applt., as B. had not called him, & that even if he could have been called against B. he certainly could not be against applt. The jury found both prisoners guilty:—*Held*: the course taken at the trial was unusual: deft's case had not been prejudiced, & no miscarriage of justice had occurred by reason of L.'s evidence being admitted in such way.

The calling of witnesses after the close of the defence was in the discretion of the judge at the trial, & that discretion must be exercised with a due regard to the interests of deft. If it were shown that the prosecution had done something unfair—had set what has been called a trap—which resulted in an injustice to the prisoner, the ct. reserved to itself full power to deal with the matter (*per Cur.*).—*R. v. FOSTER* (1911), 6 Cr. App. Rep. 196, C. C. A.

**3063. Evidence available in chief—Whether judge will call.**—After the cases for the prosecution & prisoner are closed, the judge will not, at the suggestion of the counsel for the prosecution examine a witness not before called.

It is quite clear that counsel cannot call him, as the cases are called & if it were allowed, it would necessitate two more speeches (*BRAMWELL, B.*).—*R. v. HAYNES* (1859), 1 F. & F. 666.

**3064. — Discretion of judge to admit in rebuttal.**—It is within the discretion of the judge at the trial whether evidence, admissible in chief, should be admitted in rebuttal, but that discretion is subject to review on appeal.—*R. v. CRIPPEN*, [1911] 1 K. B. 149; 80 L. J. K. B. 290; 103 L. T. 704; 75 J. P. 141; 27 T. L. R. 69; 22 Cox, C. C. 289; 5 Cr. App. Rep. 255, C. C. A.

*Annotations*:—*Consid.* *R. v. Foster* (1911), 6 Cr. App. Rep. 196. *Reid.* *R. v. Sullivan*, [1923] 1 K. B. 47. *Mentd.* *R. v. Wilson, Lewis & Havard* (1911), 6 Cr. App. Rep. 126.

**3065. — — — — —**—A judge has in a criminal trial a discretionary power, with which a Ct. of Appeal cannot interfere, unless it appear that an

the Crown, in opening the case for the prosecution, stated that he would produce S. as a witness to prove a certain fact which she had disproved in her informations:—*Held*: after prisoner's case had closed, the Crown could not examine witnesses to corroborate the evidence of a witness for the prosecution who had sworn differently at the trial from what she had sworn in her informations.—*R. v. McTEAGUE* (1841), 2 *Craw.* & *D.* 252.—*IR.*

**g. — — — — —**—Where the case for the prosecution has been rested on the evidence of a single witness, who proves the entire charge, but whose evidence is unexpectedly sought to be discredited by the witnesses for the defence, the ct. may allow witnesses to be called by the prosecution, after the defence is closed, to corroborate the evidence of the single witness examined for the prosecution.—*R. v. CUNNINGHAM* (1851), 5 Cox, C. C. 301.—*IR.*

**3064 i. Evidence available in chief—Discretion of judge to admit in rebuttal.**—*R. v. JENNINGS* (1876), 20 L. C. J. 291.—*CAN.*

**h. — Whether allowed in reply.**—A new trial will not be granted in a civil action if a judge allows evidence to be given in reply which might have been given in chief. The same principle applies in criminal cases.—*R. v. CHANTLER* (1891), 12 N. S. W. L. R. 116.—*AUS.*

**k. Discretion of judge.**—In a charge of murder witness G., in the original case of the Crown, swore that the murder had been committed about three o'clock in the afternoon, & that he & prisoner were back in the city about five o'clock. Prisoner swore that the crime was not committed until about five o'clock, & that the clocks were striking six when he & G. were coming back to the city. The Crown, by permission, then called a witness to contradict prisoner as to the time of G.'s return to the city; & the judge allowed prisoner's counsel to put in a witness in reply:—*Held*: as it was in the discretion of the judge in what order he would receive evidence, & as prisoner had had the opportunity of replying, of which he had taken advantage, a new trial on the ground that such evidence was

injustice has thereby resulted, of recalling witnesses at any stage of the trial & of putting such questions to them as the exigencies of justice require.

In a trial for the murder of a woman, evidence was given on behalf of the prosecution that the prisoner had been seen near the scene of the murder shortly before it was committed & on several of the preceding days; that certain articles which had been left by the murderer in the cottage where the murder was committed had previously been seen in the possession of the prisoner & that the prisoner had sold a suit of clothes stolen from the cottage to a woman. The prisoner gave evidence on his own behalf in which he set up an alibi & denied that he was in the neighbourhood of the scene of the murder when it was committed, or that the articles found in the cottage belonged to him, or that he had sold the suit to the woman. By the direction of the judge certain witnesses for the prosecution were recalled to rebut the evidence given by the prisoner. The counsel for the prisoner subsequently in his speech to the jury after the speech for the prosecution suggested that the husband of the murdered woman might have committed the murder, & also commented upon the fact that certain of the articles found in the cottage were not found till two days after the murder. The judge directed that the two police constables who searched the cottage should be recalled to say when & where the articles were found, the evidence which they gave being mainly a repetition of what they had previously said. The husband of the murdered woman was also recalled to deny the suggestion made against him:—*Held*: the witnesses had been recalled not for the purpose of repeating their evidence, but for the purpose of rebutting the case set up by the prisoner in his evidence & of meeting the suggestion made by the counsel for the prisoner in his speech to the jury—namely, that the murder had been committed by the husband of the murdered woman, & that therefore the witnesses were properly called even after the counsel for the prisoner had made his speech to the jury.—*R. v. SULLIVAN*, [1923] 1 K. B. 47; 91 L. J. K. B. 927; 126 L. T. 643; 86 J. P. 167; 27 Cox, C. C. 187; 16 Cr. App. Rep. 121, C. C. A.

**3066. Accused may be recalled—For further cross-examination.**—Deft. who has given evidence may be recalled, after the close of the case,

cumulative should be refused.—*R. v. HIGGINS* (1902), 36 N. B. R. 18.—*CAN.*

**l. Where no witnesses for defence—Right of prosecution to examine fresh witness.**—Upon a trial for robbery, the case for the Crown was closed, & no witnesses having been called for the defence, the judge proceeded to charge the jury, & had made some observations, when counsel for the Crown stated that, owing to inadvertence, a material witness had not been examined, & proposed then to examine such witness. No witness having been called for the defence, counsel for the Crown was permitted to examine such witness, but at the peril of a mis-trial.—*R. v. FLYNN* (1839), 1 *Craw.* & *D.* 32.—*IR.*

**m. Joint trial—One prisoner incriminated by another.**—Where in a joint trial one accused in giving or leading evidence in his defence incriminates his fellow accused the latter is entitled to cross-examine, & if necessary lead further evidence even though he has previously closed his case.—*R. v. BARRHAN & MOLLINK*, [1917] T. P. D. 35.—*S. AF.*

*Sect. 7.—The hearing: Sub-sect. 9, A., B. & C.; sub-sect. 10, A.]*

for further cross-examination.—*R. v. SEIGLEY* (1911), 6 Cr. App. Rep. 106, C. C. A.

*B. Summing up by Prosecution.*

**3067. Where accused defended by counsel—No witnesses called for defence—Criminal Procedure Act, 1865 (c. 18), s. 2.]**—It being a general principle of criminal procedure, that counsel for the prosecution should consider themselves not merely as advocates for a party, but as ministers of justice, & not as struggling for a verdict, but as assistants in the ascertainment of truth according to law, therefore, counsel for the prosecution ought not, under Denman's Act, to exercise their right of summing up the evidence, where prisoners call no witnesses, unless they really, in their discretion, deem it to be necessary for the purposes of justice.—*R. v. BERENS* (1865), 4 F. & F. 842; *sub nom. R. v. HOLCHESTER*, 10 Cox, C. C. 226.

**3068.** ———.]—Under above Act counsel for the prosecution ought not, when prisoner calls no witnesses, to sum up the evidence.—*R. v. WEBB* (1865), 4 F. & F. 862.

**3069.** ———.] **Joint indictment—One accused not defended — Time for summing up.]**—*R. v. MADDEN* (1872), 12 Cox, C. C. 239.

**3070.** ———.] **Except accused — Criminal Evidence Act, 1898 (c. 36).]**—*R. v. GARDNER*, No. 2948, *ante*.

**3071. Improper comment—On witnesses at trial not being called before magistrates.]**—It is an improper practice for counsel for the prosecution to make any comment by way of reproach upon the fact that the witnesses whom prisoner produces were not examined before the magistrates.—*R. v. CLARK* (1851), 5 Cox, C. C. 230.

**3072.** ———.] **On prisoner calling no witnesses.]**—In criminal cases counsel for the prosecution under Criminal Procedure Act, 1865 (c. 18), ought not, in summing up their evidence, to make observations on prisoner's not calling witnesses, unless, at

all events, it has appeared that he might be fairly expected to be in a position to do so. Neither ought they to press it upon the jury that, if they acquit prisoner, they may be considered to convict prosecutor or prosecutrix of perjury.—*R. v. PUDDICK* (1865), 4 F. & F. 497.

*Annotation:—Reidf. R. v. Banks*, [1916] 2 K. B. 621.

**3073.** ———.]—On a charge of rape prisoner called no witnesses. In summing up the prosecution commented upon this, & observed, that if prisoner were acquitted, the woman's character would be blasted:—*Held*: the observations ought not to be made.—*R. v. RUDLAND* (1865), 4 F. & F. 495.

**3074.** ———.] **On accused's wife not being called—Effect of comment—Criminal Evidence Act, 1898 (c. 36), s. 1 (b).]**—At the trial of a prisoner counsel for the prosecution inadvertently commented on the fact that prisoner's wife had not been called for the defence. The jury were subsequently told to disregard this comment, & their foreman said that they had disregarded it:—*Held*: the circumstances that such comment had been made by counsel for the prosecution, in contravention of s. 1 (b) of above Act did not make the trial a nullity.—*R. v. DICKMAN* (1910), 74, J. P. 449; 26 T. L. R. 640; 5 Cr. App. Rep. 135, C. C. A.

*Annotation:—Mentd. Crane v. Public Prosecutor*, [1921] 2 A. C. 299.

**3075. Proper comment—On prisoner having reserved his defence.]**—If by reserving his defence the case set up by prisoner at his trial cannot be investigated, the prosecution are entitled to comment on that circumstance.—*R. v. McNAIR* (1909), 25 T. L. R. 228; 2 Cr. App. Rep. 2, C. C. A.

*C. Summing up by Defence.*

*See No. 2990, ante.*

**SUB-SECT. 10.—RIGHT OF REPLY.**

*A. In General.*

**3076. Defence witnesses called as to character only—Discretion of prosecuting counsel.]**—A

conviction:—*Held*: certain conduct of prosecutor during his address to the jury amounted to an invitation to them to assume that certain evidence which had been rejected had been given & a persistence in that invitation notwithstanding the judge's rebuke; a new trial should be directed.—*R. v. EYLES* (1917), 23 C. L. R. 1.—**AUS.**

**r. Counsel expressing own opinion—When ground for new trial.]**—While it is the much better practice for counsel to refrain from expressing their own opinions upon the evidence before the jury, the question of their right to do so is one of propriety rather than law; some substantial wrong or miscarriage of justice must be proven to have resulted therefrom before it can provide ground for a new trial.—*R. v. MOKE*, [1917] 3 W. W. R. 575.—**CAN.**

**s. Before defending counsel addresses jury—Discretion of prosecutor.]**—After the trial & conviction of deft. on a charge of murder, the victim being his wife, a case was stated by the trial judge for the opinion of the ct.:—*Held*: the judge was right when he ruled that counsel for the Crown is not obliged to sum up before counsel for prisoner addresses the jury; he may waive that right or privilege, & address the jury in reply only.—*R. v. COPPEN* (1920), 47 O. L. R. 399; 53 D. L. R. 576; 18 O. W. N. 165.—**CAN.**

**PART VII. SECT. 7, SUB-SECT. 10.—A.**

**3076 i. Defence witnesses called as to character only—Discretion of prosecuting**

**PART VII. SECT. 7, SUB-SECT. 9.—B.**

**n. Improper comment—On accused not giving evidence.]**—*R. v. KING* (1905), 6 Terr. L. R. 139.—**CAN.**

**o.** ———.]—After the trial & conviction of deft. on a charge of murder, the victim being his wife, a case was stated by the trial judge for the opinion of the ct.:—*Held*: counsel for the Crown did not violate Canada Evidence Act, s. 4 (5), by commenting on the failure of deft. to testify, when he told the jury that, taking the facts, they had the record of a crime, of an act wrongfully done upon a woman which resulted in her death, of murder, & "no explanation has been offered & no explanation is possible of these facts that will exculpate the criminal whom we have not yet inquired as to in regard to that act." In making these observations, counsel was referring to the address of counsel for prisoner, & to his not having suggested any theory as to the cause of the woman's death that would explain the condition in which her body was found, which, according to the case of the Crown, indicated that she had been murdered.—*R. v. COPPEN* (1920), 47 O. L. R. 399; 53 D. L. R. 576; 18 O. W. N. 165.—**CAN.**

**p.** ———.]—On the trial of prisoners for robbery, etc., prisoners did not avail themselves of the privilege of giving evidence on their own behalf. Prosecutor, in addressing the jury, said, "You are sworn to give your verdict according to the evidence. E. has

sworn that prisoners robbed him, & he has not been contradicted; you must believe him." The evidence had shown that the only persons who could contradict E. were prisoners:—*Held*: the observations were not improper.—*R. v. BARKER & BAILEY* (1913), 32 N. Z. L. R. 912.—**N.Z.**

**3074 i.** ———.] **On accused's wife not being called—Effect of comment.]**—Deft. was indicted for stealing a quantity of pine oil. He pleaded not guilty, & on the trial gave evidence on his own behalf. Prosecuting counsel, in addressing the jury, commented unfavourably on the failure of deft.'s wife to testify:—*Held*: deft. was entitled to a new trial.—*R. v. CORRY* (1898), 30 N. S. R. 330.—**CAN.**

**3074 ii.** ———.]—On the trial of deft. on a charge of shooting with intent to kill, counsel for the Crown commented upon the fact that deft.'s wife, who had been a witness on the preliminary examination before the magistrate, was not called:—*Held*: the comment in question was not justified by the fact that it was made in reply to an explanation offered by counsel for deft. to account for the omission to call the wife, & the conviction must be set aside.—*R. v. HILL* (1903), 36 N. S. R. 253.—**CAN.**

**q. Stressing rejected evidence—After judge's rebuke—Effect of.]**—Resp. was convicted on a charge of murder, the evidence being purely circumstantial. The trial judge stated in his report that he had no reason to think that the evidence did not fully justify



prosecutor's counsel in a case of felony has in strictness the right of reply, though the counsel for prisoner only calls witnesses to character; but *Seemle*: it is not a right, which in practice ought to be exercised, except under very special circumstances.—*R. v. STANNARD* (1837), 7 C. & P. 673.

*Annotation*:—*Reid*. *R. v. Bliss Hill* (1918), 82 J. P. 194.

3077. ———.]—*R. v. PATTESON* (1838), 2 Lew. C. C. 262.

3078. ———.]—When witnesses have been called to the character of a prisoner; the prosecuting counsel may reply, but in ordinary cases he should not do so.—*R. v. WILDGOOSE* (1849), 13 J. P. 766.

3079. ———.]—In a case of felony, if witnesses are called to the character of prisoner, this gives prosecutor's counsel a right to reply on the whole case, & not merely to observe on the evidence to character; & it is entirely at the discretion of prosecutor's counsel whether he will exercise his right of reply or not.—*R. v. WHITING & HARVEY* (1837), 7 C. & P. 771.

3080. ———.]—(1) If the only evidence called on the part of prisoner is evidence to r, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not.

(2) In cases of public prosecutions for felony instituted by the Crown, the law officers of the Crown, & those who represent them, are, in strictness, entitled to the reply, although no evidence is produced on the part of prisoner.—*MEMORANDUM OF JUDGES* (1837), 1 Mood. C. C. 495; 7 C. & P. 676.

3081. ———.]—Counsel for the prosecution has a right to reply generally, even where witnesses to character only are called for the defence. It is in the discretion of counsel whether he will exercise that right, & it will be sanctioned by the ct. where counsel for the prosecution is of opinion that a fallacious argument has been used for the defence.—*R. v. CORFELL* (1844), 4 L. T. O. S. 215; 1 Cox, C. C. 123.

3082. ———.]—*R. v. GERARD*, No. 3050, *ante*.

3083. ———. **No right of reply—Without notice to defence.**—*Seemle*: in a prosecution for murder, where counsel for prisoner calls witnesses to character only, counsel for the prosecution has no right to reply, unless he has given notice to counsel on the other side that he intends to avail

himself of his calling witnesses to character.—*R. v. BROOKS* (1843), 1 L. T. O. S. 575; 1 Cox, C. C. 6.

3084. ———. **Criminal Procedure Act, 1865 (c. 18).**—Under above Act, "witnesses for the defence" do not include witnesses merely called as to character; & such witnesses, therefore, do not give counsel for the prosecution a reply.—*R. v. DOWSE* (1865), 4 F. & F. 492.

3085. ———.]—The practice as to reply on the part of the prosecution after witnesses only as to character, is not altered & witnesses as to character do not give the prosecution a right of reply.—*R. v. GLASS* (1865), 4 F. & F. 492, n.

3086. **Where no witness called for defence.**—*Seemle*: the privilege of replying in a criminal prosecution, when deft. does not call witnesses, is confined to the Attorney-General.—*R. v. ABINGDON (LORD)* (1794), 1 Esp. 226; Peake, 310. N. P.

*Annotations*:—*Mentd.* *R. v. Creevey* (1813), 1 M. & S. 273; *Hodgson v. Scarlett* (1817), Holt, N. P. 621; *R. v. Carille* (1819), 3 B. & Ald. 167; *Lewis v. Walter* (1821), 4 B. & Ald. 605; *R. v. Harvey* (1823), 3 Dow. & Ry. K. B. 464; *Flint v. Pike* (1825), 4 B. & C. 473; *Roberts v. Brown* (1834), 10 Bing. 519; *Stockdale v. Hansard* (1840), 3 State Tr. N. S. 723; *R. v. Pembroke* (1842), 3 Q. B. 901; *Davison v. Duncan* (1857), 7 E. & B. 229; *Wason v. Walter* (1868), L. R. 4 Q. B. 73; *R. v. Munslow*, [1895] 1 Q. B. 758; *Jones v. Hulton*, [1909] 2 K. B. 444.

3087. ———. **Counsel for defence opening new facts—Gives right of reply.**—If counsel for deft. on the trial of an indictment for a misdemeanour opens new facts in his address to the jury, & afterwards declines calling witnesses to prove the facts so opened, counsel for the prosecution is, notwithstanding, entitled to a general reply.—*R. v. BIGNOLD* (1824), 4 Dow. & Ry. K. B. 70; 2 Dow. & Ry. M. C. 167; *previous proceedings* (1823), 1 Dow. & Ry. N. P. 59, N. P.

3088. ———.]—*R. v. BUTCHER*, No. 3013, *ante*.

3089. ———. **Prosecution in Mint cases.**—*R. v. TAYLOR*, No. 3023, *ante*.

3090. **Undefended prisoner reading inadmissible document—Gives no right of reply.**—(1) The judge who tries a prisoner in one county has no jurisdiction to sentence him in another.

(2) A sentence for felony cannot be passed in the prisoner's absence.

(3) An undefended prisoner who, in his defence, reads a document which is not admissible in evidence, does not thereby give the prosecution "the right of reply."

*counsel.*—In criminal cases, when witnesses to character only are called, & there is no other evidence offered on behalf of prisoner, counsel for the Crown have the right to reply; & in every such case it rests altogether in the discretion of the Crown counsel whether or not that right shall be exercised.—*R. v. HAYES* (1840), 1 Crav. & D. 367.—*IR.*

3076 ii. ———.]—A right to reply does not exist in the case of a private prosecution, when prisoner has called witnesses merely as to character.—*R. v. LOUGHAN* (1842), Arn. M. & O. 253.—*IR.*

t. **Where no witness called for defence—Counsel for defence opening new facts—Gives right of reply.**—Notwithstanding prisoner calls no evidence, if he makes a statement of fact to the jury, the Crown has the right of reply.—*R. v. ROGERS* (1888), 1 B. C. R., pt. II., 119.—*CAN.*

3086 i. ———.]—*R. v. KING* (1905), 6 Terr. L. R. 139.—*CAN.*

3086 ii. ———.]—At the close of the evidence for the prosecution the attorney for the defence in answer to

the judge, stated that he meant to call witnesses. The ct. then adjourned, & on the following day the attorney stated that, on reconsideration, he did not

the prosecutor to reply:—though the strict interpretation of Criminal Procedure Code, ss. 249, 292, would warrant this course, it was never meant by the Legislature that

no witnesses are called for the defence, the object of the law being evidently to let each side have an opportunity of commenting on the evidence of the other, & not to give an additional advantage to prosecutor in such a case as the present.—*HURRY CHURN CHUCKERBUTTY v. R.* (1883), 1 L. R. 10 Calc. 140.—*IND.*

3086 iii. ———.]—Where two prisoners were jointly charged with conspiracy, & on being arraigned one pleaded guilty & the other not guilty, prisoner who had pleaded guilty could not be admitted as a witness against the other prisoner. No evidence being adduced for the defence:—*Held*: prisoner entitled to right of reply.—*R. v. ASHER*

& *AWANUI* (1888), 6 N. Z. L. R. 592.—*N.Z.*

b. **Where witnesses for prosecution**

Crown does not call some of the witnesses whose names are on the back of the indictment, & counsel for prisoner this will make them for the

call the witnesses itself in such a case, & if it calls them, counsel for the prisoner can cross-examine them, & will not lose his right of reply.—*R. v. SINCLAIR* (1905), 25 N. Z. L. R. 266.—*N.Z.*

b. **Documents introduced.**—In cross-examination by defence.—The fact that accused has, during the cross-examination of the witnesses for the prosecution, used certain documents, & that such documents have been put in as evidence on his behalf, does not entitle prosecutor to the right of reply, if, when asked upon the close of the case of the prosecution whether he means to adduce evidence, accused says that he does not.—*R. v.*



*Sect. 7.—The hearing: Sub-sect. 10, A., B. & C.; sub-sect. 11.]*

(4) When the ct. below has no jurisdiction Criminal Appeal Act, 1907 (c. 23), s. 4 (3), does not apply.—*R. v. HALES* (1923), 40 T. L. R. 179; 17 Cr. App. Rep. 193; 87 J. P. Jo. 828, C. C. A.

**3091. Accused making statement in addition to counsel's speech—Gives right of reply.]—***R. v. SHIMMIN*, No. 3014, *ante*.

**3092. ———.]—***R. v. DOHERTY*, No. 302, *ante*.

*See, also*, No. 2893, *ante*.

**Right of defence to reply.]—***See* Nos. 2977–2979, *ante*, & 3109, *post*.

#### *B. By Law Officers of the Crown.*

**3093. Where no witnesses called—Right confined to Attorney-General.]—***R. v. ABINGDON* (LORD), No. 3086, *ante*.

**3094. ———.]—**Right of reply exercised by the Attorney-General although no evidence was called for the defence.—*R. v. WILLIAMS* (1797), 28 State Tr. 653.

*Annotations:—Mentd.* *R. v. DUFFY* (1849), 4 Cox, C. C. 294; *Bowman v. Secular Soc.*, [1917] A. C. 406.

**3095. ———. Appearing in official capacity.]—***R. v. BELL* (1829), Mood. & M. 440, n., N. P. *Annotation:—Consd.* *R. v. Gardner* (1845), 1 Car. & Kir. 628.

**3096. ———.]—**When the A.-G. or King's counsel appears officially as such to conduct a prosecution on an indictment for misdemeanour he is entitled to reply though deft. calls no witnesses.—*R. v. MARSDEN ALEXANDER & ISAACSON* (1829), Mood. & M. 439, N. P.

*Annotation:—Consd.* *R. v. Gardner* (1845), 1 Car. & Kir. 628.

**3097. ———. Refused to Attorney-General of the County Palatine.]—***R. v. CHRISTIE* (1858), 1 F. & P. 75; 7 Cox, C. C. 506.

**3098. ———. Counsel representing Attorney-General.]—***R. v. MARSDEN ALEXANDER & ISAACSON*, No. 3096, *ante*.

**3099. ———.]—**In a prosecution by the

CHUNDER BANERJEE (1884), 1 L. R. 10 Cal. 1024.—**IND.**

**c. ———.]—**The action of the defence, during the cross-examination of a witness for the Crown, in tendering a document to such witness & using the same as evidence for the defence was held to entitle the Crown to reply.—*R. v. MOSS* (1893), 1 L. R. 16 All. 88.—**IND.**

**d. Whether restricted.]—**Counsel for the Crown is not restricted in his reply to answering matters dealt with by counsel for prisoner.—*It. v. WALKER & CHINLEY* (1910), 13 W. L. R. 47.—**CAN.**

**e. Conspiracy—Where one defendant only calls witness.]—**It was held in a prosecution for conspiracy, that although evidence was called by only one of defts., it might have occurred to the benefit of both, & that the right of general reply was with counsel for the Crown.—*R. v. CONNOLLY* (1894), 25 O. R. 151.—**CAN.**

#### **PART VII. SECT. 7, SUB-SECT. 10.—B.**

**1. Where no witnesses called.]—**The A.-G., conducting a prosecution on the part of the Crown, has the right of reply, although accused calls no witnesses, & if he elects to exercise that right he is not bound to sum up for the Crown at the conclusion of the evidence.—*R. v. KIERSTAD* (1918), 45 N. B. R. 553; 42 D. L. R. 193.—**CAN.**

**3098 i. ———. Counsel representing Attorney-General.]—**After the conviction of prisoner for murder the question

Post Office for a felony, it being stated by counsel for the prosecution that he appeared as representative of the A.-G.:—*Held*: on the ground of his representing the A.-G. he was entitled to reply without reference to prisoner's having called witnesses, or not.—*R. v. GARDNER* (1845), 1 Car. & Kir. 628.

*Annotations:—Mentd.* *R. v. Young* (1846), 2 Cox, C. C. 142; *R. v. Shepherd* (1856), Dears. C. C. 606.

**3100. ———.]—**In a prosecution directed by the Poor Law Board, counsel for the Crown cannot claim the right to reply where prisoner calls no witnesses.—*R. v. BECKWITH* (1858), 7 Cox, C. C. 505.

**3101. ———. Law officers of Crown—& their representatives—Felony.]—**MEMORANDUM OF JUDGES, No. 3080, *ante*.

**3102. ———. Solicitor-General—Post Office prosecution.]—***R. v. BARROW* (1866), 10 Cox, C. C. 407.

**3103. ———.]—**In conducting prosecutions for the Post Office, where the Solicitor-General appears on behalf of the A.-G., he has, on the part of the Crown, the right to reply on the whole case, although prisoner calls no witnesses.—*R. v. TOAKLEY* (1866), 10 Cox, C. C. 406.

**3104. ———. Appearing in person.]—**RESOLUTION OF JUDGES (1884), 5 State Tr. N. S. 3, note c.

*See, also*, CONSTITUTIONAL LAW, Vol. XI., pp. 528, 529, Nos. 325–334.

#### *C. Where more than one Accused.*

**3105. Reply by prosecution—Witness called by one accused—Joint offence—General reply.]—***Semble*: if two prisoners are indicted jointly for the same offence, & one call witnesses, the counsel for the prosecution is entitled to a general reply. But if the offences are separate, & they might have been separately indicted, he must in his reply confine himself to the case of the party who has called witnesses.—*R. v. HAYES & WALTER* (1838), 2 Mood. & R. 155.

was reserved whether counsel for Crown should have been allowed the right to reply, no evidence being tendered on behalf of prisoner:—*Held*: Crown prosecutors in the Territories are under general instructions from the department of justices over which the A.-G. for Canada presides. The administration of Criminal Law is in his hands, & Crown prosecutors act for him. The Crown prosecutor had the right to reply.—*R. v. KING* (1905), 1 W. L. R. 348.—**CAN.**

**3098 ii. ———.]—**Prisoner called no witnesses, & his counsel contended on that ground he had the right of reply. The trial judge ruled against him & Crown replied:—*Held*: Crown always had the right of reply if its representatives saw fit to use it.—*R. v. RYAN* (1905), 5 O. W. R. 125; 9 O. L. R. 137.—**CAN.**

**3098 iii. ———.]—**A.-G. (1829), 2 Ir. L. Rec. 312.—**IR.**

**3101 i. ———. Law officers of Crown—& their representatives.]—***R. v. QUATRES PATTES* (1851), 1 L. C. R. 317.—**CAN.**

**g. Whoever originates motion.]—***Semble*: no matter with which side the motion originates, the law officers of the Crown have a right to reply.—*R. v. TYRRELL* (1843), 1 Cox, C. C. 369.—**IR.**

#### **PART VII. SECT. 7, SUB-SECT. 10.—C.**

**3105 i. Reply by prosecution—Witness called by one accused—General reply.]—***R. v. CANAN*, [1918] V. L. R. 390.—**AUS.**

**3105 ii. ———.]—**A., B. & C. were charged on a joint presentment with conspiracy to defraud. A. gave evidence on his own behalf & called witnesses. B. gave evidence on his own behalf, but called no witnesses, & did not cross-examine any of A.'s witnesses. C. gave no evidence & called no witnesses, & made at the trial no unsworn statement, but did ask a few questions of one of A.'s witnesses. The evidence given affected all accused who were separately represented by counsel. On the point of order in which, after the close of the evidence, counsel should address the jury:—*Held*: the general rule that where upon a joint presentment one prisoner calls evidence which is applicable to the others, the Crown has a right of general reply, is correct, & should usually be adhered to, but the rule is not inflexible & in the peculiar circumstances of this case, counsel for B. & C., being really unaware of the way in which the facts would be presented against their respective clients, counsel for A. should first address the jury, followed by counsel for the Crown, counsel for B. & counsel for C., in that order.—*R. v. ORTON*, [1922] V. L. R. 469.—**AUS.**

**3105 iii. ———.]—**Where one of several accused persons tried jointly calls witnesses at the trial, but the other accused calls no witnesses, they must all follow one another in their defence, & the prosecution has the right of reply on the whole case.—*R. v. SADANAND NARAYAN* (1894), 1 L. R. 18 Bom. 364.—**IND.**

3106. ————.]—*R. v. JORDAN & COWMEADOW*, No. 208, *ante*.

3107. ————.]—Three prisoners were indicted for murder, & witnesses were called, for the defence of one only:—*Held*: the counsel for the prosecution was entitled to reply generally on the whole case, & was not to be limited in his reply to the case as against the one prisoner for whom the witnesses were called, although the evidence adduced for the one prisoner did not at all affect the case as it respected the other two prisoners; but if the evidence against two prisoners affect them with different offences, such as larceny & receiving, & one call witnesses, there is no right of reply against both.—*R. v. BLACKBURN* (1853), 3 Car. Kir. 330; 6 Cox, C. C. 333.  
*Annotation*:—*Mentd. R. v. Godinho* (1911), 76 J. P. 16.

3108. ————.]—Two prisoners being indicted for night poaching, the defence being on the question of identity, one of them calling witnesses to prove an alibi, the other calling no witnesses, the counsel for the prosecution was allowed a general reply on the whole case as against both prisoners.—*R. v. BRIGGS & PALMER* (1858), 1 F. & F. 106.

3109. ————.]—*R. v. COPLEY* (1865), 4 F. & F. 1097.

3110. ————.]—Where two persons were jointly indicted for arson, & evidence was called on behalf of one of them:—*Held*: this gave the prosecution the right to a general reply.—*R. v. DAVIS* (1900), 17 T. L. R. 164.

3111. ————.]—**No general reply.**—Prisoners were indicted for obtaining goods by false pretences & conspiracy to defraud. At the close of the evidence for the prosecution witnesses were called for the defts. W. & S. only, whose evidence was applicable to their respective cases only, & did not affect the cases of the other defts.:—*Held*: counsel for the prosecution should confine his reply to the cases of W. & S.—*R. v. TREVELLI* (1882), 15 Cox, C. C. 289.

3112. ————.]—Where several prisoners were indicted jointly, & some of them called witnesses, but others did not:—*Held*: the Crown had a right of reply to the counsel for those prisoners who called witnesses, but that counsel for the prisoners who called no witnesses had the right to address the jury last.—*R. v. BURNS* (1887), 16 Cox, C. C. 195.

3113. ————.]—*R. v. KAIN* (1883), 15 Cox, C. C. 388.

#### PART VII. SECT. 7, SUB-SECT. 11.

3120 i. *Duty of judge—To assist jury & protect interests of accused.*—After the trial & conviction of deft. on a charge of murder, a case was stated by the trial judge for the opinion of the ct. The judge had pointed out to the jury that they, & they alone, were the judges as to all questions of fact. He dealt with & placed before the jury every theory suggested by counsel for prisoner:—*Held*: the judge's charge indicated clearly to the jury what their functions were & the conclusion to which they must come before pronouncing deft. guilty.—*R. v. COPPEN* (1920), 47 O. L. R. 399; 53 D. L. R. 576; 18 O. W. N. 165.—**CAN.**

*h. — To decide whether sufficient evidence to go to jury.—Not to express opinion on verdict.*—On motion for a new trial by a prisoner convicted of murder on circumstantial evidence only:—*Held*: a judge is called upon only to say whether there is evidence to go to the jury, not to express any opinion as to their verdict founded upon it.—*R. v. GREENWOOD* (1864), 23 U. C. R. 255.—**CAN.**

*k. — Not to make remarks likely to result in injustice to accused.*—A verdict cannot be impeached in consequence of an observation made by the judge presiding while the trial was proceeding, unless such observation was calculated to influence the jury against the deft.—*R. v. CARLIN* (1903), Q. R. 12 K. B. 483.—**CAN.**

*l. —*—Where in the course of a criminal trial before a jury the presiding judge had made remarks which were irregular & injudicious, special leave to appeal was refused on the ground that no grave injustice to accused had resulted from the use of the language complained of, & consequently an appeal against their conviction could not hope to succeed.—*R. v. LEO* (1914), App. D. 241.—**S. AF.**

*m. — To explain law & to assist jury to arrive at correct conclusion of fact.*—While it is the duty of the judge to explain the law affecting the case to the jury so far as is necessary for its application, & it is their duty to accept his opinion without question, it is also his duty to assist them so far as he can to arrive at a correct con-

3114. ————.]—**Severed defences—Whether general reply.**—Where there are several prisoners, & they sever in their defences, if one should call witnesses & the others not, the right of reply is now in practice confined to the case against the prisoner who has called witnesses.—*R. v. BURTON, SCOTT & LOCKWOOD* (1861), 2 F. & F. 788.

3115. ————.]—Where two prisoners on the same indictment are separately defended by counsel, one of whom only has called witnesses, the convenient course of proceeding is for prisoner's counsel who calls witnesses to open his defence & sum up; then for the counsel for the prosecution to reply upon the whole case, & then for the counsel for prisoner who has called no witnesses to address the jury in his defence.—*R. v. HARRINGTON* (1869), 21 L. T. 57.

3116. *Reply by one accused as against another—Where one calls evidence incriminating another.*—*R. v. PAINTER & DAVIS*, No. 2977, *ante*.

3117. ————.]—*R. v. WOOD*, No. 2978, *ante*.

3118. ————.]—*R. v. BURDETT*, No. 2979, *ante*.

3119. ————.]—*R. v. COPLEY*, No. 3109, *ante*.

#### SUB-SECT. 11.—FUNCTION OF JUDGE AND JURY.

3120. *Duty of judge—To assist jury & protect interests of accused.*—I have been reminded that I sit here as counsel for deft. I certainly do so, so far as to interpose between him & counsel for the prosecution & to see that no improper use of the law is made against him & that no improper evidence is given to the jury; but the judge has another task to perform which is that of assisting the jury in the administration of justice (LORD KENYON, C.J.).—*R. v. WAKEFIELD* (1799), 27 State Tr. 679.

*Annotation*:—*Apprvd. R. v. O'Connell* (1844), 5 State Tr. N. S. 1, 702.

3121. ————.]—**To decide questions of foreign law—In civil & criminal cases—Administration of Justice Act, 1920 (c. 81), s. 15.**—Above Act, which provides that "in any action or other matter" questions of foreign law shall be decided by the judge & not by the jury, applies to criminal, as well as to civil, cases.—*R. v. HAMMER* [1923], 2 K. B. 787; 92 L. J. K. B. 1045; 129 L. T. 479; 87 J. P. 194; 39 T. L. R. 670; 68 Sol. Jo. 120; 27 Cox, C. C. 458; 17 Cr. App. Rep. 142, C. C. A.

clusion of fact on the evidence while making it clear to them as part of the law that that conclusion is within their province, & not his.—*R. v. CAMPBELL*, [1919] 1 W. W. R. 1076.—**CAN.**

*n. — To make notes of applications & rulings.*—It is proper that the judges should be especially careful to see that a note is made of every application & ruling during the course of a case, so that no party may possibly be deprived of any advantage to which he may be entitled.—*R. v. DOMINION DRUG STORES, LTD., R. v. CANADIAN NORTHERN RY. CO.*, [1919], 2 W. W. R. 413; 44 D. L. R. 382.—**CAN.**

*o. — To be impartial.*—It is true the judge is prisoner's counsel, & he is also the counsel for the Crown; but both those offices are subordinate to his higher functions as a dispenser of justice & an expounder of the law; & he is bound to administer that law equally & impartially to both sides.—*R. v. O'CONNELL* (1844), 7 I. L. R. 261.—**IR.**

*p. — Not to initiate criminal prosecution.*—The function of a judge is not to initiate prosecutions, but to

*Sect. 7.—The hearing: Sub-sects. 11 & 12, A.]*

**3122. Function of judge—Does not include questioning prisoner in dock—& making disparaging comments.]—***R. v. TAYLOR*, No. 4222, *post*.

**3123. Function of jury—To decide issue of fact.]**  
—At the trial at quarter sessions of a prisoner upon a charge of stealing milk, the jury retired, & without any communication from them the judge sent for them & asked them if they were agreed upon their verdict. They replied that they were not. The judge then asked them if they believed the evidence for the prosecution, & the foreman replied that they did. Thereupon the judge directed a verdict of guilty to be recorded:—*Held*: the judge in effect found a fact essential to the conviction, namely, that the prisoner did the act *animo furandi*; that was not his function, & the conviction must be quashed.

If a special verdict includes all the evidence required to find a prisoner guilty of the offence charged, the judge may act upon it & direct a verdict of guilty to be entered (*POLLOCK, B.*)—*R. v. FARNBOROUGH*, [1895] 2 Q. B. 484; 64 L. J. M. C. 270; 73 L. T. 351; 59 J. P. 505; 44 W. R. 48; 11 T. L. R. 554; 39 Sol. Jo. 691; 18 Cox, C. C. 191; 15 R. 497, C. C. R.

*Annotation*:—*Mentd.* *R. v. Meyer* (1908), 99 L. T. 202.

## SUB-SECT. 12.—JUDGE'S SUMMING UP.

*A. In General.*

**3124. Whether summing up may be dispensed with—In a simple case.]**—In a simple case the judge is entitled to ask the jury whether they will dispense with his summing up.—*R. v. NEWMAN* (1913), 9 Cr. App. Rep. 134, C. C. A.

**3125. — In a difficult case.]**—At the end of a trial for larceny on several different occasions, which had lasted four days, the assistant Recorder omitted to direct the jury saying that they had heard the case, that he expected they had had

try them. It is only in rare cases, such as where he is an eye-witness of a breach of the law, that he should initiate a prosecution, & even then, with the exception of contempts of the ct., he should not be the trial judge.—*R. v. DANIEL* (1912), 21 W. L. R. 563; 17 B. C. R. 150; 4 D. L. R. 443.—*CAN.*

**q. — Not to act as prosecutor.]**—A judge ought not to have imposed upon him the appearance of acting as prosecutor.—*R. v. FARRELL & MOORE* (1848), 3 Cox, C. C. 139.—*IR.*

**3123 i. Function of jury—To decide issue of fact.]**—It is essential that the whole evidence be submitted to the jury who decide finally as to the innocence or guilt of accused.—*R. v. CARLIN* (1903), Q. R. 12 K. B. 483.—*CAN.*

**3123 ii. — — —.]**—In an altercation prisoner struck B. & afterwards B. also struck B. several times. B. died within a few hours from the blows. Upon prisoner's trial for unlawful assault, before the chairman of the sessions & a jury:—*Held*: it was not for the judge to determine whether the assault which prisoner was alleged to have committed resulted in the death of B.; that was, if a material question, one for the jury.—*R. v. TAYLOR* (1921), 67 D. L. R. 372; 51 O. L. R. 392.—*CAN.*

**3123 iii. — — —.]**—On a charge of rape the judge in his charge to the jury stated what had been proved instead of leaving it to them to decide what in

their opinion was proved:—*Held*: such a charge amounted to a clear misdirection, & the verdict was erroneous owing to such misdirection.—*ALI FAKIR v. R.* (1897), 1 L. R. 25 Cal. 230.—*IND.*

**r. — — — Credibility of witness.]**—On a trial for murder, the Crown having made out a *prima facie* case by circumstantial evidence, prisoner's daughter, a girl of fourteen, was called on his behalf, & swore that she herself killed deceased without prisoner's knowledge, & under circumstances detailed, which would probably reduce her guilt to manslaughter:—*Held*: the judge was not bound to tell the jury that they must believe this witness in the absence of testimony to show her unworthy of credit, but he was right in leaving the credibility of her story to them, & if from her manner he derived the impression that she was under some undue influence it was not improper to call their attention to it in his charge.—*R. v. JONES* (1868), 23 U. C. R. 416.—*CAN.*

**s. — — — Sufficiency of evidence.]**—On a Crown case reserved it is not proper to reserve the question whether there is sufficient evidence in support of the criminal charge, that being a question for the jury; whether there is any evidence is a question of law for the judge.—*R. v. LLOYD* (1890), 19 O. R. 352.—*CAN.*

**t. — — — Meaning of document.]**—It is for the judge to determine

enough of it, & that anything he could say would be of little use. Prisoner complained of the method of identification adopted, & as to some of the charges his evidence went to establish an alibi. The jury found prisoner guilty. On appeal the conviction was quashed on the ground that in the circumstances the assistant Recorder should have directed the jury on the question of identification, & should have told them that if they thought that upon the evidence some of the charges could not be supported they might, if they saw fit, acquit prisoner.—*R. v. FINCH* (1916), 85 L. J. K. B. 1575; 115 L. T. 458; 25 Cox, C. C. 537; 12 Cr. App. Rep. 77, C. C. A.

**3126. Not dissertation upon the law.]**—The Ct. of Criminal Appeal does not criticise summings up as if the judge was writing an accurate treatise of that part of the criminal law with which he is dealing (*per CUR.*)—*R. v. MASON* (1909), 73 J. P. 250; 2 Cr. App. Rep. 57, C. C. A.

**3127. — Reference to particular case.]**—*R. v. HAMPTON* (1909), 2 Cr. App. Rep. 274, C. C. A.

**3128. — — —.]**—(1) On a trial for murder the judge is entitled to tell the jury that there are no grounds for finding a verdict of manslaughter.

(2) When a judge sums up he is not composing a law treatise, but speaking with regard to the facts of the particular case (*per CUR.*)—*R. v. SCHOLEY* (1909), 3 Cr. App. Rep. 183, C. C. A.

*Annotation*:—*Generally*, *Mentd.* Public Prosecutions Director v. Beard (1920), 14 Cr. App. Rep. 158.

**3129. Direction as to onus of proof.]**—Where *prima facie* evidence has been given for the Crown, which, if unanswered, would raise a presumption that might justify a jury in bringing in a verdict of guilty, & prisoner has called evidence to rebut that presumption, the proper direction for the jury is, that if the evidence in rebuttal raises in their minds a reasonable doubt as to prisoner's guilt, they should acquit him, as the onus of proof still lies upon the prosecution. If upon the whole evidence the jury are left in a real state of doubt the prosecution have failed to satisfy the onus of proof which lies upon them.—*R. v. STODDART*

whether a document is capable of bearing the meaning assigned to it, & for the jury to say whether, in the circumstances, it has that meaning or not.—*R. v. KARN* (1903), 5 O. L. R. 704; 2 O. W. R. 335.—*CAN.*

**a. — — — Not to be governed by opinion of judge as to facts.]**—*R. v. BREWSTER* (No. 2) (1896), 2 Terr. L. R. 377.—*CAN.*

**b. — — —.]**—*R. v. KAPLANSKY, SACHUK & SENILOFF* (1922), 69 D. L. R. 625; 51 O. L. R. 587.—*CAN.*

**c. Right of jury—To make inquiries.]**—On a criminal trial the jury may with leave of the ct., through their foreman, make any inquiry which could be properly made on behalf of the prosecution or defence.—*R. v. JAMES* (1884), 3 V. R. (Law), 193.—*AUS.*

## PART VII. SECT. 7, SUB-SECT. 12.—A.

**3126 i. Not dissertation upon the law.]**—On a stated case for argument on the question "should a judge at trial specifically instruct the jury to consider the state of intoxication of prisoner, & if they thought his state of intoxication was such as to prevent him appreciating the nature & result of his acts they should not convict of murder, but of manslaughter?"—*Held*: when a judge sums up to a jury, he must not be taken to be intiting a treatise on the law.—*R. v. BLYTHE* (1909), 14 O. W. R. 688; 1 O. W. N. 33; 19 O. L. R. 386; 15 Can. Crim. Cas. 224.—*CAN.*

(1909), 73 J. P. 348; 25 T. L. R. 612; 53 Sol. Jo. 578; 2 Cr. App. Rep. 217, C. C. A.

*Annotations:—Held.* R. v. Vassileva (1911), 6 Cr. App. Rep. 228; R. v. Schama, R. v. Abramovitch (1914), 112 L. T. 480; R. v. Bliss Hill (1918), 82 J. P. 194; R. v. Sanders (1919), 14 Cr. App. Rep. 11. *Mentd.* R. v. Bradshaw, etc. (1910), 4 Cr. App. Rep. 280; R. v. Brownlow (1910), 74 J. P. 240; R. v. Norton, [1910] 2 K. B. 496; R. v. Pratley (1910), 4 Cr. App. Rep. 159; R. v. Ellsom (1911), 76 J. P. 38; R. v. Hill (1911), 76 J. P. 49; R. v. Savidge (1911), 76 J. P. 32; R. v. Horn (1912), 76 J. P. 270; R. v. Monk (1912), 7 Cr. App. Rep. 119; Ibrahim v. R., [1914] A. C. 599; R. v. Finch (1916), 85 L. J. K. B. 1575; R. v. Immer, R. v. Davis (1917), 118 L. T. 416.

**3130. Issues of fact must be left to jury.**—On an indictment for attempted rape, a positive direction to the jury to convict of indecent assault is a ground for quashing.—R. v. WEST (1910), 4 Cr. App. Rep. 179, C. C. A.

*Annotation:—Consd.* R. v. Beeby (1911), 6 Cr. App. Rep. 138.

**3131.** —.]—However strong a judge's view may be of the evidence he should leave questions

of fact to the jury.—R. v. BEEBY (1911), 6 Cr. App. Rep. 138, C. C. A.

**3132.** —.]—A summing up, in effect recommending a verdict of guilty which does not adequately put prisoner's case to the jury, is reason for quashing a conviction.—R. v. FRAMPTON (1917), 12 Cr. App. Rep. 202, C. C. A.

**3133.** —.]—Judge may express opinion.—On the facts.]—Provided that the judge in summing up clearly leaves the issues of fact to the jury he is entitled to express his opinion on the facts of the case.—R. v. O'DONNELL (1917), 12 Cr. App. Rep. 219, C. C. A.

**3134.** —.]—As to defence.]—R. v. MELVILLE (1909), 2 Cr. App. Rep. 173, C. C. A.

**3135.** —.]—R. v. HEPPWORTH (1910), 4 Cr. App. Rep. 128, C. C. A.

**3136.** —.]—As to conduct of defending counsel.]—R. v. CASTRO, No. 3207, *post*.

**3137.** Where gist of offence is intent—Should

**3133 i. Issues of fact must be left to jury—Judge may express opinion.**—On the facts.]—R. v. SWYRD (1909), 13 O. W. R. 468; 15 Can. Crim. Cas. 138.—CAN.

**3133 ii.** —.]—It is open to a judge in charging the jury to express his opinion as to the effect of a certain portion of the evidence; but he should always be careful to add that it is for the jury to form their own opinion.—R. v. BEPIN BISWAS (1884), 1 L. R. 10 Calc. 970.—IND.

**3133 iii.** —.]—Where the judge expresses an opinion that if the facts given in evidence are believed, accused is guilty of murder, the jury have a right to disagree with his view & acquit prisoner of the offence.—R. v. NIRMAL KANTA ROY (1914), 1 L. R. 41 Calc. 1072.—IND.

**d. Mode of summing up—Two counts—Evidence for one only.**—Where two counts are included in one presentment & evidence is given which is applicable to one count, but not to the other, the ct. will not interfere with it if the trial judge in his summing up has directed the jury not to apply the evidence to the count to which it is not applicable.—R. v. JOHANSEN, [1917] V. L. R. 584.—AUS.

**e.** —.]—Avoidance of interrogative expressions assuming guilt of accused.]—The judge should avoid the use, in the charge to the jury, of interrogative expressions assuming the guilt of accused, & of slang & colloquial phrases.—AMIRUDDIN AHMED v. R. (1917), 1 L. R. 45 Calc. 557.—IND.

**f.** —.]—Direction that guilt must be beyond reasonable doubt.]—In a criminal case accused is entitled to have the jury directed that before they can convict him they must, on the evidence, be satisfied of his guilt, beyond reasonable doubt.—R. v. ROBERTS (1910), 10 S. R. N. S. W. 612; 27 N. S. W. W. N. 148.—AUS.

**g.** —.]—On a trial for manslaughter the judge directed the jury that the Crown must prove two things to their satisfaction beyond all reasonable doubt: that deceased was killed by being struck by a motor car, & that accused was the driver of that car. He then directed them to weigh the evidence for & against the contention that accused was culpably negligent, but did not tell them before convicting accused they must be satisfied beyond reasonable doubt of his negligence.—*Held:* this was a proper direction.—WITTIG v. R. (1919), 27 C. L. R. 158.—AUS.

**h. Misdirection—Ground for setting aside verdict.**—[Whole summing up must be considered.]—Isolated passages of a summing up will not be considered separately as grounds for setting aside

a verdict, but the whole summing up must be taken into consideration.—R. v. BENNETT (1900), 10 Q. L. J. 147.—AUS.

**k.** —.]—R. v. WALKER (1893), 1 Terr. L. R. 482.—CAN.

**l.** —.]—What constitutes—Neglect to draw attention to Criminal Code, s. 259 (d).]—On the trial of an indictment for murder of K., it was proved that prisoners, who had been drinking, came on deceased's lawn & commenced to shout & sing & use profane & insulting language towards him. He twice warned them away, & finally appeared with a loaded gun threatening to shoot. A rush was made towards the verandah where he stood, when he took hold of the barrel of the gun & struck one of prisoners with the stock. The gun was discharged into his body & there was evidence that prisoners then maltreated him & his wife. He was taken to a hospital & died shortly after. The trial judge, in charging the jury, instructed them that prisoners were doing an unlawful act in trespassing on the property of deceased, & that if they were actuated by malice it would be murder, if not it was manslaughter, drawing their attention specially to the above sect. & sect. 259 (6). Prisoners were found guilty of murder. On appeal:—*Held:* the above direction to the jury ignored the requirements of the sub-sect. above, to which the judge should also have drawn their attention directing them to find whether or not prisoners knew, or ought to have known, that their acts were likely to cause death, & his failure to do so left his charge open to objection & constituted misdirection for which prisoners were entitled to a new trial.—GRAVES v. R. (1913), 47 S. C. R. 568.—CAN.

**m.** —.]—Neglect to point out minor inconsistencies.]—A case is to be put to the jury in a way to ensure their due appreciation of the value of the evidence; but, if the judge, in his analysis of the evidence, omits some fact relied on or fails to note its significance, that is not misdirection or non-direction.

The theory of the defence & the evidence favourable to the defence should be put before the jury in such a way as to ensure their appreciation of the points at issue. But every bit of evidence & every inconsistency therein need not be pointed out to the jury (FERGUSON, J.).—R. v. BAUGH (1917), 38 O. L. R. 559; 33 D. L. R. 191; 28 Can. Crim. Cas. 146.—CAN.

**n.** —.]—Omission to call attention to evidence of witnesses for defence.]—In summing up a case to the jury, the judge omitted to call their attention to the evidence of the witnesses for the defence. This evi-

dence appeared to the High Ct. to be untrustworthy:—*Held:* the summing up was not defective on account of this omission on the part of the judge.—RE ROCHIA MOHATO, R. v. ROCHIA MOHATO (1881), 1 L. R. 7 Calc. 42; 8 C. L. R. 273.—IND.

**o.** —.]—Omission to call attention to fact in favour of accused.]—Three persons, who were attacked & wounded in an affray, informed the police on the same day that the persons who had attacked them were A., B. & C. Eighteen days afterwards the same complainants gave to the magistrate inquiring into the case the names of four other persons who, they said, with the three persons first accused, formed the attacking party. The seven accused were tried jointly for the offence before the Additional Recorder of Rangoon & a jury. In his charge to the jury the Additional Recorder omitted to call their attention to the fact that four out of the seven accused had not been mentioned by prosecutors until after eighteen days had passed over. Prisoners were convicted:—*Held:* the Additional Recorder misdirected the jury; under the circumstances the misdirection prejudiced the four persons last accused; & the verdict must be set aside as far as they were concerned.—LEU TU v. R. (1884), 1 L. R. 11 Calc. 10.—IND.

**p.** —.]—Points in favour of accused not sufficiently amplified.]—Where a charge to the jury is, upon the whole, favourable to accused, & most of the points of importance in favour of accused are more or less dealt with in the charge, the mere fact that some of the points are not so amplified as they might have been does not amount to a misdirection.—R. v. WAMAN SHIVRAM DAMLE (1903), 1 L. R. 27 Bom. 626.—IND.

**q.** —.]—Material inadmissible evidence admitted.]—Where material evidence, which ought not to be admitted, is admitted, it is a misdirection of law when the judge tells the jury that it was evidence which they can consider & on which they can, if they think proper, convict accused. The fact that, after putting the jury in possession of the inadmissible evidence, the judge in his charge goes on also to point out circumstances which would justify the jury in disbelieving the wrongly admitted evidence, does not make the misdirection less a misdirection.—R. v. WAMAN SHIVRAM DAMLE (1903), 1 L. R. 27 Bom. 626.—IND.

**r.** —.]—Transfer of witnesses—Failure to acquaint jury.]—The omission by the judge in his charge to the jury, to mention the fact of the original witnesses named in the first information having been abandoned by

**Sect. 7.—The hearing: Sub-sect. 12, A. & B.]**

**expressly ask jury to deal with question.]**—When the gist of the offence is intent, the jury should be expressly asked to deal with that point.—*R. v. SHEVILL* (1923), 17 Cr. App. Rep. 97, C. C. A.

**3138. Mistake in summing up—Should be corrected by counsel.]**—If a mistake is made in summing-up, counsel ought to correct it.—*R. v. KAMS* (1910), 4 Cr. App. Rep. 8, C. C. A.

**Annotation:—***Mentd. R. v. Landow* (1913), 8 Cr. App. Rep. 218.

**3139. ———.]**—If a judge makes a misstatement in summing up counsel may interrupt to correct him.—*R. v. MOWBRAY* (1912), 8 Cr. App. Rep. 8, C. C. A.

**B. Necessary Contents.**

**3140. Must put case for defence to jury—As well as case for prosecution.]**—It is most important that the judge who is trying a case should put to the jury in his summing up the case for the defence set up by or on behalf of prisoner as well as the case for the prosecution. If that is not done there is sometimes a miscarriage of justice where the conviction is quashed (*per cur.*).—*R. v. KEATING* (1909), 2 Cr. App. Rep. 61; 73 J. P. Jo. 112, C. C. A.

**3141. ———.]**—A judge in summing up is bound to put the defence, however weak, before the jury.—*R. v. DINNICK* (1909), 74 J. P. 32; 26 T. L. R. 74; 3 Cr. App. Rep. 77, C. C. A.

**Annotations:—***Expld. R. v. Trueman* (1913), 9 Cr. App. Rep. 20. *Refd. R. v. Hill* (1911), 105 L. T. 751; *R. v. Immer*, *R. v. Davis* (1917), 26 Cox, C. C. 186.

the prosecution, of two of them having given evidence for the defence, & of the witnesses actually examined for the prosecution being entirely new witnesses, is a sufficient misdirection to justify the setting aside of the conviction.—*DASARATH MANDAL v. R.* (1907), 1 L. L. R. 34 Calc. 325.—**IND.**

**h. ———. Instructing jury to consider statements not amounting to confessions against co-accused.]**—It is a misdirection which must have misled the jury to instruct them to take into consideration statements not amounting to confessions by an accused as against the co-accused.—*AMIRUDDIN AHMED v. R.* (1917), 1 L. L. R. 45 Calc. 557.—**IND.**

**i. ———. Admissibility of confessions.]**—It is a misdirection to put to the jury & to leave it to them to determine whether a confession to a magistrate, & how much of a confession to the police are admissible.—*AMIRUDDIN AHMED v. R.* (1917), 1 L. L. R. 45 Calc. 557.—**IND.**

**a. ———. Recommendation to mercy.]**—Prisoner was tried for murder. Prosecutor informed the jury that it was competent for them to bring in verdict of guilty with a strong recommendation to mercy.

Application for prisoner was made for an order reserving for the opinion of the Ct. of Appeal the question whether the fact that the ct. at the trial did not direct the jury that a recommendation to mercy would not necessarily be given effect to & might be disregarded by the ct., constituted a misdirection in law:—*Held: non-direction did not vitiate the verdict.*—*R. v. PARKINSON* (1915), 34 N. Z. L. R. 636.—**N.Z.**

**b. Comment of judge.]**—Under the criminal law of Canada the failure of accused at the preliminary hearing to disclose his defence must not be a matter of comment by the judge in his instructions to the jury. A conviction was quashed & a new trial directed on the ground that what was said in the instructions to the jury amounted to such comment.—*R. v. MAH HONG* (1920), 3 W. W. R. 314; 53

D. L. R. 356.—**CAN.**

**c. Undue prominence to certain evidence—Counsel's duty to call judge's attention to.]**—As to certain threats alleged to have been uttered by prisoner:—*Held: they were clearly admissible, & if undue prominence was given to them in the charge, the attention of the judge should have been called to it by prisoner's counsel.*—*R. v. JONES* (1868), 28 U. C. R. 416.—**CAN.**

**d. Illegal evidence—Subsequent ruling out.]**—*R. v. FRASER* (1870), 14 L. C. J. 245.—**CAN.**

**e. Whole charge not delivered in open court—Effect of.]**—A trial judge did not deliver the whole of his charge to the jury in open ct., but, having been requested by message from the jury after they had retired, proceeded to the jury room with plff. in charge of the sheriff, & in the absence of both counsel for the Crown, who elected to be absent, & counsel for plff., gave further instructions to the jury, plff. not objecting:—*Held: the facts as to this did not properly form part of the record: that it was a question which could have been recovered, & therefore, not raisable in error: while it is inexpedient for a judge to communicate with the jury otherwise than in open ct., yet his doing so is not necessarily a ground of error.*—*GREER v. R.* (1892), 2 B. C. R. 112.—**CAN.**

**f. Proper evidence only to go to jury—Mistake by counsel.]**—Even if a mistake is made by counsel at a trial, that does not relieve the judge in a criminal case from the duty to see that proper evidence only is before the jury.—*R. v. BROOKS* (1906), 11 O. L. R. 525; 7 O. W. R. 533; 11 Can. Crim. Cas. 188.—**CAN.**

**g. Necessity for specific direction—Where principle made obvious in other language.]**—On a conviction for murder being affirmed by the Supreme Ct.:—*Held: the trial judge was justified in refusing to direct the jury specifically that "besides being satisfied that the facts proven were consistent with prisoner's guilt, they must also be with*

**3142. ———.]**—Conviction quashed on the ground that the defence was not properly put to the jury.—*R. v. RICHARDS* (1910), 4 Cr. App. Rep. 161, C. C. A.

**3143. ———.]**—It is a misdirection not to put a substantive defence raised by deft. to the jury although the judge suggests another defence.—*R. v. HILL* (1911), 105 L. T. 751; 76 J. P. 49; 28 T. L. R. 15; 22 Cox, C. C. 625; 7 Cr. App. Rep. 26, C. C. A.

**Annotation:—***Refd. R. v. Immer*, *R. v. Davis* (1917), 26 Cox, C. C. 186.

**3144. ———.]**—If the Ct. of Criminal Appeal considers that deft.'s case was not fully put to the jury, it may quash a conviction.—*R. v. WILSON (alias WHITTINGDALE)* (1913), 9 Cr. App. Rep. 124, C. C. A.

**3145. ———.]**—*R. v. FRAMPTON*, No. 3132, *ante*.

**3146. ———. Although not raised by defence.]**—Whatever may be the line of defence adopted by counsel for a prisoner at the trial, the judge is bound to put to the jury such questions as appear to him properly to arise upon the evidence even although counsel may not himself have raised some point.

At the trial of applt. for murder his counsel relied substantially on the defence that the killing was accidental, but he indicated that in the event of the jury not accepting that view he would ask them to find that the crime was manslaughter & not murder. The judge directed the jury that it was impossible for them to find a verdict of manslaughter, & that if they did not come to the conclusion that the killing was accidental they

any other rational explanation, theory or hypotheses," if the charge made this principle sufficiently obvious to the jury in other language.—*R. v. COOK* (1914), 14 E. L. R. 471; 18 D. L. R. 706; 23 Can. Crim. Cas. 50.—**CAN.**

**h. Necessity for calling attention to matters of prime importance—If favouring accused.]**—A judge, in summing up, is entitled to have regard to the elaboration & skill with which the rival contentions have been placed before the jury by the advocates on both sides, but he should not in doing so omit pointedly to call the attention of the jury to matters of prime importance, especially if they favour accused, merely because they have been discussed by the advocate.—*R. v. MALGOWDA BASGOWDA* (1902), 1 L. R. 27 Bom. 644.—**IND.**

**k. Objections to charge—When & how made.]**—I look upon it as a principle, that if an objection exists, whether to the charge of the judge or to the reception of evidence, the objection must be taken at the time, & taken in a specific, tangible shape, so that it may not be misunderstood. The reason is, because, if thus so made, it may be easy, by additional evidence or otherwise, to supply or correct what was supposed defective; or, if the objection lay to the charge of the judge, he might, on the supposed error being pointed out, retract or qualify, or explain what he had said. On that ground the principle seems to apply equally in misdemeanours as in civil cases.—*R. v. O'CONNELL* (1844), 7 I. L. R. 261, 332.—**IR.**

**PART VII. SECT. 7, SUB-SECT. 12. —B.**

**3140 i. Must put case for defence to jury—As well as case for prosecution.]**—It is the duty of the judge to call the attention of the jury to the different elements constituting the offence & to deal with the evidence by which it is proposed to make accused liable.—*TAJU PRAMANIK v. R.* (1898), 1 L. R. 25 Calc. 711.—**IND.**

must find a verdict of murder. The jury returned a verdict of murder:—*Held*: the judge ought to have left to the jury the question whether the crime was manslaughter only, & that as he had omitted to do so, the Ct. would enter a verdict of manslaughter, which the jury might have found if they had been directed upon the point.—*R. v. HOPPER*, [1915] 2 K. B. 431; 84 L. J. K. B. 1371; 113 L. T. 381; 79 J. P. 335; 31 T. L. R. 360; 59 Sol. Jo. 478; 25 Cox, C. C. 34; 11 Cr. App. Rep. 136, C. C. A.

*Annotations*:—*Consd. R. v. Clinton* (1917), 12 Cr. App. Rep. 215. *Refd. R. v. Beard* (1920), 84 J. P. 129.

**3147. — Especially where accused is undefended.**—In summing up the judge should take care to point out all that there is to be said for the defence, especially when prisoner is undefended by counsel.—*R. v. TOTTY* (1914), 111 L. T. 167; 24 Cox, C. C. 227; 10 Cr. App. Rep. 78, C. C. A.

*Annotation*:—*Consd. R. v. Immer, R. v. Davis* (1917), 26 Cox, C. C. 186.

**3148. —**—The rule that a summing up must carefully put the defence is especially strict when deft. is not represented by counsel.—*R. v. IMMER, R. v. DAVIS* (1917), 118 L. T. 416; 26 Cox, C. C. 186; 13 Cr. App. Rep. 22, C. C. A.

**3149. — Need not discuss defence.**—A judge in summing up is not bound to discuss the defence raised.—*R. v. NICHOLLS* (1908), 73 J. P. 11; 25 T. L. R. 65; 1 Cr. App. Rep. 167, C. C. A.

**3150. — Need not state defence in terms.**—Omission in a summing up to tell the jury in terms what the defence is does not amount to misdirection if the issues in the case are in substance put to the jury in the summing up.—*R. v. BRADSHAW, ETC.* (1910), 4 Cr. App. Rep. 280, C. C. A.

**3151. — When dealt with exhaustively by counsel.**—A summing up need not go through the evidence, especially where counsel on both sides have dealt with it exhaustively.—*R. v. McDOUGALL* (1912), 7 Cr. App. Rep. 130, C. C. A.

**3152. Need not go into every detail of evidence.**—Omissions in summing up not necessarily misdirection. Summings up were not intended to be a minute examination into all the details of a case, though in this case the summing up might have been fuller. There not being a miscarriage of justice the Ct. could not interfere.—*R. v. FARINGTON* (1908), 1 Cr. App. Rep. 113, C. C. A.

**3153. —**—Unimportant omissions in a summing up do not amount to misdirection. A conviction cannot be quashed because a judge, in summing up, does not go through every detail of the case.—*R. v. HAYES* (1909), 2 Cr. App. Rep. 70, C. C. A.

**3154. — Provided defence is clearly put.**—The substantial defence must be put to the jury, but not every part or particular of it.—*R. v. TRUEMAN* (1913), 9 Cr. App. Rep. 20, C. C. A.; *subsequent proceedings*, 9 Cr. App. Rep. 45, C. C. A.

**3155. Only necessary to put main defence fully before jury.**—In cases of indecent assault & cases of the same kind where consent is a defence, if the facts of the case are such that the jury may reasonably infer that prosecutrix consented to the acts alleged, there ought to be a direction to the jury by the judge both as to the *onus* which is on the prosecution to prove non-consent, & also as to the evidence given on the question of consent. But if the facts are not such as that the jury may reasonably infer consent, & particularly if the

case has been conducted by counsel so as to make the question of consent an entirely secondary issue, there is no necessity for such a direction.—*R. v. MAY*, [1912] 3 K. B. 572; 82 L. J. K. B. 1; 108 L. T. 351; 77 J. P. 31; 29 T. L. R. 24; 23 Cox, C. C. 327; 8 Cr. App. Rep. 63, C. C. A.

*Annotation*:—*Mentd. R. v. Hopper* (1915), 79 J. P. 335.

**3156. —**—Applt. was indicted for murder. The defences set up were accident, & that the circumstances reduced the crime to manslaughter, of which the jury convicted him. The defence substantially relied on was the second defence. The judge in directing the jury did not deal fully with the defence of accident:—*Held*: as the defence had been substantially that the case was one of manslaughter, & the defence of accident, though not abandoned, was not strongly relied on, it could not be said that the judge had misdirected the jury.—*R. v. GORGES* (1915), 85 L. J. K. B. 1049; 114 L. T. 77; 25 Cox, C. C. 218; 11 Cr. App. Rep. 259, C. C. A.

**3157. Second trial before same jury—Clear direction essential—Same defendant.**—When a prisoner has already been tried in the same Ct. before the same judge & by the same jury, it is essential that a proper & careful direction should be given them, on the trial of a later indictment, that it is not affected by the former charge.—*R. v. BRERETON* (1914), 10 Cr. App. Rep. 201, C. C. A.

**3158. — Different defendants.**—When the same jury has tried different defts. on charges arising out of the same facts there is especial need of a careful direction in the subsequent case.—*R. v. YATES* (1920), 15 Cr. App. Cas. 15, C. C. A.

*Annotation*:—*Mentd. R. v. Young* (1923), 129 L. T. 64.

**3159. Joint indictment of several accused—Evidence by one accused against another—Separate summing up.**—Where prisoners are jointly indicted, & a statement is put in evidence in which one implicates the other, the judge will sum up the cases separately, requesting the jury to consult & come to a decision upon the one case, but not to deliver their verdict, & then he will sum up the case of the other, & take the verdict against both.—*R. v. CLOTHIER & TILER* (1844), 4 L. T. O. S. 196; 1 Cox, C. C. 113.

**3160. — Cases must be clearly distinguished.**—The only evidence on which B. was convicted of receiving a gun, well knowing that it was stolen, was that of G., who said that S. & B. together sold him the stolen gun for 5s. G. admitted previous convictions. The judge who tried the case against S. & B. together, told the jury that 5s. was a ridiculous price for the gun; but he omitted to caution the jury that if that were so, it was as much evidence of guilty knowledge on the part of G., who bought the gun, as it was on the part of B., who sold it, & that the sole evidence against B. was that of G., who might be an accomplice. There was abundant evidence against S., but the judge did not properly distinguish between the cases against the two prisoners. On these grounds the conviction of B. was quashed.—*R. v. BEAUCHAMP* (1909), 73 J. P. 223; 25 T. L. R. 330; 2 Cr. App. Rep. 40, C. C. A.

**3161. —**—When defts. are tried together & set up different defences, the direction to the jury must state clearly the difference.—*R. v. ROWAN* (1910), 5 Cr. App. Rep. 279, C. C. A.

**3160 i. Joint indictment of several accused—Cases must be clearly distinguished.**—A distinct instruction that the evidence of a witness upon one point affects only one of two persons

jointly accused, emphasises the necessity for giving an equally distinct instruction as to any other evidence on other points, which is not applicable to both accused.—*R. v. MURRAY &*

*MAHONEY* (No. 2), [1917] 1 W. W. R. 404; 10 Alta. L. R. 275; 27 Can. Crim. Cas. 247; 33 D. L. R. 702.—**CAN.**



*Sect. 7.—The hearing: Sub-sect. 12, B.]*

**3162.** ———.]—When two or more persons are jointly indicted the direction must carefully distinguish between the case of each, & it is a grave misdirection to suggest wrongly that if one is guilty another must also be guilty.—*R. v. GRAHAM* (1919), 14 Cr. App. Rep. 7, C. C. A.

**3163.** ———.]—When there is more than one deft., the direction must distinguish carefully between each case.—*R. v. MATTHEWS* (1919), 14 Cr. App. Rep. 23, C. C. A.

**3164.** ———.]—When defts. are jointly indicted but not all on all charges, the jury must be directed to discriminate carefully between the respective allegations.—*R. v. TWIGG* (1919), 14 Cr. App. Rep. 71, C. C. A.

**3165.** ———.]—In the case of co-defts. the must, if necessary, be carefully charged to distinguish between their cases.—*R. v. LOVETT & FLINT* (1921), 16 Cr. App. Rep. 41, C. C. A.

**3166. Whether necessary to inform jury of power to convict of lesser offence.**—A judge is not bound in every case to tell the jury that they are at liberty to convict of a lesser offence, unless that point is substantially raised by the evidence (*per CUR.*).—*R. v. VAUGHAN* (1908), 1 Cr. App. Rep. 25, C. C. A.

**3167.** ———.]—Where by statute a lesser verdict can be returned on an indictment than that charged in the indictment, a judge, in summing up the case to the jury, need not tell the jury of their right to return the lesser verdict, if the evidence in the case is inconsistent with the return of such a

verdict.—*R. v. NAYLOR* (1910), 74 J. P. 460; 5 Cr. App. Rep. 19, C. C. A.

**3168.** ———.]—It does not follow that because it is open to the jury to find a verdict to convict of a lesser offence than that charged the judge must so direct them.—*R. v. PARROTT* (1913), 8 Cr. App. Rep. 186, C. C. A.

**3169.** ———.]—Applt. was convicted of wounding with intent to do grievous bodily harm but was indicted for wounding with intent to murder:—*Held*: on such an indictment the jury should have been directed that they were entitled to find a verdict of unlawful wounding.—*R. v. PARKS* (1914), 10 Cr. App. Rep. 50, C. C. A.

**3170. Defence unsupported by facts—Whether necessary to put before jury.**—On the trial of an indictment for murder, the judge is not bound to suggest to the jury that they can find a verdict of not guilty, unless the facts require it.—*R. v. LYONS* (1910), 5 Cr. App. Rep. 99, C. C. A.

**3171.** ———.]—**Hypothetical suggestion of insanity.**—A judge is not bound to put to a jury a defence resting merely on a hypothesis of impulsive insanity.—*R. v. THOMAS* (1911), 7 Cr. App. Rep. 36, C. C. A.

**3172.** ———.]—A judge is not bound in law to put a particular defence to the jury if he takes the view that that defence has not been made out & that the facts do not amount in law to proof of the defence which is suggested.—*R. v. HONEYANDS* (1914), 10 Cr. App. Rep. 60, C. C. A.

*Annotation:—Refd. Public Prosecutions Director v. Beard* (1920), 14 Cr. App. Rep. 158.

**3173. Direction as to manslaughter on charge of murder.**—A judge is not bound in every trial

**3166 i. Whether necessary to inform jury of power to convict of lesser offence.**—

—Dft. was charged with carnal knowledge of a girl under the age of ten years. The judge directed the jury that they might find dft. guilty of an assault with intent to commit the offence charged:—*Held*: he was not bound to tell them that they might also find dft. guilty of an attempt to commit the offence.—*R. v. KEOGH* (1878), 1 N. S. W. S. C. R. N. S. 136.—**AUS.**

**3166 ii.** ———.]—If on a criminal trial the judge correctly instructs the jury on the essential ingredients of the crime charged, & fully & fairly puts to the jury the defence set up by prisoner, a verdict of guilty amounts to a finding by the jury of every essential element of that crime, & it cannot be disturbed by a suggestion that the jury, or one part of the evidence, might have found him guilty of a lesser offence, not referred to by counsel for the defence, if the judge had informed them that they were at liberty to do so.—*Ross v. R.*, [1922] V. L. R. 329.—**AUS.**

**3166 iii.** ———.]—Prisoner, being indicted for highway robbery & assault, the ct. is not bound to tell the jury that they may acquit prisoner on the count for robbery, & find him guilty on the count for assault; it is discretionary in the ct. to do so or not.—*R. v. CROWAN* (1842), Arn. M. & O. 321.—**IR.**

**1. —Necessity for drawing distinction between offences.**—Dft. was tried on an information which charged him with having committed an indecent assault on a female child under the age of twelve years. The judge, in summing up, told the jury they might find prisoner guilty of common assault, but he did not draw a distinction between the offences, nor tell the jury that an assault must be either without or against consent. The jury found dft. guilty of a common assault. The facts showed that there was no consent:—*Held*: verdict of common assault

was admissible under the information, but as the attention of the jury was not called to the question of consent, the conviction ought to be quashed.—*R. v. BRADY* (1876), 14 N. S. W. S. C. R. 468.—**AUS.**

**m.** ———.]—It is the duty of the judge in a criminal trial with a jury to define to the jury the crime charged & to explain the difference between it & any other offence of which it is open to the jury to convict accused. Failure to so instruct the jury is good cause for granting a new trial, & the fact that counsel for accused took no exception to the judge's charge is immaterial.—*R. v. WONG ON & WONG GOW* (1904), 10 B. C. R. 555.—**CAN.**

**3173 i. Direction as to manslaughter on charge of murder.**—Prisoner was charged with the murder of a girl. The medical evidence was that the girl had been violated & had died of strangulation. The main evidence for the Crown was that of three witnesses who deposed to confessions made by prisoner. Prisoner's defence was an *alibi*. No suggestion was made at the trial by prisoner's counsel that it was open to the jury to return a verdict of manslaughter. The trial judge directed the jury that if they were satisfied that prisoner caused the girl's death with the intention of bringing that death about, or that in the course of having sexual connection with her he caused her death, or that he caused her death in furtherance of that purpose, he would be guilty of murder. The jury found prisoner guilty of murder. On motion for special leave to appeal it was argued that in view of the evidence of one of the confessional witnesses, it would have been open to the jury to find prisoner guilty of manslaughter & that the judge should have so directed them:—*Held*: the effect of the direction was that the jury should acquit prisoner unless they found that he caused the girl's death in one of the three ways declared by the judge, to amount to murder; the direction was

proper; & the judge was in the circumstances under no duty to tell the jury that it was open to them to find prisoner guilty of manslaughter.—*Ross v. R.*, [1922] V. L. R. 329.—**AUS.**

**3173 ii.** ———.]—Where the judge in a trial for murder concludes his trial thus: "the verdict of the jury is generally resumed in a few words, in the solemn words of guilty or not guilty," he is not supposed to direct the jury to bring in but one of the two verdicts of guilty or not guilty of the murder, if in other parts of his charge he has sufficiently pointed out the distinction between murder & manslaughter, & instructed them as to their duty to find whether prisoner acted with or without intent to kill.—*It. v. FOUQUET* (1905), Q. R. 14 K. B. 87.—**CAN.**

**3173 iii.** ———.]—*R. v. BARRETT* (1907), 1 Sask. L. R. 373; 8 W. L. R. 877.—**CAN.**

**3173 iv.** ———.]—On the trial of an indictment for murder the evidence was that deceased had been killed by a gunshot wound inflicted through the discharge of a gun in the hands of accused, & the defence was that the gun had been discharged accidentally:—*Held*: in view of the character of the defence & the evidence in support of it, there could be no objection to a charge by the trial judge to the jury that the offence could not be reduced by them from murder to manslaughter, but that their verdict should be either for acquittal or one of guilty of murder.—*GILBERT v. IT.* (1907), 38 S. C. R. 284.—**CAN.**

**3173 v.** ———.]—On a trial for the murder of a police officer, there was evidence that E. & J. had set out from their home, during the night when deceased was killed, with the intention of committing theft; J. & his wife testified that, on returning home, E. had told them that a man, whom he supposed to be a secret-police constable, had pointed a pistol at him & that he had shot him. The defence



for murder to direct the jury that they may find manslaughter.—*R. v. FAIRBROTHER* (1908), 1 Cr. App. Rep. 233, C. C. A.

**3174.** —[—]—On an indictment for murder the judge is entitled to withdraw a defence of manslaughter from the jury.—*R. v. FOY* (1909), 2 Cr. App. Rep. 121, C. C. A.

**3175.** —[—]—*R. v. SCHOLEY*, No. 3128, *ante*.

**3176.** —[—]—On a trial for murder there need not necessarily be a direction that it is open to the jury to find manslaughter.—*R. v. FLETCHER* (1913), 9 Cr. App. Rep. 53, C. C. A.

**3177.** — **Where defence of manslaughter is not raised.**—[—]—*R. v. HOPPER*, No. 3146, *ante*.

**3178.** — [—]—On an indictment for murder if deft.'s counsel does not suggest a possible verdict of manslaughter but only an acquittal on the ground of accident the judge is not bound to suggest that verdict.—*R. v. CLINTON* (1917), 12 Cr. App. Rep. 215, C. C. A.

*Annotation:—Refd.* *R. v. ROBINSON* (1922), 16 Cr. App. Rep. 140.

was rested entirely upon *alibi*, & accused testified on his own behalf, stating that he had been at home during the whole of the night in question, but making no mention of any facts concerning the shooting. In his charge, the trial judge reviewed the evidence, in a general way, & told the jury that, upon the evidence adduced, they must either convict or acquit of the crime of murder; that they could not return a verdict of manslaughter; that, if they believed J.'s account of what happened to be substantially true, they should convict of murder; & he did not instruct the jury as to what, in law, constituted manslaughter nor as to circumstances on which the verdict might be reduced to manslaughter. *Held*: the charge of the trial judge was right, & the omission to instruct the jury in respect to manslaughter did not occasion any substantial wrong or miscarriage which could justify the setting aside of the conviction nor a direction for a new trial.—*R. v. EBBERTS* (1912), 22 W. L. R. 901; 3 W. W. R. 37; 7 D. L. R. 530.—**CAN.**

**3173 vi.** —[—]—On the trial of an accused on a charge of murder, when the evidence shows that the jury may reasonably infer a case of manslaughter, there must be a direction on that point, but the judge ought to be slow to arrive at the conclusion that there are no circumstances that would justify a verdict of manslaughter.—*R. v. JAGAT SINGH* (1915), 32 W. L. R. 637; 9 W. W. R. 514.—**CAN.**

**3173 vii.** —[—]—*R. v. OLKHOVIV*, [1920] 35 Can. Crim. Cas. 35; 56 D. L. R. 499.—**CAN.**

**3173 viii.** —[—]—On a trial for murder defence adduced evidence to show that accused did not intend to shoot his gun. After the judge's charge accused's counsel took objection to its sufficiency & requested that the judge tell the jury that "If the jury believes accused's evidence that he did not point his gun at M. or did not point it at Q. & he had no intent—no intention of shooting anybody & in the scuffle the gun was discharged & M. was unfortunately killed, then accused is not guilty of the crime with which he is charged." The judge refused so to do.—*Held*: the charge had failed to fully present the defence to the jury, that the facts deposed to on behalf of accused were, if believed, open to the inference that the shots had been fired in the scuffle by misadventure in some unexplained way by one of the participants therein, & such being the case that whole aspect of the occurrence, constituting, if true,

a good defence to the charge of murder, should have been presented to the jury, & that there should be a new trial.—*R. v. DEAL*, [1923] 1 W. W. R. 615; [1923] 3 D. L. R. 201; 39 Can. Crim. Cas. 105; 32 B. C. R. 219.—**CAN.**

**3181 i.** *Should direct jury as to point of law.*—[—]—It is the duty of a judge to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the facts; & if he does not give them an explanation of the law sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection.—*Re JIUBROO MAITON*, *R. v. JIUBROO MAITON* (1882), 1 L. R. 8 Cal. 739.—**IND.**

**3181 ii.** —[—]—In charging a jury it is incumbent on the judge to explain the law to them in order to assist them in applying the law to the facts of the case. Mere reference to sections of the Penal Code defining the offences is not sufficient.—*ABBAS PEADA v. R.* (1898), 1 L. R. 25 Cal. 736.—**IND.**

**3181 iii.** —[—]—Where a judge, in charging a jury, said: "The law bearing on the case has been placed before you more than once in the addresses delivered by the learned pleaders on either side. I need not go into detail as to the law"—*Held*: it was immaterial how much or how often the jury might have been addressed by the pleaders on both sides upon the law. The responsibility of laying down the law for the guidance of the jury rested entirely with the judge, & a verdict arrived at by the jury in the absence of any such direction on the law by which they should be guided could not be accepted as a valid verdict in the case.—*MANGAN DAS v. R.* (1902), 1 L. R. 29 Cal. 379.—**IND.**

**3181 iv.** —[—]—It is not only desirable but necessary that a charge should be recorded in an intelligible form & with sufficient fulness to satisfy the Appeal Ct. that all points of law arising in the case were clearly & correctly explained to the jury.—*PANCHU DAS v. R.* (1907), 1 L. R. 34 Cal. 698.—**IND.**

*n. Evidence denied by prisoner admitted—Caution as to effect to be given to such evidence.*—[—]—The Crown tendered in evidence a conversation between a detective officer & prisoner in which the officer told prisoner that P. had made a statement regarding prisoner's whereabouts at a certain time. Prisoner denied P.'s statement. After objection the conversation was admitted. In his summing up, the judge cautioned the jury that as prisoner had denied the truth of what P. was alleged to have said it was no evidence against him of the fact:—

**3179.** — [—]—The rule about the judge's direction on manslaughter in a trial for murder is correctly laid down in *R. v. CLINTON*, No. 3178, *ante*.

"Where there is no evidence of manslaughter the question should not be left to the jury"—(*LORD HEWART, C.J.*)—*R. v. ROBINSON* (1922), 16 Cr. App. Rep. 140, C. C. A.

**3180. Direction as to intent to defraud—Charge of obtaining by false pretences.**—[—]—A summing up on an indictment for obtaining by false pretences must contain an express direction on intent to defraud; if it does not, the ct. will quash a conviction.—*R. v. BAKER* (1923), 17 Cr. App. Rep. 190, C. C. A.

**3181. Should direct jury as to point of law.**—[—]—*R. v. VASSILEVA* (1911), 6 Cr. App. Rep. 228, C. C. A.

**3182. Although not referred to by defence.**—[—]—The omission by counsel of taking a point of law does not affect the duty of the judge to call the attention of the jury to it.—*R. v. SMITH* (1916), 12 Cr. App. Rep. 42, C. C. A.

*Held*: the judge had sufficiently cautioned the jury as to the effect to be given to the evidence.—*R. v. EYLES* (1917), 17 S. R. N. S. W. 377.—**AUS.**

*o. Caution to disregard questions suggesting similar offences to that charged.*—[—]—Accused was tried before a judge & jury & convicted on a charge of theft of money from a passenger in a sleeping-car on a specified day. Having testified on his own behalf, he was cross-examined by counsel for the Crown, & asked questions relating to money which had been lost in sleeping-cars on other occasions when he had been, as suggested, in such cars. The questions were not objected to, & were answered by accused, who denied all knowledge of such losses. The Crown made no attempt to prove the facts suggested. The trial judge directed the jury to disregard these questions & answers & any inferences suggested by them.—*Held*: full justice was done to accused by the trial judge's direction, & it was his duty to give such direction, independently of whether the questions were properly asked or not; & it was not necessary to decide whether they were properly asked.—*R. v. HURD* (1913), 23 W. L. R. 812; 10 D. L. R. 475; 4 W. W. R. 185; 21 Can. Crim. Cas. 98.—**CAN.**

*p. Bearing of facts in evidence upon questions to be determined.*—[—]—In charging the jury in an action for assault & battery, the trial judge ought to point out to the jurors the bearing of the facts of evidence upon each of the questions which they must determine, & which of the facts are, in his judgement, in dispute.—*McKENNA v. CUMMISKEY* (1913), 13 E. L. R. 229.—**CAN.**

*q. Caution as to admissibility of evidence of complaints.*—[—]—A victim of rape complained thereof immediately thereafter to certain persons. She did not then know the offender but recognised him subsequently & identified him at the trial. Evidence was given by witnesses for the Crown of the victim's said complaints as to the commission of the offence, but it was only on cross-examination of these witnesses that details, which were general in character, of the offender's description as given in such complaints, were elicited. There was no doubt, on the evidence, as to the commission of the offence, & the only real issue before the jury was that of identity.—*Held*: under such circumstances the trial judge's omission to charge the jury that the complaints were only admissible to show consistency of the victim's conduct with her evidence at trial & as negating consent & were not evidence of the facts complained

*Sect. 7.—The hearing: Sub-sect. 12, C.]**C. Powers of Judge.*

**3183. To make independent suggestions as to facts.**—A judge is entitled to make an independent suggestion on the facts not made by the prosecution or the defence.—*R. v. RYDER* (1913), 9 Cr. App. Rep. 100, C. C. A.

**3184.** —.]—It is not a misdirection to make a suggestion as to the facts of a case different from that made by the prosecution & by the defence.—*R. v. BENTLEY* (1913), 9 Cr. App. Rep. 109, C. C. A.

**3185.** —.]—If prisoner elects not to take advantage of the provisions of Criminal Evidence Act, 1898 (c. 36), s. 1, & does not offer himself as a witness on his own behalf, it is entirely in the discretion of the judge to comment on that fact in whatever way & to whatever extent he thinks fit.

It is undesirable that the judge should suggest in his charge to the jury a theory of the mode of death not previously put forward at such trial.—*R. v. SMITH* (1915), 84 L. J. K. B. 2153; 114 L. T. 239; 31 T. L. R. 617; 25 Cox, C. C. 271; 11 Cr. App. Rep. 229, C. C. A.

**3186. To make comments—On accused not giving evidence.**—Prisoner applied for special leave to appeal in a criminal matter on the ground that the judge misdirected the jury in commenting upon prisoner having refrained from giving evidence in a case in which he was a competent but not compellable witness:—*Held*: the com-

ment was according to law, & not precluded by the Criminal Law Amendment Act (55 Vict. No. 5), s. 6).—*KOPS v. R.*, *Ex p. KOPS*, [1894] A. C. 650; 64 L. J. P. C. 34; 70 L. T. 890; 58 J. P. 668; 10 T. L. R. 525; 6 R. 522, P. C.

**3187. — Criminal Evidence Act, 1898 (c. 36).**—A judge at the trial has the right to comment on a prisoner's failure to give evidence on his own behalf under the above Act, but the right of comment rests solely on the judge's discretion, & its exercise depends upon the circumstances of each particular case, & is one as to which no general rule can be laid down.—*R. v. RHODES*, [1899] 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360; 62 J. P. 774; 47 W. R. 121; 15 T. L. R. 37; 43 Sol. Jo. 45; 19 Cox, C. C. 182, C. C. R.

*Annotations*:—*Mentd.* *R. v. Saunders* (1898), 63 J. P. 24; *R. v. Ollis*, [1900] 2 Q. B. 758; *R. v. Wyatt*, [1904] 1 K. B. 188; *R. v. Smith* (1905), 92 L. T. 208; *R. v. Bond*, [1906] 2 K. B. 389; *R. v. Stone* (1910), 6 Cr. App. Rep. 89; *R. v. Boyle & Merchant*, [1914] 3 K. B. 339; *R. v. Mason* (1914), 111 L. T. 336.

**3188.** — — — —.]—*R. v. BERNARD*, No. 330, *ante*.

**3189.** — — — —.]—*R. v. HAMPTON*, No. 3127, *ante*.

**3190.** — — — —.]—*R. v. SMITH*, No. 3185, *ante*.

**3191.** — — — — Or not calling particular witness.]—The ct. will not review a judge's comment on deft.'s not giving evidence nor on his not calling a particular person.—*R. v. VOISIN*, [1918] 1 K. B.

of, could not be said to have misled the jury.—*R. v. SCHIRABA* (1921), 62 D. L. R. 308; 35 Can. Crim. Cas. 402; 31 Man. L. R. 275; [1921] 3 W. W. R. 107.—*CAN.*

*r. Caution not to be prejudiced by previous knowledge or public opinion.*—

*R. v. PARKIN*, [1922] 1 W. W. R. 732; 66 D. L. R. 175; 37 Can. Crim. Cas. 35; 31 Man. L. R. 438.—*CAN.*

## PART VII. SECT. 7, SUB-SECT. 12.

### —C.

**3183 i. To make independent suggestions as to facts.**—A judge has a right to express his opinion on a question of fact in charging the jury.—*R. v. HOO SAM* (1912), 20 W. L. R. 571; 1 W. W. R. 1049.—*CAN.*

**3183 ii.** —.]—A trial judge in a criminal case has an absolute right to express any opinion of his own upon the facts on which the jury has to pass; the question in each case is whether, reading the charge as a whole, he has made an improper use of his right.—*R. v. MOKE*, [1917] 3 W. W. R. 575.—*CAN.*

**3183 iii.** —.]—*R. v. SPELLMAN* (1921), 69 D. L. R. 649; 37 Can. Crim. Cas. 390; 49 N. B. R. 200.—*CAN.*

**3183 iv.** —.]—Accused was charged with stealing one post letter containing money. His counsel in addressing the jury attacked severely the testimony of witnesses for the prosecution whose efforts to detect crime had led to the charge against accused. The judge in charging the jury expressed a strong opinion that there was no justification for such a charge against these witnesses as he deemed was made in counsel's address, & in connection therewith said: "Under our system of law counsel are given great latitude. It is realised that for the purpose of protecting their clients' interests they must not be harassed by fear of anything that might be stated & they are absolutely free of liability for anything they say for the protection of their client."—*Held*: while the statement of the law was correct for him to express his own opinion upon the facts, while making it clear

that the jury was to decide the facts, yet the words above quoted, in the circumstances & taken together with his other remarks, were such as to likely prejudice the accused & constituted in law a misdirection.—*R. v. SHANDRO*, [1923] 1 W. W. R. 405; [1923] 1 D. L. R. 722; 38 Can. Crim. Cas. 337; 19 Alta. L. R. 129.—*CAN.*

**3183 v.** —.]—The expression by a judge of his opinion as to the facts of the case, without submitting them exclusively to the jury, is no ground for setting aside a verdict for misdirection, such being a matter resting with the discretion of the judge.—*R. v. O'CONNELL* (1844), 11 Cl. & Fin. 155; 9 Jur. 25.—*IR.*

**3186 i. To make comments—On accused not giving evidence.**—A constable gave evidence of admission of guilt made to him by prisoner in a conversation when no one else was present. Prisoner did not give evidence. The judge referred to the constable's evidence as "uncontradicted":—*Held*: this was not a comment within Crimes Act, 1900, s. 407 (2).—*R. v. DUFFY* (1901), 1 S. R. N. S. W. 20; 18 N. S. W. N. 28.—*AUS.*

**3186 ii.** — — — —.]—*R. v. TEMPLETON*, [1922] St. R. Qd. 165.—*AUS.*

**3186 iii.** — — — —.]—Prisoner, who was tried & convicted of murder, although he had ample time & opportunity to tell all he knew concerning the crime both to the authorities & others, maintained a complete silence respecting it with the exception of some bald assertions of his innocence, until he went upon the witness stand at the trial to give evidence on his own behalf, when he admitted being present at the doing of the deed, but charged it upon one G., a young companion, who was with him, & who, before & at the trial, had alleged prisoner's guilt. The judge, in charging the jury, told them that they were entitled to take this continued silence of prisoner into consideration, & after deciding whether or not such silence proceeded from a consciousness of guilt & a desire to spring a defence upon the Crown, which it might not be able to meet,

they might therefrom draw an inference as to his guilt or innocence. He further instructed them that this continued silence of prisoner was an element that might assist them in determining the amount of credence that ought to be given by the story told by prisoner in the witness box:—*Held*: the charge was correct in both respects.—*R. v. HIGGINS* (1902), 36 N. B. R. 18.—*CAN.*

**3186 iv.** — — — —.]—There can be no question that the judge in a criminal case tried before a jury is justified in commenting upon the fact that accused has not given evidence; it is not possible to lay down any general rule as to when this should be done or as to the extent to which comments should go; the justification for such comment depends in each case on its circumstances; it is a discretion in the ct. which should be used with a due regard to the interests of justice.—*R. v. DUBE* (1915), App. D. 557.—*S. AF.*

**3186 v.** — — — —.]—The failure of an accused to give evidence on his own behalf is a circumstance which may properly be taken into consideration by a ct. of law. It should not be pressed too far. But where there is evidence, entitled to credence, which directly implicates an accused person, the fact that he refrains from going into the box to contradict that evidence may well be regarded as an element to be weighed in connection with all the others in the case, bearing in mind always that the *onus* remains upon the Crown.—*R. v. NYATI* (1916), App. D. 324.—*S. AF.*

**3186 vi.** — — — —.]—Where a prisoner refrains in a criminal trial from giving evidence a judge in charging the jury is debarred by the above sect. from commenting adversely on prisoner's so refraining.—*R. v. BROWN & MCCANN* (1909), 29 N. Z. L. R. 846.—*N. Z.*

**s. — What amounts to.]**—At a criminal trial accused made a statement not on oath. In reference to that statement the judge, in his summing up to the jury, said: "That statement is something which the law requires you to take into consideration together with the evidence, but it is

531; 87 L. J. K. B. 574; 118 L. T. 654; 34 T. L. R. 263; 62 Sol. Jo. 423; 26 Cox, C. C. 224; 13 Cr. App. Rep. 89, C. C. A.

*Annotation*:—*Mentd.* R. v. Cook (1918), 34 T. L. R. 515.

**3192.**—On what punishment will ensue on conviction.]—*Semble*: when prisoner's counsel hints in his speech at the maximum of punishment, the judge may tell the jury that the punishment on conviction will be mild & lenient.—R. v. HARRINGTON (1862), 26 J. P. 793.

**3193.**—As to the improbability of capital sentence being carried out.]—Whether the judge in summing up should refer to the improbability of a capital sentence being carried out depends on the way counsel for the defence deals with the question of punishment.—R. v. VISICK (1909), 2 Cr. App. Rep. 277, C. C. A.

**3194.**—On effect of successful defence of insanity.]—R. v. REYNOLDS (1843), Taylor's Medical Jurisprudence, 5th ed., Vol. I., 870.

**3195.**—To read depositions—Though not put in evidence.]—Upon the trial of a prisoner at assizes or quarter sessions it is competent for the presiding judge to lay before the jury, when summing up the case to them, matter which, though not put in evidence previously, would have been admissible in evidence had it been tendered.

not in itself evidence in the same sense as the statement of a witness given upon oath; it is not subject in any way to test by cross-examination":—*Held*: what was said by the judge was not a comment upon the fact that accused had refrained from giving evidence on oath on his own behalf.—JACKSON v. R., [1918] 25 C. L. R. 113.—**AUS.**

**t.** ————.]—A direction to the jury that an accused has failed to account for a particular occurrence, when the *onus* has been cast upon him to do so, does not amount to a comment on his failure to testify, within the above sub-sect.—R. v. AHO (1904), 25 C. L. T. 50; 11 B. C. R. 114; 8 Can. Crim. Cas. 453.—**CAN.**

**a.** ————.]—A statement made by a judge, in charging the jury in a criminal case, that the evidence of a witness for the Crown is wholly uncontradicted, is not a comment on the failure of a person charged to testify.—R. v. GUERIN (1909), 18 O. L. R. 425; 14 O. W. R. 5, 14.—**CAN.**

**b.** ————.]—It is the duty of the judge in a criminal case carefully to protect the accused from damaging insinuations which may not in terms invite a consideration of the accused's failure to testify but make indirect & covert allusions to his silence.—R. v. GALLAGHER, [1922] 1 W. W. R. 1183; 63 D. L. R. 629; 37 Can. Crim. Cas. 83; 17 Alta. L. R. 519.—**CAN.**

*Statement by accused.*]—Prisoner made a statement from the dock amounting merely to a general denial that he was the man who had committed the offence charged. The judge told the jury, "You may take as much notice of that as you like":—*Held*: not an invitation to the jury to disregard prisoner's statement in favour of sworn evidence.—R. v. MANSFIELD (1916), 16 S. R. N. S. W. 187; 33 N. S. W. W. N. 56.—**AUS.**

**d.** — *Unsworn statement.*]—Where a trial judge improperly permits an accused to make an unsworn statement on his own behalf at the trial & then directs the jury to pay no attention to it because it was not sworn, this is a direction which is an indirect violation of the Canada Evidence Act.—R. v. KELLY (1916), 35 W. W. L. R. 46; 11 W. W. R. 46.—**CAN.**

*When made.*]—Ac-

cused has always been allowed to make an unsworn statement as part of his defence, the only question being at what stage of the proceedings it should be made, & some weight may be given by the jury to such a statement, but the judge should direct them that it is not legal evidence.—R. v. PERRY & PLEDGER, [1920] N. Z. L. R. 21.—**N.Z.**

**f.** — *On evidence.*]—A judge is entitled to make in his summing up such observations on the evidence as he thinks fit.—JEFFRIES v. R. (1916), 18 W. A. L. R. 143.—**AUS.**

**g.** — *That witness under undue influence.*]—On a trial for murder prisoner's daughter, a girl of 14, was called on his behalf:—*Held*: if from her manner the judge derived the impression that she was under some undue influence, it was not improper to call the attention of the jury to it in his charge.—R. v. JONES (1868), 28 U. C. R. 416, 424.—**CAN.**

**h.** — *On accused not calling certain witnesses.*]—Prisoner & F. were jointly indicted, & a true bill found against them. It was ordered that prisoner should be tried separately & apart from F., as to whom the indictment was traversed to another sittings. At the trial of prisoner the judge commented on the fact that F. was not called as a witness:—*Held*: the judge had the right to comment as he did.—R. v. BLAIS (1906), 11 O. L. R. 345; 7 O. W. R. 380; 10 Can. Crim. Cas. 354.—**CAN.**

**k.** ————.]—On the trial of deft. on an indictment charging him with the forgery of two promissory notes, deft. having been found guilty, a reserved case was applied for on the ground that in the course of his address to the jury the trial judge commented upon the failure of the deft. to produce a witness, S., & said that in the interests of truth & justice he should have done so. The reserved case applied for having been refused & an appeal taken:—*Held*: there having been no substantial wrong or miscarriage which would be ground for a new trial, the appeal should not be allowed.—R. v. MCLEAN (1906), 39 N. S. R. 147; 1 E. L. R. 334.—**CAN.**

— *On motive.*]—R. v. LEW 7 B. C. R. 77.—**CAN.**

**m.** — *To refuse to direct—Where no evidence.*]—M., on his trial for the

murder of S., a constable, made a statement which he reduced to writing to the effect that S., in attempting to arrest him, had used unnecessary violence, & that in order to protect himself he had shot the constable. Counsel for prisoner asked the judge to direct the jury that if the arrest, though legal, was made with unnecessary violence, amounting to an assault, prisoner was only guilty of manslaughter. The judge refused so to direct the jury, on the ground that there was no evidence that the arrest was made with unnecessary violence:—*Held*: the judge was right in refusing so to direct the jury, inasmuch as prisoner's statement not being evidence, there was no evidence that the arrest was made with unnecessary violence.—R. v. MORRISON (1889), 10 N. S. W. L. R. 197.—**AUS.**

Upon the cross-examination of one of a prisoner's witnesses in a trial before a ct. of quarter sessions, such witness admitted that her evidence differed materially from the evidence she had given when before the committing magistrates. The depositions of the witness were not put in by the counsel for the prosecution nor by the counsel for the prisoner. But the chairman, in the course of his summing up of the case to the jury, at the request of one of the jurors read the depositions. Prisoner having been found guilty, upon a case reserved:—*Held*: it was competent for the chairman to read the depositions when he did read them, inasmuch as they would have been admissible in evidence had they been tendered by either the counsel for the prosecution or the counsel for the prisoner at any time previously; it being the duty of the presiding judge at a criminal trial to decide what evidence, within reasonable bounds, should be placed before the jury, the mere fact that the depositions had not been put in previously to the summing up did not prevent their being put in subsequently; & the reading of them by the chairman to the jury when he was summing up the case, did not amount to a misreception of evidence.—R. v. GARNER (1889), 61 L. T. 699; 54 J. P. 424; 6 T. L. R. 110, C. C. R.

**n.** — *To instruct jury—As to inference possible as to intent.*]—It is lawful for the judge, in charging the jury in a trial for an attempt to murder, to instruct them that they may draw an inference as to prisoner's intent to kill from the circumstances of his being a stranger loitering in a street or park, between four & five o'clock in the morning, with a loaded revolver & burglar's tool in his possession.—R. v. MOONEY (1905), Q. R. 15 K. B. 57.—**CAN.**

**o.** — *To withdraw from consideration verdict for lesser offence.*]—If the judge allows the indictment to go generally to the jury, it is not competent for him to withdraw from their consideration a verdict for any lesser offence which may be included in the indictment.—R. v. SCHERF (1908), 13 B. C. R. 407.—**CAN.**

**p.** — *Withdrawal of direction.*]—Where a prisoner was indicted for larceny & for receiving the judge directed the jury to acquit prisoner on the count for receiving, but the jury notwithstanding acquitted prisoner on the count for larceny but convicted her of receiving & the judge did not insist on the direction he had previously given:—*Held*: whether the judge withdrew his direction as to the count for receiving or not, the evidence being sufficient in law to sustain the conviction, the conviction must stand.—R. v. McMAHON (1875), 13 Cox, C. C. 275.—**IR.**

*Sect. 7.—The hearing: Sub-sects. 13 & 14, A.]*

## SUB-SECT. 13.—VIEW BY JURY.

**3196. Power to order.]**—There can be no view in a criminal prosecution without consent, & the practice was so before the 4 Ann. c. 16 (*per cur.*).—*R. v. REDMAN* (1756), 1 Keny. 384; Say. 303; 96 E. R. 888.

**3197. —.]**—The ct. will only in particular circumstances grant a view in an indictment for perjury; a view will be refused, if there be any risk of its misleading the jury.—*ANON.* (1815), 2 Chit. 422.

**3198. —.]**—Where, on the trial of a case of rape, it was wished on the part of the prisoner that the jury should see the place at which the offence was said to have been committed, & the place was so near to the ct. that the jury could have a view without inconvenience, the judge allowed a view, although the prosecutor did not consent to it.—*R. v. WHALLEY* (1847), 2 Car. & Kir. 376; 8 L. T. O. S. 559; 2 Cox, C. C. 231.

**3199. — After summing up.]**—(1) It is no irregularity to allow the jury to have a view of premises after the judge has summed up the case.

(2) Where it is alleged that the jury have received evidence in the absence of the judge & of the prisoners, it is for the ct. before which the trial takes place to investigate the facts, & ascertain whether the alleged irregularity has occurred.

(3) *Qu.*: whether if such irregularity be so found to have occurred, the ct. has jurisdiction to order a *venire de novo*, as for a mistrial.—*R. v. MARTIN* (1872), L. R. 1 C. C. R. 378; 41 L. J. M. C. 113; 26 L. T. 778; 36 J. P. 549; 20 W. R. 1016; 2 Cox, C. C. 204, C. C. R.

*Annotation:—As to (3) Rejd. Crane v. Public Prosecutor, [1921] 2 A. C. 299.*

**3200. Where view is in different county—Removal of indictment by certiorari.]**—When at a criminal trial it is necessary for the jury to have a view of the premises which are situated in a different county an appln. will be granted to change the place of trial into such county.—*R. v. SHELDON* (1875), 32 L. T. 27; 39 J. P. 232.

**3201. —.]**—A rule *nisi* for a *certiorari* was obtained in order to remove from the Central Criminal Ct. into the High Ct. an indictment by

were jointly

who might become debenture holders in the North Wales Quarries, Ltd., & the Welsh Slate Quarries, Ltd.

The appct. desired to have a special jury, & that the jury should view the premises, these advantages not being available to deft. at the Central Criminal Ct. Appct. also alleged that for certain reasons there would be a prejudice against him among Central Criminal Ct. jurors:—*Held*: (1) a special jury was unnecessary; (2) a view was not required; (3) the allegations of prejudice had not

## PART VII. SECT. 7, SUB-SECT. 13.

**3196 i. Power to order.]**—There is a right inherent in all the common law cts. to grant a "view" at any time during the progress of a criminal cause.—*R. v. SULLIVAN* (1869), 8 S. R. N. S. W. 131.—*AUS.*

**3196 ii. —.]**—The authority given to the judge to direct that the jury shall have a view of any place, thing or person does not make a view, when had, evidence; the purpose of a view by the jury is in order to better their understanding the evidence.—*R. v. KAPLANSKY, SACHUK & SENILOFF* (1922), 69 D. L. R. 625; 51 O. L. R. 587.—*CAN.*

**3200 i. Where view is in different county—Removal of indictment by certiorari.]**—The fact of a view of the *locus in quo* being necessary for the fair trial of a prisoner is not sufficient ground for removing the indictment into the Q. B. Div. by *certiorari*, when the *locus in quo* is situate in a different county from the Winter Assize County.—*R. v. MCNAMARA* (1878), 14 Cox, C. C. 229.—*IR.*

**q. View by the judge—Trial without jury.]**—Prisoner was tried without a jury by a county ct. judge exercising jurisdiction under the Speedy Trials Act, upon an indictment for feloniously

been made out.—*R. v. GYDE, Ex p. GYDE* (1908), 72 J. P. 504, D. C.

*See, further, CROWN PRACTICE, Vol. XVI., pp. 411, 412, Nos. 2686–2692.*

## SUB-SECT. 14.—ADJOURNMENT AND POSTPONEMENT.

## A. In General.

**3202. General rule—No adjournment.]**—It is undoubtedly a general rule that there should be no adjournment & no separation for the jury after the evidence is entered upon, until the jury have given their verdict. This is a rule which I should never willingly depart from . . . but in a case of extreme necessity (*EYRE, L.C.J.*).—*R. v. HARDY* (1794), 24 State Tr. 199, 414.

*Annotations:—Rejd. R. v. Edwards* (1812), 4 Taunt. 309; *Conway & Lynch v. R.* (1845), 5 L. T. O. S. 458. *Mentd. R. v. Stone* (1796), 25 State Tr. 1155; *R. v. Watson* (1817), 2 Stark. 116; *Redford v. Birley* (1822), 3 Stark. 110, n.; *R. v. Barber & Dorey* (1844), 8 J. P. 644; *R. v. Blake* (1844), 6 Q. B. 126; *R. v. O'Connell* (1844), 5 State Tr. N. S. 1; *R. v. Richards* (1844), 3 L. T. O. S. 142; *A.-G. v. Briant* (1846), 15 M. & W. 169; *R. v. Garbett* (1847), 2 Cox, C. C. 448; *R. v. Grant, Ranken & Hamilton* (1848), 7 State Tr. N. S. 507; *R. v. Smith O'Brien* (1848), 7 State Tr. N. S. 1; *R. v. Duffy* (1849), 7 State Tr. N. S. 795; *R. v. Poteherini* (1856), 7 Cox, C. C. 79; *R. v. McCafferty* (1867), 15 W. R. 1022; *R. v. Meany* (1867), 15 W. R. 1082; *Mulcahy v. R.* (1867), 15 W. R. 446; *Marks v. Beyfus* (1890), 25 Q. B. D. 494.

**3203. —.]**—It undoubtedly is so far established that there never ought to be an adjournment or separation in any degree of the jury if it can be avoided; but there may arise a necessity so urgent that all those principles of justice which originally demanded that there should be no adjournment would loudly call for an adjournment; because the true principle upon which it is required that there should be no adjournment is for the furtherance of justice that it may be quite sure that justice will be done both to the Crown & to prisoner; that there should be no opportunity of having intercourse with the jury. The ct. is bound to take upon itself the responsibility that does belong to directing an adjournment in a case so circumstanced (*EYRE, L.C.J.*).—*R. v. HORNE TOOKE* (1794), 25 State Tr. 1, 127.

*Annotations:—Rejd. Conway & Lynch v. R.* (1845), 5 L. T. O. S. 458. *Mentd. R. v. Stone* (1796), 25 State Tr. 1155; *Eagleton v. Kingston* (1803), 8 Ves. 438; *R. v. . . .* (1810), 10 State Tr. 1155; *R. v. . . .* (1812), 4 Taunt. 309; *R. v. Smith* (1828), 8 B. & C. 341; *R. v. Parry* (1837), 7 C. & P. 836; *R. v. Frost* (1839), 4 State Tr. N. S. 85; *R. v. Zulueta* (1843), 1 Car. & Kir. 215; *R. v. Grant, Ranken, & Hamilton* (1848), 7 State Tr. N. S. 507; *Mansell v. R.* (1857), 8 E. & B. 54; *R. v. Meany* (1867), 15 W. R. 1082.

**3204. — Absence of prosecutor & witnesses.]**—The judge, in a case of felony, has no authority to order an adjournment on account of the mere absence of the prosecutor & his witnesses.—*R. v. PARR* (1862), 2 F. & F. 861.

**3205. — After evidence called—Absence**

displacing a railway switch. After hearing the evidence & the addresses of counsel, the judge reserved his decision. Before giving it, having occasion to pass the place, he examined the switch in question, neither prisoner nor any one on his behalf being present. Prisoner was found guilty:—*Held*: there was no authority for the judge taking a view of the place, & his so doing was unwarranted; & even if he had been warranted in taking the view, the manner of his taking it, without the presence of prisoner, or of any one on his behalf, was unwarranted.—*R. v. PETRIE* (1890), 20 O. R. 317.—*CAN.*

of witness.]—A prisoner's trial may be adjourned, if the case has only been opened by counsel for the prosecution, but not after evidence called. If the witnesses do not appear, prisoner is entitled to be acquitted for want of evidence.—*R. v. ROBSON* (1864), 4 F. & F. 360.

**3206. Exceptions to rule—Jury exhausted.]**—*R. v. STONE* (1796), 25 State Tr. 1155; 6 Term Rep. 527; 101 E. R. 684.

*Annotations:—***Refd.** *Conway & Lynch v. R.* (1845), 1 Cox, C. C. 210. **Mentd.** *R. v. O'Connell* (1844), 5 State Tr. N. S. 1; *R. v. Meany* (1867), 15 W. R. 1082.

**3207. — Court of Queen's Bench sitting at bar.]**—Remarks of great severity upon the conduct of deff.'s counsel, made by a judge in summing up to a jury, although calculated to influence them unfavourably to deff., do not constitute an undue influence, if intended to counteract the evil effect which what the judge considers to be the improper conduct of the counsel might have upon the jury. The Ct. of Q. B. sitting at bar may for sufficient reason adjourn a trial either in or out of term.

It was then contended that the adjournment of the ct. vitiated the whole proceedings. It is scarcely possible to suppose that this objection was seriously made. The ct. was sitting on a day which for the purpose of the trial, was to be taken as part of the then preceding term. It is incident to a trial that the ct. may for sufficient reason adjourn it, & there is nothing either in the words of the enactment or the object of the Legislature to take away this power from the Queen's Bench sitting on a trial at bar in what is by legislative enactment to be taken as part of the term (*BLACKBURN, J.*).—*R. v. CASTRO* (1874), L. R. 9 Q. B. 350; 43 L. J. Q. B. 105; 30 L. T. 320; 38 J. P. 342; *affd.* (1880), 5 Q. B. D. 490, C. A.; *sub nom.* *CASTRO v. R.* (1881), 6 App. Cas. 229, H. L.

*Annotations:—***Mentd.** *R. v. Cox & Raiton* (1884), 1 T. L. R. 181; *Dixon v. Farrer* (1886), 17 Q. B. D. 658; *R. v. Poole Corp.* (1887), 19 Q. B. D. 683; *R. v. Thompson*, [1914] 2 K. B. 99.

#### PART VII. SECT. 7, SUB-SECT. 14.— A.

**3208 i. Exceptions to rule—Absence of witnesses.]**—At the trial of an indictable offence the judge has the power to order the ct. to be adjourned to a place in the county other than the ct. house, for the purpose of allowing the jury to hear the evidence of a witness who was unable through illness to leave his home.—*R. v. ROGERS* (1902), 36 N. B. R. 1.—**CAN.**

**3208 ii. —.**—*R. v. —.*—On an application to grant a postponement of a trial on the ground of absence of witnesses, the ct. must be satisfied by affidavit, that the persons are material witnesses; that there has been no neglect in omitting to apply to them & endeavouring to procure their attendance; & that there is reasonable expectation of counsel being able to procure their attendance at the future date, if granted.—*R. v. MULVHILL* (1914), 19 B. C. R. 197; 49 S. C. R. 587.—**CAN.**

**r. — Absence of senior counsel — Illness.]**—Prisoner was indicted for murder. Application was made to have the case adjourned on account of the absence through illness of the senior counsel for deff. & his consequent inability to address the jury. The trial was adjourned for that day only.—*R. v. MURPHY* (1875), 2 Q. L. R. 383.—**CAN.**

**s. — Engaged elsewhere.]**—The one counsel who had been consulted about the case & had given it the careful consideration it called for & for that reason the only counsel who, without a reasonable time for the study

of the case, could represent deff. that he would be in a position to make full answer & defence & be afforded a fair trial of the charge against it; & furthermore, that the circumstances from the commencement of the proceedings were such that he might reasonably take it for granted that counsel appearing in his stead would have no difficulty in procuring an adjournment from Saturday to any following day on the ground of counsel's absence elsewhere, are good reasons for granting an adjournment.—*R. v. EDMONTON BREWING & MALTING CO.*, [1923] 2 W. W. R. 1107, 1121; 40 Can. Crim. Cas. 236.—**CAN.**

**t. — Discretion of judge — For convenient view by jury.]**—When the *locus in quo* is situate in a different county from the Winter Assize County. The judge at the trial should in the exercise of his judicial discretion postpone the case, to enable the trial to take place in the county where a view could conveniently be had.—*R. v. —.*, 14 Cox, C. C. 229.—**IR.**

**a. — Trial still proceeding.]**—The ct. has power to adjourn a criminal trial after evidence has been given from one day to any other day.—*R. v. HALL* (1890), 16 V. L. R. 650.—**AUS.**

**b. — To change venue — Jury panel biased.]**—Accused were members of a trades' union which was engaged in a strike, in the course of which the occurrences forming the subject of the criminal charge had taken place. A great number of those upon the jury panel were either members of, or otherwise connected with, an employers'

**3208. — Absence of witnesses.]**—*R. v. LEWIS*, No. 3228, *post*.

**3209. — Discretion of judge.]**—A judge has a discretion, even after the close of the defence, whether he will adjourn the trial for the attendance of witnesses for the Crown.—*R. v. JACKSON* (1919), 83 J. P. 196; 14 Cr. App. Rep. 41, C. C. A.

**3210. Postponement—For production of property.]**—In a case of larceny, where, after all the witnesses for the prosecution had been examined, it was discovered, that the stolen property was not immediately forthcoming, in consequence of its having been deposited at a neighbouring inn, the ct. allowed a messenger to be sent for it, & in the meantime proceeded with the trial of other cases, the first prisoner remaining in a corner of the dock until the return of the messenger.—*R. v. WENBORN* (1842), 6 Jur. 267.

*Annotation:—***Refd.** *R. v. Charlesworth* (1861), 1 B. & S. 460.

**3211. — Witness not in attendance.]**—After a trial for murder had commenced, it was ascertained that a witness had not arrived, but was expected by a railway train. The judge ordered the jury to be locked up until the arrival of the witness, had another jury called, & proceeded with another case.—*R. v. FOSTER* (1848), 3 Car. & Kir. 201.

**3212. —.**—*R. v. —.*—The ct. has no power to adjourn a criminal trial when once the jury are sworn.—*R. v. TEMPEST* (1858), 1 F. & F. 381.

**3213. —.**—*R. v. FERNANDEZ* (1861), 2 F. & F. 862, n.

**3214. Period of trial considered as one legal day.]**—Although in contemplation of law the whole time during which assizes continue at one place is considered for some purposes as one legal day, yet the particular day on which a conviction actually took place may be proved when necessary. Therefore, where a convicted felon made a *bona fide* assignment of goods after the commission-day of the assizes, but before the day on which he was actually

federation, which had been formed to resist the operations of the strikers :—**Held:** the trial of the indictment should be adjourned upon the application of accused to enable accused, if they thought fit, to move for a change of venue.—*R. v. FEARON* (1909), 43 I. L. T. 228.—**IR.**

**c. — To obtain better evidence.]**—An adjournment of a trial to procure better evidence of the witness being out of Canada refused, as contrary to the spirit of the Speedy Trials Act.—*R. v. MORGAN* (1893), 2 B. C. R. 329.—**CAN.**

**d. Postponement of judgment — Several charges—Judgment withheld till completion of trials.]**—A judge may adjourn the trial from time to time until finally terminated under Criminal Code, s. 777. *Semble:* the object of this provision is only to empower the judge to adjourn the particular trial for such necessary purposes as receiving further evidence, etc., but it does not enable him, where several charges are to be heard against the same party, to postpone his decision on the first charge until he has heard the evidence on the other charges, & then decide all.—*R. v. MCBERNY* (1897), 29 N. S. R. 327.—**CAN.**

**e. Custody of accused.]**—Accused person on trial should during an adjournment be committed to the gaoler for custody & not left to the charge of the sheriff's officers.—*R. v. BROWN* (1907), 7 S. R. N. S. W. 290.—**AUS.**

**f. Waiver.]**—*R. v. HAZEN* (1893), 20 A. R. 633.—**CAN.**

**g. Same judges for adjourned hearing.]**—It is a general rule, governing

**Sect. 7.—The hearing: Sub-sect. 14, A. & B.; sub-sect. 15, A.]**

convicted:—*Held*: the assignee could prove the actual day of the conviction, although the record mentioned only the commission-day, & the assignment was valid.—*WHITAKER v. WISBEY* (1852), 12 C. B. 44; 21 L. J. C. P. 116; 19 L. T. O. S. 156; 16 Jur. 411; 6 Cox, C. C. 109; 138 E. R. 817.

*Annotations*:—*Refd.* *Preston v. Peeke* (1858), 31 L. T. O. S. 162. *Mentd.* *R. v. Roberts* (1873), L. R. 9 Q. B. 77.

**B. Separation of Jury.**

*See Juries Detention Act, 1897 (c. 18), s. 1.*

**3215. Misdemeanour.]—R. v. CANNING** (1754), 19 State Tr. 283.

*Annotations*:—*Refd.* *R. v. Kinnear* (1819), 2 B. & Ald. 462. *Mentd.* *R. v. Dowlin* (1793), 5 Term Rep. 311.

**3216. —.]—Upon the trial of an indictment for a misdemeanour, which continued more than one day, the jury, without the knowledge or consent of defts., separated at night:—Held: the verdict was not, therefore, void; & it formed no ground for granting a new trial, it not appearing that there was any suspicion of any improper communications having taken place.**

The practice has been of late years for the jury to separate on the trials of misdemeanour. In *Canning's Case*, No. 3215, *ante*, which continued for fifteen days, the jury separated each night (*ABBOTT, C.J.*).—*R. v. KINNEAR* (1819), 2 B. & Ald. 462; 106 E. R. 434; *sub nom.* *R. v. WOOLF*, 1 Chit. 401.

*Annotations*:—*Refd.* *R. v. O'Connell* (1844), 3 L. T. O. S. 323; *Winsor v. R.* (1866), 6 B. & S. 143; *R. v. Ketteridge*, [1915] 1 K. B. 467; *Panshaw v. Knowles*, [1916] 2 K. B. 538. *Mentd.* *Ex p. Kinning* (1847), 4 C. B. 507; *Douglas v. R.* (1848), 12 Jur. 974.

**3217. Trial for murder.]—The rule that the jury must not separate during a trial for murder does not mean that in no circumstances must they physically part from one another. The rule is subject to the qualification that upon an emergency, or where it is necessary, a juror may leave the rest of his fellows.**

On the second day of a trial for murder a juror became ill & was taken out of ct., but not out of the building, accompanied by two medical men & a ct. usher, to a space at the bottom of the building at the back of the ct. where there was open air & to which the public had no access. After a consultation between the medical men, one of them returned into ct. & gave an opinion as to when the juror would probably recover. The ct. then adjourned for a short time, & the medical man was sworn to take charge of the juror during the adjournment. He then returned to the juror, & the two medical men, a constable, & the usher remained with him in the open air for about three-quarters of an hour. The juror then rejoined his fellows, the usher having been

with him the whole time he was absent from the rest of the jury. The usher had been sworn on the first day of the trial to take charge of the jury during the adjournment for that night, but was not sworn for the particular purpose of taking charge of the juror who became ill on the second day. During the whole time the juror was absent no one spoke to him about the trial. The medical men only spoke to him, & no one else had an opportunity of doing so. On the way to the open air less than a dozen persons had to be passed, & the juror was in a state of collapse & was in such a condition as to be quite unable to communicate with any one:—*Held*: it was not necessary that the usher who conducted the juror to the open air should be sworn as a ct. bailiff to take charge of him upon that occasion; nothing was done which was not justified in law, & therefore there was no ground for quashing the conviction.

Whether or not rebutting evidence on the part of the prosecution ought to be admitted at a criminal trial after the close of the evidence for the defence is a matter for the discretion of the judge at the trial.

*Semble*: where the judge at the trial allows rebutting evidence to be given the C. C. A. will not quash a conviction upon the ground that it does not agree with the way in which the judge at the trial exercised his discretion, unless there is something in the rebutting evidence in the nature of a trap, which results in an injustice to the prisoner.—*R. v. CRIPPEN*, [1911] 1 K. B. 149; 80 L. J. K. B. 290; 103 L. T. 704; 75 J. P. 141; 27 T. L. R. 69; 22 Cox, C. C. 289; 5 Cr. App. Rep. 255, C. C. A.

*Annotations*:—*Refd.* *R. v. Sullivan*, [1923] 1 K. B. 47. *Mentd.* *R. v. Foster* (1911), 6 Cr. App. Rep. 196; *R. v. Wilson, Lewis & Havard* (1911), 6 Cr. App. Rep. 125.

*See Nos.* 3202, 3203, 3211, *ante*.

*See, further, JURIES.*

**SUB-SECT. 15.—DISCHARGE OF JURY IN THE COURSE OF A TRIAL.**

**A. In General.**

**3218. Right of judge to discharge jury.]—R. v. WHITEHEAD** (1879), 7 State Tr. 311.

*Annotations*:—*Consd.* *R. v. Kinloch* (1746), *Fost.* 22, 28, 30; *R. v. Charlesworth* (1861), 1 B. & S. 460; *Winsor v. R.* (1866), 6 B. & S. 143.

**3219. — Withdrawal of juror—Consent of parties.]—In criminal cases, not capital, a juror may be withdrawn, if both parties consent, but not otherwise.—R. v. PERKINS** (1698), *Cited in Carth.* at p. 465; 90 E. R. 868.

*Annotations*:—*Consd.* *R. v. Kinloch* (1746), 18 State Tr. 395; *R. v. Charlesworth* (1861), 1 B. & S. 460. *Refd.* *Winsor v. R.* (1866), 6 B. & S. 143.

**3220. — — —.]—R. v. JEFFS** (1734),

all judicial procedure, recognised by statute & authority, that the judges before whom a case begins are the ct. to complete the hearing & determination; & that whether there be an adjournment of the hearing or not, no judge other than the judge before whom the proceedings began can, without the consent of such latter judges, intervene to hear or adjudicate.—*R. (AGRICULTURE & TECHNICAL INSTRUCTION FOR IRELAND DEPARTMENT) v. LONDONDERRY CITY J.J.*, *R. (MEEHAN) v. HARDY*, [1917] 2 I. R. 283.—*IR.*

**PART VII. SECT. 7, SUB-SECT. 14.—B.**

**h. General rule.]—R. v. DERRICK**

(1879), 2 L. N. 214; 23 L. C. J. 239.—*CAN.*

**k. —.]—There is no difference between capital felonies and felonies not capital, so far as regards the practice respecting adjournments of trials. In both classes of cases the jury must be kept together all night & cannot be allowed to separate.—DAMERY'S CASE** (1841), *Ir. Cir. Rep.* 371.—*IR.*

**l. —.]—A county juror, even in a capital case, & after the judge has commenced his charge, may be brought in the custody of the sheriff into the adjoining city ct. as a witness, without vitiating the trial.—R. v. LYNCH** (1844), 3 L. T. O. S. 23.—*IR.*

**3217i. Trial for murder.]—On a trial**

for murder lasting some days, the jury were placed in charge of officers of the ct. One day eleven went for a drive under escort & the other spent some hours at home with an officer & had no communication with any one except in the officer's presence. Other jurors on different occasions went under escort to the hairdressers & some communicated by telephone, but the latter, though known to accused's counsel, was not known to the judge:—*Held*: there had been no separation of the jury; separation to amount to a mistrial must be the mingling of the jury amongst others without being in charge of an officer of the ct.—*R. v. LANGMAID* (1910), 8 Tas. L. R. 10.—*AUS.*



2 Stra. 984; cited in *Fost.* at p. 24; 93 E. R. 984.

*Annotation*:—*Refd.* R. v. Charlesworth (1861), 1 B. & S. 460.

**3221. — Consent of defendant.**—R. v. WILKINSON (1733), cited in *Fost.* at p. 26.

**3222. —**—R. v. KINLOCH (1746), 18 State Tr. 395; 1 Wils. 157; *Fost.* 16; 95 E. R. 547.

*Annotations*:—*Consd.* Conway & Lynch v. R. (1845), 5 L. T. O. S. 458; R. v. Charlesworth (1861), 1 B. & S. 460; R. v. Winsor (1865), 10 Cox, C. C. 276. *Refd.* R. v. Newton (1849), 18 L. J. M. C. 201; R. v. Davison (1860), 2 F. & F. 250. *Mentd.* R. v. Grainger (1765), 3 Burr. 1617; R. v. Johnson (1805), 6 East, 583; R. v. Fitzgerald (1843), 1 Car. & Kir. 201; R. v. O'Connell (1843), 2 L. T. O. S. 193; R. v. Duffy (1846), 7 L. T. O. S. 9.

**3223. — Application of accused—Absence of witness.**—In a case of manslaughter, after the jury were charged, it was ascertained that the surgeon who examined the body was absent. Prisoner's counsel asked that the jury should be discharged:—*Held*: if prisoner asked that the jury should be discharged, the judge had authority to order it to be done.—R. v. STOKES (1833), 6 C. & P. 151.

*Annotation*:—*Refd.* R. v. Charlesworth (1860), 2 F. & F. 326.

**3224. — By consent.**—A jury may be discharged by consent, after having been charged.—R. v. DEANE (1851), 5 Cox, C. C. 501.

**3225. Discretion of judge.**—R. v. FERRAR (1663), *Fost.* 31; T. Raym. 84; 83 E. R. 46.

*Annotations*:—*Refd.* R. v. Kinloch (1746), 18 State Tr. 395; R. v. Charlesworth (1861), 1 B. & S. 460.

**3226. —**—R. v. KINLOCH, No. 3222, *ante*.

**3227. —**—*Semble*: the discharge of the jury is a matter of practice in the discretion of the judge.

Information by the A.-G. for bribery at an election of a member of Parliament. Plea, not guilty. At the trial, a material & necessary witness for the Crown refused to give evidence, & was committed for contempt, whereupon, at the application of counsel for the Crown, deft. objecting, the judge discharged the jury from giving any verdict. *Qu.*: whether he was right in so doing. The ct. refused to allow deft. to add a plea *mis darrein continuance* stating the above facts, on the ground that this would be to allow double pleading, & also, as the facts would be set out on the record, deft. could take advantage of them.—R. v. CHARLESWORTH (1861), 1 B. & S. 460; 31 L. J. M. C. 25; 5 L. T. 150; 25 J. P. 820; 8 Jur. N. S. 1091; 9 W. R. 842; 9 Cox, C. C. 44; 121 E. R. 786.

*Annotations*:—*Fold.* R. v. Lewis (1909), 78 L. J. K. B. 722. *Refd.* Winsor v. R. (1866), L. R. 1 Q. B. 390; R. v. Richardson (1913), 108 L. T. 384. *Mentd.* R. v. Hoytesbury (1863), 8 L. T. 315.

**3228. — Is final.**—The Ct. of Criminal Appeal has no power to review the decision of the judge at the trial of a prisoner that a necessity has arisen for discharging the jury without giving a verdict & adjourning the case to be heard before another jury. Such a decision is entirely within the discretion of the judge, & even if the discretion has been wrongly exercised, no objection can be taken in respect thereof at the second trial.

Where a prisoner has been put upon his trial, given in charge to the jury, & after the case has been opened, some of the witnesses are found not to be present owing to some unforeseen accident, it may be proper to adjourn the trial generally,

but where the witnesses are absent owing to some mistake, e.g. as to the date of trial, the proper practice is to adjourn the case for a reasonable time for prisoner to be tried by the same jury, & if that cannot be done, a verdict should be taken on the evidence as it stands. The jury should not be discharged & the case adjourned merely to enable the prosecution to establish a stronger case against prisoner.—R. v. LEWIS (1909), 78 L. J. K. B. 722; 100 L. T. 976; 73 J. P. 346; 25 T. L. R. 582; 22 Cox, C. C. 141; 2 Cr. App. Rep. 180, C. C. A.

*Annotation*:—*Refd.* R. v. Richardson (1913), 8 Cr. App. Rep. 159.

**3229. Grounds for discharge—Interference with jurors.**—If pltf. or any one in his behalf say to a jurymen after his departure from the bar & before verdict given, the case is clear for pltf., & the verdict be given for pltf.:—*Held*: sufficient to justify a *venire de novo*, for it is new evidence.—ATHIL v. BULWER (1625), 2 Hale, P. C. 308.

**3230. — Departure of juror.**—R. v. HANSCOM (1639), 2 Hale, P. C. 295.

*Annotation*:—*Refd.* R. v. Mellor (1858), Dears. & B. 468.

**3231. —**—In the course of the trial, & during the examination of witnesses, one of the jurors had, without leave, & without it being noticed by any one, left the jury box & also the ct. house, whereupon the ct. discharged the jury without giving a verdict, & a fresh jury was empanelled. Prisoner was then tried anew & convicted before the fresh jury:—*Held*: the course pursued was right.—R. v. WARD (1867), 17 L. T. 220; 31 J. P. 791; 16 W. R. 281; 10 Cox, C. C. 573, C. C. R.

*Annotation*:—*Refd.* R. v. Ketteridge, [1915] 1 K. B. 467.

**3232. —**—If a juror, after the summing up by the judge in a criminal trial, leaves his colleagues &, without being under the control of the ct. converses or is in a position to converse with other persons, the irregularity makes the whole trial abortive, & the only course open to the judge is to discharge the jury & proceed to a fresh trial.—R. v. KETTERIDGE, [1915] 1 K. B. 467; 84 L. J. K. B. 352; 112 L. T. 783; 79 J. P. 216; 31 T. L. R. 115; 59 Sol. Jo. 103; 24 Cox, C. C. 678; 11 Cr. App. Rep. 54, C. C. A.

*Annotations*:—*Consd.* Fanshawe v. Knowles, [1916] 2 K. B. 538. *Distd.* R. v. Twiss, [1918] 2 K. B. 853.

**3233. — Separation of jurymen.**—R. v. MACRAE (1892), Roscoe's Criminal Evidence, 14th ed. at p. 301.

**3234. — Access to newspaper reports of case.**—Respt. was tried for murder at a sessions of *oyer & terminer* & gaol delivery in New South Wales, & convicted & sentenced to death. Afterwards the Supreme Ct. of that colony made a rule absolute for a *venire de novo*, on the ground that the jury had before giving their verdict, been allowed access to newspapers containing reports of the case:—*Held*: the Supreme Ct. had no power to order a *venire de novo* in such a case.

The cases in which a verdict upon a charge of felony has been held to be a nullity & a *venire de novo* awarded have not been classified in digests; there are cases of defect of jurisdiction in respect of time, place, or person, cases of verdicts so insufficiently expressed, or so ambiguous, that a judgment could not be founded thereon (*per CUR.*).

#### PART VII. SECT. 7, SUB-SECT. 15.—A.

**3224 i. Right of judge to discharge jury—By consent.**—R. v. WYLLIE (1880), 3 L. N. 139.—CAN.

**3228 i. Discretion of judge—Is final.**—Where the judge on a criminal

trial has, for any reason, discharged the jury, without verdict, the ct. will not review his discretion by quashing a conviction upon a second trial.—R. v. McNAMARA (1878), 4 V. L. R. 19.—AUS.

**3228 ii. —**—JONES v. R. (1880), 3 L. N. 309.—CAN.

**3228 iii. —**—The discharge of a jury during the course of a trial is a matter solely within the jurisdiction of the trial judge, & his discretion is not open to review on appeal.—R. v. BORDENINK, [1919] 1 W. W. R. 968; 45 D. L. R. 470.—CAN.



*Sect. 7.—The hearing: Sub-sect. 15, A. & B.]*

—*R. v. MURPHY* (1869), L. R. 2 P. C. 535; 6 Moo. P. C. C. N. S. 177; 38 L. J. P. C. 53; 17 W. R. 1047; 16 E. R. 693; *sub nom.* A.-G. FOR NEW SOUTH WALES *v. MURPHY*, 21 L. T. 598; 11 Cox, C. C. 372, P. C.; *previous proceedings, sub nom.* *R. v. MURPHY* (1868), L. R. 2 P. C. 35,

*Annotations*.—*Refd.* *R. v. Martin* (1872), L. R. 1 C. C. R. 378; *R. v. Crippen* (1910), 27 T. L. R. 69; *R. v. Dickman* (1910), 5 Cr. App. Rep. 135; *Crane v. Public Prosecutor*, [1921] 2 A. C. 299.

**3235.** — *Absence of juror through illness.*—*R. v. GOULD* (1763), 3 Burn's Justice, 30th ed. 98; 18 State Tr. 415, n.

*Annotation*.—*Refd.* *R. v. Charlesworth* (1861), 1 B. & S. 460.

**3236.** — *Juror substituted.*—If a juror be taken ill during the trial of a prisoner for felony, the jury may be discharged, & the remaining eleven, together with a new juror, re-sworn to try the prisoner.—*R. v. SCALBERT* (1794), 2 Leach, 620.

*Annotation*.—*Refd.* *R. v. Charlesworth* (1861), 1 B. & S. 460.

**3237.** — *—*—*—*—*—*—If a jurymen is taken ill so as to be incapable of attending through the trial, the jury may be discharged & the prisoner tried *de novo*, or another jurymen may be added to the eleven; but in that case the prisoner should be offered his challenges over again, as to the eleven, & the eleven should be sworn *de novo*.—*R. v. EDWARDS* (1812), 3 Camp. 207; Russ. & Ry. 224; 4 Taunt. 309; cited in 2 Leach, 621, n.; 128 E. R. 348.

*Annotations*.—*Refd.* *Conway & Lynch v. R.* (1845), 1 Cox, C. C. 210; *Re Newton* (1849), 13 Q. B. 716; *R. v. Charlesworth* (1861), 1 B. & S. 460.

**3238.** — *—*—*—*—*—*—Where a jurymen on a criminal trial is taken so ill as to be unable to continue, another jurymen may be sworn with the eleven already on the trial, & the case proceed, the witnesses already heard being recalled.—*R. v. BEERE* (1843), 2 Mood. & R. 472, N. P.

**3239.** — *—*—*—*—*—*—Where during the pro-

cess of discharge the juror. He will then cause each witness to be re-sworn, & having read over to him his former evidence, both in chief & on cross-examination, & having asked him "if it be true" will give prisoner again the opportunity of cross-examining.—*R. v. COWLEY & SPACKMAN* (1843), 7 J. P. 132.

**3235 i. Grounds for discharge—Absence of juror through illness.—After the jury had been given in charge, one of the jurymen was taken with a fit & removed, in charge of the sheriff & his physician, to his residence. The remainder of the jury subsequently adjourned to the sick man's house, where, upon his recovery, a verdict of guilty was rendered.—*Held*: after the verdict had been recorded, it could not be disturbed.—*R. v. PETER* (1869), 1 B. C. R., pt. 1, 2.—**CAN.****

*m.* — *Juror from infected house.*—*R. v. CONSIDINE* (1885), 8 L. N. 307.—**CAN.**

*n.* — *Indictment for attempt—Alteration to complete offence.*—Where a prisoner is indicted for an attempt to steal, & the proof establishes that the offence of larceny was actually committed, the jury may convict of the attempt, unless the ct. discharges the jury & directs that prisoner be indicted for the complete offence.—*R. v. TAYLOR*, [1895] Q. R. 4 Q. B. 226.—**CAN.**

*o.* — *Evidence ruled inadmissible volunteered again.*—Although a witness at a trial before a jury volunteers evidence which the trial judge has already ruled to be inadmissible & which might have weight with the jury in arriving at a verdict, yet the judge should not for that reason immediately discharge the jury & empanel a new jury to try the issue.—*R. v. GROBB* (1907), 6 W. L. R. 727; 17 Man. L. R. 191.—**CAN.**

*p.* — *Prosecution questioning as to prior conviction—Where no evidence of good character brought.*—*R. v. ATLAS* (1910), 16 Can. Crim. Cas. 35.—**CAN.**

*q.* — *Juror professing prejudice after oath.*—Where on the second day of the trial the foreman of the jury informed the judge that one of the jury stated that he was prejudiced, the judge refused to take any action other than directing the trial to proceed.—*Held*: the course adopted was right; a jurymen ought not to volunteer a statement of that kind; jurors after being sworn expected to live up to their oaths.—*R. v. MAH HUNG* (1912),

**3240.** — *—*—*—*—*—*—Where a jurymen is suddenly taken ill, & obliged to leave the ct. in the midst of a trial, the jury will be discharged, & a new jury sworn, comprising the eleven remaining jurymen, & the evidence gone through *de novo*.—*R. v. ASHE* (1845), 4 L. T. O. S. 475; 1 Cox,

trial, one of the jurors is compelled by illness to leave the box, the proper practice is to re-swear the remaining eleven with the substituted juror.—*R. v. SALMON* (1849), 13 J. P. 237.

**3242.** — *—*—*—*—*—*—*R. v. MONSON, VERONICA CASE* (1903), 38 L. Jo. 261; *Times*, May 15.

**3243.** — *—*—*—*—*—*—In the course of a trial for murder, & after several witnesses had been examined, one of the jurymen became ill, & medical evidence was given that he would not be able to serve again for several days. The judge thereupon discharged the jury, called the original eleven jurors & one other, & after they had been sworn, read over to them his notes of the evidence, the witnesses being sworn & put into the box and asked to alter or add to their evidence if it seemed to them necessary to do so.—*R. v. LAWRENCE* (1909), 25 T. L. R. 374.

**3244.** — *Witness tampered with by accused.*—*R. v. D*—(1670), 1 Vent. 69; 86 E. R. 460. *Annotation*.—*Refd.* *R. v. Charlesworth* (1861), 1 B. & S. 460.

**3245.** — *Illness of accused.*—*R. v. MEADOW* (1750), Fost. 76.

*Annotation*.—*Mentd.* *Winsor v. R.* (1866), 6 B. & S. 143.

**3246.** — *—*—*—*—*—*—If a prisoner, indicted for a felony, with whom the jury are charged, be by sudden illness during the trial, rendered incapable of remaining at the bar, the jury may be discharged from the trial of that indictment, & prisoner, on his recovery, tried before another jury.—*R. v. STEVENSON* (1791), 2 Leach, 546.

*Annotation*.—*Refd.* *R. v. Charlesworth* (1861), 1 B. & S. 460.

& is obliged to be assisted out of ct., the judge will discharge the jury.

By consent, evidence of prosecutrix, as far as it had gone was read over to her, & she stated it to be true. The trial then proceeded as in other cases.—*R. v. STREEK* (1826), 2 C. & P. 413.

*Annotation*.—*Refd.* *R. v. Charlesworth* (1860), 2 F. & F. 326.

17 B. C. R. 56.—**CAN.**

**3245 i.** — *Illness of accused.*—Prisoner becoming ill during the progress of the trial, the jury was discharged, & prisoner remanded for the purpose of taking his trial at the next assizes.—*R. v. FLYNN* (1838), *Craw. & D. Abr. C.* 293.—**IR.**

*s.* — *Longer confinement endangering lives of jurors.*—When the jury could not agree, & after remaining a long time shut up were discharged by the ct., no consent being given by the counsel on either side, in consequence of the physician's report that a longer confinement would endanger the lives of some of them.—*Held*: they were properly discharged.—*R. v. BARRETT* (1829), *Jebb Cr. & Pr. Cas.* 103.—**IR.**

*t.* — *—*—*—*—*—*—When the judge took it upon himself to discharge the jury, in consequence of a statement upon oath by one of the jurors, without the examination of a medical man, that his life would be endangered by a longer confinement.—*Held*: the judge

**3248. — Accused unable to understand proceedings.]**—If it is found at the trial of a prisoner that he cannot understand the proceedings, the judge ought to discharge the jury & put an end to the trial, or order a verdict of not guilty (*KELLY, C.B.*).—*R. v. BERRY* (1876), 1 Q. B. D. 447; 45 L. J. M. C. 123; 34 L. T. 590; 40 J. P. 484; 13 Cox, C. C. 189, C. C. R.

*Annotation:—Consd. R. v. Stafford Prison, Ex p. Emery, [1909] 2 K. B. 81.*

**3249. — When indictment is bad in law.]**—A jury sworn on an indictment, clearly bad in point of law, may be discharged by the judge from giving a verdict. *R. v. DEACON* (1824), Ry. & M. 27, N. P.

**3250. — Incompetency of witness—As to nature of oath.]**—It is not a sufficient ground for discharging a jury, that the material witness against the prisoner is not sufficiently acquainted with the nature, & obligation of an oath, though this appears as soon as the jury is charged, & before any evidence is given.—*R. v. WADE* (1825), 1 Mood. C. C. 86, C. C. R.

*Annotations:—Reff. R. v. Charlesworth* (1861), 1 B. & S. 460; *R. v. Hollinrake Whitehead* (1866), 14 W. R. 677.

**3251. — Relative of accused serving on jury.]**—If during the trial of a case of felony it be discovered that prisoner has a relation on the jury, this is no ground for discharging the jury, & the case must proceed.—*R. v. WARDLE* (1842), Car. & M. 617.

**3252. — Wrong juror sworn.]**—If a jurymen on calling over the names of the panel answer to a wrong name the trial is a mistrial, for prisoner has not had his opportunity of challenging the jurymen misnamed. The judge offered to discharge the

jury if counsel desired.—*R. v. METCALFE & SLATER* (1848), 3 Cox, C. C. 220.

*Annotation:—Consd. R. v. Mellor* (1858), 7 Cox, C. C. 454.

**3253. — —.]**—A juror was summoned in error, but not returned in the panel, & in mistake was sworn to try a case, during the progress of which these facts were discovered. The jury were discharged, & a fresh jury constituted by taking another jurymen in the place of the one who had served in error.—*R. v. PHILLIPS* (1868), 11 Cox, C. C. 142; 32 J. P. 328.

**3254. Effect of discharge of jury—Not a discharge of prisoner.]**—*R. v. KINLOCH*, No. 3222, *ante*.

#### B. Procedure on Second Trial.

**3255. Challenge of jury.]**—*R. v. EDWARDS*, No. 3237, *ante*.

**3256. Recall of witnesses.]**—*R. v. BEERE*, No. 3238, *ante*.

**3257. — Re-examination of witnesses.]**—*R. v. STREEK*, No. 3247, *ante*.

**3258. — —.]**—*R. v. ASHE*, No. 3240, *ante*.

**3259. — Evidence read over to witness.]**—Where there are two prosecutions against the same person for felony, the judge will not, even by consent, take the evidence of the first trial, as given in the second, but the witnesses may be re-sworn in the second case, & their evidence read over to them from the judge's notes.—*R. v. FOSTER* (1836), 7 C. & P. 495.

**3260. — Further cross-examination.]**—*R. v. COWLEY & SPACKMAN*, No. 3239, *ante*.

**3261. — —.]**—A prisoner was tried by the ct. in New South Wales for felony. The jury not agreeing, were discharged, & a fresh

had acted rightly.—*R. v. DELANY* (1829), Jebb Cr. & Pr. Cas. 106.—*IR.*

**a. — Jury unable to follow evidence.]**—Where in a criminal case, a jury, through pre-possession or want of intelligence, are unable to follow the evidence, the judge may, if he considers it necessary in the interests of justice, discharge the jury & cause a new jury to be empanelled & accused to be put upon trial before it. This jurisdiction should only be exercised in a clear case.—*R. v. KIRKE* (1909), 43 I. L. T. 130.—*IR.*

**b. — Illness of material witness.]**—At a trial for forgery a material witness, while under examination, had an apoplectic fit, & a medical practitioner gave evidence that it would be dangerous to his health to continue the examination the same day or next day, whereupon the judge discharged the jury.—*Held*: there was a sufficient necessity to justify the judge in discharging the jury, in the exercise of his discretion.—*R. v. HENNESSEY* (1873), 2 C. A. 243.—*N.Z.*

**c. — Misconduct & partiality of foreman.]**—During an adjournment in a criminal trial the foreman of the jury visited & conversed with accused, & also discussed the case with members of the public outside the ct., showing bias in favour of accused. He acted upon his own volition, & accused were in no way responsible for the occurrence. On prosecutor reporting the matter to the judge, the judge examined on oath the responsible officers, & satisfied himself of the truth of the matters, & came to the conclusion that the foreman was not capable of doing justice in the case between the Crown & accused.—*Held*: the proper course was to discharge the jury.—*R. v. BINLEY & WALSH* (1912), 31 N. Z. L. R. 949.—*N.Z.*

**3254 i. Effect of discharge of jury—Not a discharge of prisoner.]**—*JONES v. R.* (1880), 3 L. N. 309.—*CAN.*

**d. Jury discharged of prisoner —**

*Illness of prosecutrix—Whether prisoner liable to another trial.]*—The jury having been discharged of a prisoner on account of the illness of the prosecutrix, prisoner cannot again be put upon his trial for the offence.—*R. v. KEIL* (1809), 1 Craw. & D. 151.—*IR.*

#### PART VII. SECT. 7, SUB-SECT. 15.—B.

**3255 i. Challenge of jury.]**—Upon a trial for felony, a juror having been taken ill during the trial, a new jury must be sworn, & prisoners are entitled to their challenges anew. By the consent of prisoners, the eleven jurors who had sat with the juror who had been taken ill were re-sworn, & another juror added & sworn, & the trial recommenced & was gone through *de novo*.—*R. v. DUNNE* (1838), Craw. & D. Abr. C. 535.—*IR.*

**3259 i. Recall of witnesses—Evidence read over to witness.]**—On trial by a jury, after two witnesses had been examined, one of the jurors was discovered to be deaf & was discharged & another juror sworn in his place. The trial, however, was not commenced afresh, but the evidence given by the two witnesses was read over to & admitted by them.—*Held*: this procedure was inadmissible, & the trial was invalid.—*R. v. NARAIN* (1914), 1 L. R. 36 All. 481.—*IND.*

**3260 i. — Further cross-examination.]**—*H.M. ADVOCATE v. McNAMARA* (1848), Arkley, 521.—*SCOT.*

**e. — Duty of prosecutor—Where witness originally called by court.]**—It is not the duty of the public prosecutor to call, or put in the box, for cross-examination, a witness, called at a previous trial by the ct. itself, & not the Crown, whose evidence he believes to be false.—*R. v. REED* (1921), 1 L. R. 49 Calc. 277.—*IND.*

**f. Judge's power to exclude jurors before challenge.]**—The judge has power of his own motion without waiting for

a challenge or notwithstanding that neither party has exercised his right of challenge to exclude men discharged because of their inability to agree, & the same issue is tried again at the same session of the ct. Such jurymen are not "indifferent" within Jury Act, 1862, s. 29, from the second jury.—*R. v. GILLEN* (1914), S. A. L. R. 196.—*AUS.*

**g. Disclosure of happenings in jury room—Exception to rule—Condition of exhibit.]**—The rule of law forbidding the disclosure of what took place in the jury room at the trial will not prevent a jurymen at a trial which proved abortive from giving evidence at a second trial before another jury as to the condition of an exhibit when examined in the jury room at the first trial, e.g. to show that there were at that time barley ends in a purse which prosecutor identified as one which had been stolen from him after he had been engaged in threshing barley & which was, after the theft, found in the possession of accused, who had claimed it to be his own.—*R. v. ROSS* (1909), 15 W. L. R. 17; 17 Can. Crim. Cas. 278.—*CAN.*

**h. Evidence of witness at former trial—Conditions of admissibility.]**—The evidence of a witness at a former trial, if otherwise properly admissible, may be admitted upon the trial of an accused person for a criminal offence, upon authentication of the stenographer's transcript of it by the judge who presided at the former trial, although not so authenticated at the time when, or immediately after, it was taken, & not until after objection to the receipt of it was made at the second trial.—*R. v. BAUGH* (1917), 38 O. L. R. 559; 28 Can. Crim. Cas. 146; 33 D. L. R. 191.—*CAN.*

**k. — —.]**—Prisoner indicted for murder, having been put upon trial, the jury did not agree. A witness who had been examined at the trial on behalf of prisoner died; prisoner

**Sect. 7.—The hearing: Sub-sect. 15, B.; sub-sect. 16, A.]**

trial had. On the second trial, at the same sittings, before another jury, some of the witnesses having been re-sworn, the evidence given by them at the first trial was read over to them from the judge's notes, liberty being given both to the prosecution & to prisoner to examine & cross-examine:—*Held*: the course adopted by the judge at the fresh trial was irregular, & could not be cured even by the consent of the prisoner.—*R. v. BERTRAND* (1867), *L. R. 1 P. C. 520*; *16 L. T. 752*; *31 J. P. 531*; *10 Cox, C. C. 618*; *sub nom. A.-G. OF NEW SOUTH WALES v. BERTRAND*, *4 Moo. P. C. C. N. S. 460*; *36 L. J. P. C. 51*; *16 W. R. 9*; *16 E. R. 391, P. C.*

*Annotations*:—*Consd. Re Guerin* (1888), *58 L. J. M. C. 42*; *Ex p. Bottomley* [1909] *2 K. B. 14*. *Refd. R. v. Murphy* (1869), *L. R. 2 P. C. 535*. *Mentd. R. v. Murphy* (1868), *L. R. 2 P. C. 35*; *R. v. Duncan* (1881), *7 Q. B. D. 198*; *Ibrahim v. R.*, [1914] *A. C. 599*.

**3262.** ————*]*—*R. v. MONSON, VERONICA* CASE, No. 3242, *ante*.

**3263.** ————*]*—*R. v. LAWRENCE*, No. 3243, *ante*.

#### SUB-SECT. 16.—VERDICT.

##### A. In General.

**3264. Jury must be unanimous—Not compromise.]**—*WATTS v. BRAINS* (1600), *Cro. Eliz. 778*; *78 E. R. 1009*.

*Annotations*:—*Mentd. Bushel's Case* (1670), *T. Jo. 13*; *R. v. Mawbridge* (1706), *Kol. 119*; *Smith v. Bowen* (1709), *2 Ld. Raym. 1288*.

**3265.** ————*]*—A jury must be sure beyond reasonable doubt, & they ought to be unanimous & clear in their belief in the identity of the man charged before convicting. A compromise verdict is a very undesirable thing in any circumstances. In a criminal case involving the liberty of the subject it is not only undesirable; it is wrong (*LORD COLERIDGE, J.*).—*R. v. FLOOD* (1914), *10 Cr. App. Rep. 227, C. C. A.*

was subsequently again put upon trial before the same judge, upon the same indictment:—*Held*: the judge's note of the testimony of deceased witness, taken at the first trial, could not be read at the second trial, save on consent by the Crown; the proper course, under the circumstances, was to produce a person who was present at the former trial, & who could depose specifically to the testimony of deceased witness.—*R. v. MCCARRON* (1834), *1 Craw. & D. 533.—IR.*

**1. Same indictment & plea.]**—Where a prisoner is unanimously acquitted of some of the charges, & the jury are divided as to the rest, & discharged, & he is retried before a different jury, his retrial is on the original indictment & plea, & the ct. continues the trial before another jury, & the process may continue till a verdict is passed on all the counts.—*R. v. NIRMAL KANTA ROY* (1914), *1 L. L. R. 41 Cal. 1072.—IND.*

**m.** ————*]*—At a trial for forgery a material witness, while under examination, had an apoplectic fit, & a medical practitioner gave evidence that it would be dangerous to his health to continue the examination the same day or next day, whereupon the judge discharged the jury. At a later day in the same sittings, the witness being sufficiently recovered to be examined, the prisoner was again arraigned on the same indictment, pleaded "Not guilty," & was convicted & sentenced:—*Held*: the second trial & the conviction were regular.—*R. v. HENNESSEY* (1873), *2 C. A. 243.—N.Z.*

**3266. Incapacity of jurymen—Unfit to take part in deliberations or verdict—Proof by affidavit of co-jurymen.]**—On an application for a rule *nisi* for *certiorari* or alternatively for a *venire de novo* a solr. swore on affidavit that his client was tried for indecent assault at quarter sessions, & being convicted of a common assault was sentenced to one month's imprisonment with hard labour; that during the trial he noticed one of the jurymen was sitting in a huddled position in the back row of the jury box; that he was informed by one of the other eleven jurymen, who was sitting next but one to the jurymen aforesaid, that the latter appeared during the trial to be very tired & sleepy, gave some indication of having taken drink earlier in the day, took no part whatever in the deliberation of the jury, & did not join in the verdict. His informant also stated that in the next case it was found impossible to proceed, the aforesaid jurymen having fallen fast asleep, & only being roused by repeated shakings. The jury did not leave the box between the two cases:—*Held*: on these materials the ct. would not grant a rule, but that they would give leave to renew the application on further & better materials. The ct. was of opinion that if the application was to succeed, there should be an affidavit as to the circumstances from one of the other eleven jurymen.—*Ex p. MORRIS* (1907), *72 J. P. 5*.

**3267. Must be arrived at upon the evidence alone.]**—*R. v. NEWTON* (1912), *28 T. L. R. 362*; *7 Cr. App. Rep. 214*; *76 J. P. Jo. 184, C. C. A.*

**3268. Must be accepted by judge.]**—A verdict is never complete until it is accepted as such by the judge.—*R. v. AMOS* (1851), *2 Den. 65*; *T. & M. 422*; *4 New Sess. Cas. 580*; *20 L. J. M. C. 103*; *15 J. P. 70*; *15 Jur. 90*; *5 Cox, C. C. 222, C. C. R.*

**3269. May be against judge's direction—Judge not to dictate verdict.]**—*R. v. HENDRICK* (1921), *37 T. L. R. 447*; *15 Cr. App. Rep. 149, C. C. A.*

**3270. Must not be inconsistent or ambiguous.]**—On an information for riotously diverting a water-course, a verdict finding deft. guilty of diverting

**n. Same commission—Discretion of judge.]**—When on a trial at a special commission, the jury could not agree, & after remaining a long time shut up, were discharged by the ct., no consent being given by the counsel on either side, in consequence of the physician's report that a longer confinement would endanger the lives of some of them:—*Held*: they were properly so discharged, & prisoners were triable again; & they might have been tried at the same commission if the judge had thought proper.—*R. v. BARRETT* (1829), *Jebb, Cr. & Pr. Cas. 103.—IR.*

**o. Charge of sedition—Evidence of concurrent circumstances.]**—On a charge of sedition contained in a speech, evidence of the concurrent circumstances necessary for understanding of the speech can be proved on a new trial of an accused after a disagreement on a former trial.—*R. v. YOUNG* (1914), *33 N. Z. L. R. 1191.—N.Z.*

**p. Whether re-arraignment necessary.]**—On a new trial it is unnecessary to re-arraign accused & call upon him to plead afresh before empanelling the jury.—*R. v. YOUNG* (1914), *33 N. Z. L. R. 1191.—N.Z.*

#### PART VII. SECT. 7, SUB-SECT. 16.—A.

**3269 i. May be against judge's direction—Judge not to dictate verdict.]**—Where a prisoner was indicted for larceny of certain goods & also for receiving, & the evidence against her consisted of the fact of the stolen property having been found concealed on her person at about 10 o'clock on

the morning after the night on which the goods were stolen, & prisoner made a voluntary statement asserting she had found the goods, the judge directed the jury to acquit prisoner on the count for receiving, but the jury notwithstanding, acquitted prisoner on the count for larceny, but convicted her of receiving, & the judge did not insist on the direction he had previously given but reserved the question as to whether the evidence was sufficient in law to sustain the conviction on the count for receiving:—*Held*: whether the judge withdrew his direction as to the count for receiving or not, the evidence being sufficient in law to sustain the conviction, the conviction must stand.—*R. v. McMAHON* (1875), *13 Cox, C. C. 275.—IR.*

**3270 i. Must not be inconsistent or ambiguous.]**—Prisoner, being indicted for stealing & receiving certain horses, was acquitted of the stealing but found guilty of receiving. After the verdict of guilty had been pronounced & minuted by the clerk the jury said they recommended prisoner to mercy on the ground that they thought that she believed herself to have some claim to the property:—*Held*: the verdict was wrong, & prisoner ought not to have been convicted.—*R. v. DICKSON* (1865), *4 N. S. W. S. C. R. 298.—AUS.*

**3270 ii.** ————*]*—A., being charged with obtaining money by false pretences, it appeared that A. had drawn & passed at G. a cheque on the O. Bank at Y. The jury found A. was "guilty of drawing the cheque but intended to have provided funds to meet it if he had had sufficient time." The judge

a watercourse, & not guilty of the riot, is repugnant & void.—*R. v. COLSON* (1685), 3 Mod. Rep. 72; 87 E. R. 47.

**3271.** —.]—*R. v. KEITE* (1696), 1 Ld. Raym. 138; 91 E. R. 95; *sub nom. R. v. KEAT*, 5 Mod. Rep. 287; Holt, K. B. 481; Skin. 667; 1 Com. 13.

*Annotations*:—*Consd. R. v. Huggins* (1729), 17 State Tr. 309; *R. v. Charlesworth* (1861), 1 B. & S. 460. *Mentd. R. v. Burridge* (1735), 3 P. Wms. 439; *Campbell v. R.* (1847), 11 Q. B. 814; *Winsor v. R.* (1866), L. R. 1 Q. B. 289.

**3272.** —.]—*R. v. WOODFALL* (1770), 5 Burr. 2661; 20 State Tr. 895; 98 E. R. 398.

*Annotations*:—*Mentd. R. v. Shipley* (1784), 4 Doug. K. B. 73; *R. v. Topham* (1791), 4 Term Rep. 126; *R. v. Phillips* (1805), 6 East, 464; *Mouson v. Tussaud*, *Monson v. Tussaud* (1894), 63 L. J. Q. B. 454; *R. v. Morris* (1907), 71 J. P. Jo. 520.

**3273.** —.]—*R. v. MURPHY*, No. 3234, *ante*.

**3274.** —.]—A prisoner was found guilty of obtaining food & money under false pretences, but the jury added that they considered there was not sufficient evidence of any intent to defraud:—*Held*: as it was necessary to allege an intent to defraud in the indictment, & the jury had found that it was not proved in the evidence, a conviction on the above findings of the jury could not be

sustained.—*R. v. GRAY* (1891), 7 T. L. R. 477; 17 Cox, C. C. 299, C. C. R.

*Annotations*:—*Mentd. R. v. Farnborough* (1895), 64 L. J. M. C. 270; *R. v. Fairbrother* (1908), 1 Cr. App. Rep. 233.

**3275.** —.]—*Good if intention of jury clear.*—When the words of a verdict are not clear or are confused, but the intention of the jury is plain, the ct. will give effect to it, under the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1).—*R. v. RAWLINGS* (1909), 3 Cr. App. Rep. 5, C. C. A.

**3276.** —.]—The verdict & recommendation of a jury must be considered as a whole. If they find specifically guilty, the verdict cannot be set aside because they express doubts on points of detail. If a verdict is on its face inconsistent, this ct. can refuse to allow it to stand.—*R. v. CHARLTON* (1911), 6 Cr. App. Rep. 119, C. C. A.

**3277.** —.]—Applt. was convicted of being accessory before the fact to a burglary & of receiving the stolen goods:—*Held*: there was no inconsistency in the verdict.—*R. v. GOODSPEED* (1911), 75 J. P. 232; 27 T. L. R. 255; 55 Sol. Jo. 273; 6 Cr. App. Rep. 133, C. C. A.

**3278.** *May be partial—Guilty on one count & not guilty on another.*—A verdict of not guilty

refused to accept this as verdict of not guilty & insisted on an unambiguous verdict. The jury retired, & presently returned a verdict of guilty:—*Held*: the first finding was sufficiently ambiguous to justify the judge in the course he pursued, & the conviction was sustained.—*R. v. SHADFORTH* (1866), 5 N. S. W. S. C. R. 337.—*AUS.*

**3270 iii.** —.]—Where the jury in a criminal trial add to a verdict of guilty & objection is taken to the conviction on the ground that the rider is a rider finding special facts which are alleged to be inconsistent with guilt, the ct. must look at the whole finding, including the rider, & if it then appears reasonably doubtful whether the jury have found the facts necessary to establish the offence charged accused is entitled to the benefit of the doubt & the conviction should be quashed.—*MYERSON v. R.* (1907), 5 C. L. R. 596.—*AUS.*

**3270 iv.** —.]—Accused charged with breaking & entering a dwelling-house with intent to steal, & being in the said dwelling-house stealing certain articles. The jury found him guilty of burglary, but not guilty of stealing, & recommended that he be treated as a first offender on the ground that he was too drunk to know what he was doing:—*Held*: taking the whole finding together & considering it with the evidence, & summing up it was reasonably doubtful whether the jury had found the facts necessary to establish the offence of burglary, & the conviction was quashed.—*R. v. O'CONNELL* (1913), 13 S. R. N. S. W. 374; 30 N. S. W. N. 103.—*AUS.*

**3270 v.** —.]—Where, on an indictment for murder, the jury returned a verdict in the following words: "Guilty of murder, with a recommendation to mercy, as there is no evidence to show malice aforethought & premeditation":—*Held*: it was too ambiguous & uncertain to allow the ct. to pronounce any judgment on it.—*R. v. HEALEY* (1856), 3 N. S. R. (2 Thom.) 331.—*CAN.*

**3270 vi.** —.]—Indictment for forging a promissory note & uttering a forged endorsement on a promissory note. The grand jury returned a bill with a special finding, viz. "We find prisoner guilty of having & uttering the forged promissory note knowing it to be forged":—*Held*: such finding being a nullity, the jury impanelled to try prisoner was discharged, & prisoner held to bail to stand his trial at the

ensuing assizes.—*R. v. DILLON* (1838), *Craw. & D. Abr. C.* 291.—*IR.*

**3270 vii.** —.]—*H.M. ADVOCATE v. TIERNEY* (1875), 3 Couper, 152.—*SCOT.*

**3275 i.** —.]—*Good if intention of jury clear.*—A. was tried on an information charging him with stealing £300, the property of a bank. The jury returned a verdict of guilty but with the intention of returning the amount:—*Held*: the verdict was a verdict of guilty, & the conviction was sustained.—*R. v. JOHNSON* (1867), 6 N. S. W. S. C. R. 201.—*AUS.*

**3275 ii.** —.]—Upon the trial of deft. upon an indictment for obtaining money by false pretences, the jury found deft. "guilty of obtaining money by false pretences without intent to defraud":—*Held*: the finding was in law a verdict of "not guilty" & it should have been so recorded.—*R. v. WEBER* (1921), 61 D. L. R. 601; 36 Can. Crim. Cas. 33; 51 O. L. R. 218.—*CAN.*

**3275 iii.** —.]—An indictment charged an attempt to poison by mixing a certain noxious & destructive thing called sugar of lead with flour, & administering the said poison so mixed with flour. The jury found prisoner guilty, but stated that they could not say what particular kind of poison had been mixed up with the flour:—*Held*: the conviction was good.—*R. v. SHANNON* (1837), *Jebb, Cr. & Pr. Cas.* 209.—*IR.*

**3275 iv.** —.]—In a trial for murder the jury returned a verdict of guilty but recommended the panel to mercy on the ground of want of malice aforethought:—*Held*: this was a good verdict of murder.—*H.M. ADVOCATE v. MACDONALD* (1867), 5 Irv. 525; 40 Sc. Jur. 92.—*SCOT.*

**3275 v.** —.]—Accused was indicted for the crime of theft, in that he did wrongfully & unlawfully steal ten head of cattle. The jury found him "guilty of theft of two cattle by fraudulent sale thereof, which cattle had been entrusted to him for safe keeping." On a question reserved as to whether the verdict could be sustained as a verdict of guilty under the indictment, the conviction was confirmed.—*R. v. MATTHEOS JAN* (1890), 16 S. C. 361; 9 C. T. R. 378.—*S. AF.*

**3275 vi.** —.]—On an indictment for forging & uttering a promissory note the jury first returned a verdict of guilty, with a recommendation to mercy on the ground that prisoner

did not intend to defraud. The judge told them to reconsider their verdict, & said if they thought there was no intention at all to defraud they ought to find him not guilty. The jury reconsidered their verdict, & found prisoner guilty, but recommended him to mercy on various grounds set out in writing, the first being that there was no intent to defraud, as prisoner believed he would receive money in time to meet the bill:—*Held*: the recommendation to mercy did not qualify the verdict, & that the conviction was good.—*R. v. WARNE* (1875), 3 C. A. 1.—*N.Z.*

**3275 vii.** —.]—Prisoner was indicted for arson. In summing up the judge directed the jury that there was no evidence before them as to prisoner's mental condition to justify them in finding that prisoner was incapable of understanding the nature & quality of the act & of knowing it was wrong. The jury said they found prisoner guilty & handed to him the following document: "We find prisoner guilty of setting fire to P.'s house, & wish to add a rider that we think accused was not responsible for his actions at the time":—*Held*: this verdict was one of guilty, the rider being simply a statement to induce the ct. to deal leniently with prisoner.—*R. v. ALDRED* (1914), 33 N. Z. L. R. 926.—*N.Z.*

**3278 i.** *May be partial—Guilty on one count & not guilty on another.*—Where a prisoner is charged with an offence consisting of a felony & a misdemeanour, the jury may convict him of the felony, though they acquit him of the misdemeanour.—*R. v. STEWART & SULLIVAN* (1886), 12 V. L. R. 507.—*AUS.*

**3278 ii.** —.]—Deft., who was employed by a co. in the capacity of clerk & servant, was tried on an indictment charging him with theft of moneys paid to him on account of goods supplied by the co. Certain counts of the indictment charged the payment of moneys to deft. with instructions that the same should be paid to the co., & the fraudulent conversion by deft. of such moneys to his own use. The evidence of guilt was conclusive, but the trial judge, while charging strongly against prisoner, without attempting to find facts, stated the effect of the evidence to the jury & left it to them to say whether prisoner was guilty or not guilty of the offence charged. The jury having returned a general verdict

*Sect. 7.—The hearing: Sub-sect. 16, A. & B.]*

can be entered on one count, & of guilty on another.—*R. v. CRADDOCK* (1850), 2 Den. 31; *T. & M.* 361; 4 New Sess. Cas. 400; 20 L. J. M. C. 31; 16 L. T. O. S. 514; 15 J. P. 20; 14 Jur. 1031; 4 Cox, C. C. 409, C. C. R.

**3279.** ———.]—Finding prisoner guilty on the first count is perfectly consistent with finding him not guilty on the second.—*R. v. HALLIDAY* (1860), Bell, C. C. 257; 29 L. J. M. C. 148; 2 L. T. 254; 24 J. P. 341; 6 Jur. N. S. 514; 8 W. R. 423; 8 Cox, C. C. 298, C. C. R.

**3280.** ———.]—Each count equivalent to a separate indictment.]—Where an indictment contains several counts it is not ground of error that no verdict has been given on some of them, provided a verdict has been found on one good count, & judgment given generally. Each count is a separate indictment.—*LATHAM v. R.* (1864), 5 B. & S. 635; 4 New Rep. 329; 33 L. J. M. C. 197; 10 L. T. 571; 28 J. P. 727; 10 Jur. N. S. 1145; 12 W. R. 908; 9 Cox, C. C. 516; 122 E. R. 968.

*Annotation:—Refd. R. v. Paul* (1890), 25 Q. B. D. 202.

**3281.** Effect of general verdict of guilty—Indictment containing several counts.]—*R. v. J. P.* (1583), Co. Ent. 352 b.

*Annotation:—Refd. Campbell v. R.* (1847), 10 L. T. O. S. 396.

**3282.** ———.]—Accused charged both as principal & as accessory.]—A general conviction of a prisoner, charged both as principal in the first degree, & as an aider & abettor of other men in rape, is valid on the count charging him as principal. On such an indictment evidence may be given of several rapes on the same woman at the same time, by the prisoner & other men, each assisting the other in turn, without putting the prosecutor to

elect on which count to proceed.—*R. v. FOLKES & LUDDS* (1832), 1 Mood. C. C. 354.

*Annotation:—Mentd. R. v. Mitchel* (1848), 3 Cox, C. C. 1.

**3283.** ———.]—Where an indictment charged A. with shooting B., & C. with being present, aiding & abetting him, in one count, & in the second charged C. with having afterwards shot the said B., & A. with being present, aiding & abetting him, & the jury found both guilty, but were unable to say which fired the gun:—*Held*: such general finding was good, & both prisoners were properly convicted of the whole offence thereunder, each of them being equally guilty in law on each count, & the verdict returned by the jury supporting each count.—*R. v. DOWNING & POWYS* (1845), 2 Car. & Kir. 382; 1 Den. 52; 9 J. P. 166; 1 Cox, C. C. 156, C. C. R.

*Annotation:—Refd. Campbell & Haynes v. R.* (1847), 2 Cox, C. C. 463.

**3284.** ———.]—Same offence charged differently in different counts.]—*CAMPBELL v. R.*, No. 3532, *post*.

**3285.** ———.]—When the same act is differently charged in various counts the ct. may construe a verdict of guilty upon all as if it was limited to the least offence alleged.—*R. v. JOHNSTON* (1913), 9 Cr. App. Rep. 262, C. C. A.

**3286.** ———.]—Verdict of guilty on alternative counts for stealing & receiving same articles.]—Where an indictment charges several prisoners in separate counts with stealing & receiving the same property, & all prisoners are found guilty, both of stealing & of receiving, & the facts necessary to support a conviction on both charges are the same & the maximum punishment is the same in respect of both offences, the conviction, though irregular in form, ought to be construed as a general verdict of guilty on an indictment containing these two counts.—*R. v. LOCKETT, GRIZZARD, GUTWIRTH & SILVERMAN*, [1914] 2 K. B.

of guilty:—*Held*: the conviction should be affirmed; assuming that certain counts of the indictment were defective for want of an allegation of directions to pay the money over to the co., it was open to the ct. to give directions in relation to the entry of judgment on the counts which were good & to pass sentence upon them.—*R. v. McDONALD* (1915), 49 N. S. R. 245.—*CAN.*

**3278 iii.** ———.]—An indictment, in the first count, charged that S. with a leaden ball & shot, out of a gun by force of gunpowder shot & sent forth, D. feloniously did strike, penetrate & wound with intent, in so doing, the said D. feloniously to kill & murder; & that W. was present, aiding & abetting. Another count charged W. as principal & S. as present, aiding & abetting; & in other counts they were charged as principals & accessories respectively in the like wounding of D. with intent to disable him, & to do him grievous bodily harm. The record stated that prisoners were found guilty upon the first count, & sentenced to death; & that the jury were discharged from giving any verdict upon the other counts:—*Held*: the discharge of the jury from giving any verdict upon the issues joined on the other counts did not render the judgment upon the first count erroneous.—*SHEA v. R., DWYER v. R.* (1848), 3 Cox, C. C. 141.—*IR.*

**3278 iv.** ———.]—A father was charged with neglect of his imbecile son. The first count of the indictment averred not only wilful neglect but also assault. There was a second count for assault. The only evidence of assault was that the imbecile was deprived of his liberty by the door of his room being fastened. The jury found prisoner guilty of wilful neglect, but acquitted

him of assault:—*Held*: the conviction should stand.—*R. v. WATSON* (1896), 30 I. L. T. 135.—*IR.*

**3278 v.** ———.]—Two persons were indicted for assaulting & putting prosecutor in bodily fear, & stealing money from his person, & immediately afterwards feloniously wounding him. The jury returned a verdict of assault, but the judge sent them back to reconsider it:—*Held*: he was right in doing so, & in directing the jury that they could find the prisoners guilty of an assault with intent to rob, or stealing from the person, or an unlawful wounding, but not of common assault.—*R. v. WILLIAMS & FERGUSON* (1877), 3 C. A. 370; 2 J. R. N. S. 42.—*N.Z.*

**3281 i.** Effect of general verdict of guilty—Indictment containing several counts.]—Prisoner was charged on an indictment containing two counts, obtaining money partly by a false pretence & partly by a wilfully false promise, & obtaining money by false pretences. He gave a cheque on a bank where he had no account in part payment of a buggy:—*Held*: there was no inconsistency in a general verdict of guilty on these two counts.—*R. v. ROWE* (1909), 9 S. R. N. S. W. 747.—*AUS.*

**3281 ii.** ———.]—*R. v. BAIN* (1877), 23 L. C. J. 327.—*CAN.*

**3281 iii.** ———.]—Deft. was charged with four distinct & separate offences. On the conclusion of the trial for the first offence deft.'s solr. asked for a verdict, but the judge, not being prepared to determine the case, proceeded with the trial of the other charges, & when all had been heard, rendered verdicts of guilty in all four cases:—*Held*: the judge had no power to so withhold his verdicts, & having done so, prisoner was wrongly con-

victed in all four cases, & the verdicts must be set aside & new trials ordered.—*R. v. McBERNY* (1897), 29 N. S. R. 327.—*CAN.*

**3286 i.** ———.]—Verdict of guilty on alternative counts for stealing & receiving same articles.]—A prisoner was charged with stealing a cornet & in a second count of the indictment with receiving "the said cornet well-knowing, etc." The jury returned a general verdict of guilty:—*Held*: the conviction must be quashed.—*R. v. MITCHELL* (1904), 4 S. R. N. S. W. 317.—*AUS.*

**3286 ii.** ———.]—Prisoner was charged with stealing three steers & in a second count with receiving the same three steers. The jury returned a general verdict of guilty:—*Held*: conviction must be quashed.—*R. v. PRATT* (1904), 4 S. R. N. S. W. 573; 21 N. S. W. W. N. 140.—*AUS.*

**3286 iii.** ———.]—Prisoners were charged with larceny of certain goods & in a second count with receiving the same goods. The jury found both prisoners guilty of larceny & receiving & were discharged. Objection was then taken on behalf of one of prisoners that the verdict was irregular. The jury who had not left precincts of ct. were recalled by the judge & returned a verdict of larceny against each prisoner upon which prisoners were sentenced:—*Held*: the first verdict was illegal & the second verdict a nullity & the conviction must be set aside.—*R. v. ATKINSON & CLUTTON* (1907), 7 S. R. N. S. W. 713.—*AUS.*

**3286 iv.** ———.]—When on an indictment charging prisoner with stealing, & also receiving goods knowing them to be stolen, the jury found a general verdict of guilty, not specifying on which count the verdict was found,

720; 83 L. J. K. B. 1193; 110 L. T. 398; 78 J. P. 196; 30 T. L. R. 233; 24 Cox, C. C. 114; 9 Cr. App. Rep. 268, C. C. A.

*Annotation*.—**Mentd.** R. v. Starkie, [1922] 2 K. B. 275.

**3287. Must state amount of damage—Conviction under Malicious Injury to Property Act, 1827 (c. 30), s. 24.]—***Semble*: the above sect. is inapplicable to growing trees. But, neither under that nor any other sect., is a committal or conviction good, which states the offence to be wilfully & maliciously cutting up & destroying fruit trees in a garden, or wilfully & maliciously committing damage, injury & spoil to real property, to wit fruit trees, without a finding as to the amount of damage.—**CHARTER v. GREAME** (1849), 13 Q. B. 216; 3 New Mag. Cas. 106; 3 New Sess. Cas. 382; 18 L. J. M. C. 73; 12 L. T. O. S. 471; 13 J. P. 232; 13 Jur. 208; 116 E. R. 1245.

*Annotations*.—**Mentd.** Fuller v. Brown (1849), 13 L. T. O. S. 301; *Ex p.* Austin (1880), 50 L. J. M. C. 8.

#### B. Special Verdict.

**3288. Jury may find.]—**On an indictment of murder for killing a serjeant of the mace in London, the jury found a special verdict, & upon argument before all the judges, upon exceptions being made to the indictment:—*Held*: (1) the verdict was good, although the indictment averred that the sheriff made a precept to deceased, & the verdict found an arrest made according to the custom without any precept. Because it was sufficient if the substance of the matter was found, & the indictment might have been general, that he feloniously & of his malice prepense killed the deceased; & because, besides the special matter which implies malice, it was expressly averred in the indictment that he feloniously & of malice aforethought killed the deceased.

(2) The custom of London, that after the plaintiff entered, deft. might be arrested without being first summoned, was good.

(3) If a minister of justice was killed in the execution of process, it was murder, although such process was apparently erroneous. If a sheriff, justice of peace, chief constable, *petit* constable, watchman, or any other, be killed in the execution of their office, it was murder. If an officer or minister of the law was resisted or assaulted in the execution of his office, he is not bound to fly to the wall as others were.

(4) An officer making an arrest ought to show at whose suit, out of what ct., & for what cause he made the arrest, when the party arrested submits himself to the arrest, but not where the party resists. If an officer having process to arrest a party is killed by the party before any arrest made in order to prevent the arrest, it was murder.

(5) Where the jury doubted, whether the facts proved amount in law to murder, they might find a special verdict, stating the facts as proved, & leaving the inference to the judges, who might give judgment of death, if they thought the offence

was murder, though the killing was not found to be felonious.

(6) One indicted of murder might be found guilty of manslaughter.—**MACKALLEY'S CASE** (1611), 9 Co. Rep. 61 b; Cro. Jac. 279; 79 E. R. 239.

*Annotations*.—**Mentd.** Hodges v. Marks (1615), Cro. Jac. 485; R. v. Cary (1616), 3 Bulst. 206; Holloway's Case (1629), W. Jo. 198; Gwinne v. Poole (1689), 2 Lut. App. 1560; R. v. Plummer (1701), Kel. 107; Jackson v. Humphreys (1707), 1 Salk. 273; R. v. Tooley (1709), 2 Ld. Raym. 1296; Smith v. Boucher (1733), Kel. W. 144; Swann v. Broome (1764), 3 Burr. 1595; O'Brian's Case (1844), 1 Den. 9; R. v. Davies (1861), 8 Cox, C. C. 486; Galliard v. Laxton (1862), 2 B. & S. 363; Barnacott v. Passmore (1887), 51 J. P. 821.

**3289. — Sufficient to enable court to give judgment.]—**R. v. ROYCE (1707), 4 Burr. 2073; 98 E. R. 81.

*Annotations*.—**Refd.** R. v. O'Brien (1848), 7 State Tr. N. S. 1. **Mentd.** Thellusson v. Woodford (1798), 4 Ves. 227.

**3290. — To enable legal point to be decided.]—**R. v. WESTBEER (1739), 2 East, P. C. 596; Sess. Cas. K. B. 233; 2 Stra. 1133; 93 E. R. 235; 1 Leach, 12.

*Annotations*.—**Consd.** R. v. Walker (1827), 1 Mood. C. C. 155. **Refd.** R. v. Morrison (1859), 28 L. J. M. C. 210.

**3291. — — —.]—**R. v. STAINES LOCAL BOARD (1880), 52 J. P. 215; 4 T. L. R. 307.

**3292. Jury cannot be compelled to find.]—**In a case of felony, the judge will not direct the jury to find special facts, & the jury may, if they think proper, find a general verdict, instead of finding special facts, with a view to raise a question of law.—R. v. ALLDAY (1837), 8 C. & P. 136, N. P.

*Annotations*.—**Refd.** R. v. Nott (1843), 7 Jur. 621; R. v. Hendrick (1921), 37 T. L. R. 447.

**3293. Court to decide judgment.]—**MACKALLEY'S CASE, No. 3288, *ante*.

**3294. — Only on facts actually found.]—**R. v. PLUMMER (1701), Kel. 109; Fost. 352; 12 Mod. Rep. 627; 84 E. R. 1103.

*Annotations*.—**Refd.** R. v. Higgins (1730), 1 Barn. K. B. 396; R. v. Burridge (1735), 3 P. Wins. 439; R. v. Francis (1735), Cunn. 165. **Mentd.** R. v. Pemberton (1874), 22 W. R. 553.

**3295. — — —.]—**A taking in the presence is a taking from the person & felony, but in special verdicts it must be expressly found that the party robbed was present at the taking up.—R. v. FRANCIS (1735), 2 Stra. 1015; Cunn. 165; Lee *temp.* Hard. 113; 2 Com. 478; 93 E. R. 1104.

*Annotations*.—**Mentd.** R. v. Borthwick (1779), 1 Doug. K. B. 207; Thompson v. Gibson (1841), 8 M. & W. 281; Grace v. Clinch (1843), 4 Q. B. 606.

**3296. — — —.]—**R. v. GREY (1735), 2 East, P. C. 708.

*Annotation*.—**Refd.** R. v. Farnborough (1895), 73 L. T. 351.

**3297. — — —.]—**R. v. CONNOR, No. 2143, *ante*.

**3298. — On facts as found.]—**R. v. FARNBOROUGH, No. 3123, *ante*.

**3299. — Intention of accused stated as excuse.]—**On indictment against N. for obtaining goods by false pretences, the jury found that N. made a false statement, that he intended it to, & that it actually did, induce the prosecutor to part

the ct. set aside this verdict for uncertainty, & awarded a *verdict de novo*.—R. v. EVANS (1856), 6 I. C. L. R. 500.—**IR.**

**g. Must be no reasonable doubt.]—**R. v. GREEN (1918), 29 Can. Crim. Cas. 425.—**CAN.**

**r. Verdict returned on Sunday.]—**H.M. ADVOCATE v. ROSENBERG (1842), 1 Broun. 367.—**SCOT.**

**s. Several accused—Verdict against some.]—**On an indictment against several persons for jointly receiving goods knowing them to have been feloniously stolen:—*Held*: although

there was no evidence against some of the prisoners, the others might be convicted.—**HANLON'S CASE** (1841), Ir. Cir. Rep. 364.—**IR.**

**t. Indictment for full offence—Plea of guilty of attempt.]—**Where a prisoner pleads not guilty of rape, & offers a plea of guilty of attempt to rape, which is accepted, but there is no count in the indictment for such an attempt, the procedure is to direct the jury to find him guilty of an attempt to rape on his own confession.—R. v. MAULEY (1911), 46 I. L. T. 103.—**IR.**

**a. Recommendation to mercy—Statement of grounds—Whether part of verdict.]—***Semble*: the terms in which a jury recommend a prisoner, whom they have found guilty, to mercy are not to be taken as part of the verdict.—R. v. WARNE (1875), 3 C. A. 1.—**N.Z.**

#### PART VII. SECT. 7, SUB-SECT. 16.—B.

**3299 i. Court to decide judgment—On facts as found—Intention of accused stated as excuse.]—**Prisoner was indicted under Criminal Code Act, 1893, ss. 269, 271, upon a charge of forging



**Sect. 7.—The hearing: Sub-sect. 16, B.]**

with the goods; but that N. intended, when he could, to pay for the goods:—*Held*: this was a verdict of guilty, & the last finding did not qualify the former findings, nor negative the fraudulent intent.—*R. v. NAYLOR* (1865), *L. R. 1 C. C. R. 4*; 35 *L. J. M. C. 61*; 13 *L. T. 381*; 30 *J. P. 6*; 11 *Jur. N. S. 910*; 14 *W. R. 58*; 10 *Cox, C. C. 149, C. C. R.*

*Annotation*:—*Consd. R. v. Gray* (1891), 17 *Cox, C. C. 299*.

**3300.** ——— **Extreme necessity stated as excuse.]**—The two prisoners were indicted for wilful murder, & on the trial the jury returned a special verdict, stating the facts, & referred the matter to the ct. The facts stated in the special verdict were substantially as follows: The prisoners, able-bodied English seamen, & the deceased, an English boy between seventeen & eighteen years of age, the crew of an English yacht, were cast away in a storm on the high seas 1,600 miles from land, & were compelled to put into an open boat. The food they took with them was all consumed in twelve days, & having been for eight days without food, & for six days without water, the prisoners killed the boy. The boy when killed was lying at the bottom of the boat quite helpless & weak, & unable to make any resistance, & did not assent to his being killed. The prisoners, & another man who was with them, fed upon the body & blood of the boy for four days, when they were picked up by a passing vessel. The verdict went on thus: "That, if the men had not fed upon the body of the boy, they would probably not have survived to be so picked up & rescued, but would within the four days have died of famine; that the boy, being in a much weaker condition, was likely to have died before them; that at the time of the act in question there was no sail in sight

nor any reasonable prospect of relief; that, under the circumstances, there appeared to the prisoners every probability that unless they then fed, or very soon fed, upon the boy or one of themselves, they would die of starvation; that there was no appreciable chance of saving life except by killing some one for the others to eat; that, assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men." On the special verdict:—*Held*: the facts as found afforded no justification for the killing of the boy, & the prisoners were guilty of wilful murder.—*R. v. DUDLEY & STEPHENS* (1884), 14 *Q. B. D. 273*; 54 *L. J. M. C. 32*; 52 *L. T. 107*; 49 *J. P. 69*; 33 *W. R. 347*; 1 *T. L. R. 118*; 15 *Cox, C. C. 624, D. C.*

*Annotations*:—*Reid. R. v. Staines* *L. B.* (1888), 4 *T. L. R. 364*; *R. v. Jameson* (1896), 60 *J. P. 662*. *Mentd. R. v. Steventon Parish* (1885), 1 *T. L. R. 395*; *R. v. Brooke* (1894), 59 *J. P. 6*; *Allen v. Flood*, [1898] *A. C. 1*.

**3301.** ——— **Prevention of Cruelty to Children Act, 1904, c. 15, s. 1.]**—The prisoner was indicted for the manslaughter of a child under the age of 16. During the trial the judge told the jury that they could, under above Act, instead of finding the prisoner guilty of manslaughter, find him guilty of wilful neglect. When the jury were asked for their verdict they said "Guilty." They were then asked, "Guilty of manslaughter or wilful neglect?" & they replied "of wilful neglect," & after an appreciable pause they added, "Through ignorance."—*Held*: there was a distinct finding of guilty, & the addition of the words "through ignorance" did not negative that finding.—*R. v. PETCH* (1909), 25 *T. L. R. 401*; 2 *Cr. App. Rep. 71, C. C. A.*

**3302.** ——— **May enter verdict of acquittal—If facts found do not justify conviction.]**—Where the jury in an indictment for murder bring in a special verdict, & the facts so found by them do

& uttering an acknowledgment of the receipt of money. Prisoner as agent for M. had incurred a debt of £5, & the creditor G. demanded payment from him. He thereupon made & signed in G.'s name a receipt for £5 from himself. Prisoner then sued M. for the £5 which he alleged he had paid to G., & produced the false receipt in support of his claim. He recovered judgment. G. swore that he had not authorised prisoner to sign the receipt. The jury found the following verdict: "We find accused guilty of forging & using a receipt, but do not consider "was done with any criminal intent."

*Held*: the verdict was ambiguous, for it might have meant that the jury thought prisoner had no intent to defraud, in which case, as that was not a necessary ingredient of the offence, it was a verdict of guilty; or it might have meant that they believed he honestly thought he had authority to sign & use the receipt, in which case it was probably equivalent to a verdict of not guilty; & under the circumstances a new trial should be ordered.—*R. v. STEWART* (1908), 27 *N. Z. L. R. 682*.—**N.Z.**

**3302 i.** ——— **May enter verdict of acquittal—If facts found do not justify verdict.]**—Prisoners were charged with having feloniously killed with intent to steal the carcasses thereof one bull, one steer, one cow. The evidence was conclusive that they killed one animal of the ox kind, but no evidence what was its particular kind, whether bull, steer or cow. The judge directed the jury that if satisfied of the guilt of prisoners in killing a grown animal of the ox kind they might find them guilty, & although it was certain that a bull & steer & cow were in point of fact not so killed. The jury found prisoners guilty accordingly, but added that they could not say what was the

sex of the beast killed:—*Held*: the direction was right but the verdict could not be sustained.—*R. v. CHRISTIAN* (1869), 8 *N. S. W. S. C. R. 294*.—**AUS.**

**3302 ii.** ——— **]**—When the jury in a criminal trial add to a verdict of guilty & objection is taken to the conviction on the ground that the rider is a rider finding special facts which are alleged to be inconsistent with guilt, the ct. must look at the whole finding including the rider, & if it then appears reasonably doubtful whether the jury have found the facts necessary to establish the offence charged, accused is entitled to the benefit of the doubt and conviction should be quashed.—*MYERSON v. R.* (1907), 5 *C. L. R. 596*.—**AUS.**

**3302 iii.** ——— **]**—Accused was charged with breaking & entering a dwelling house with intent to steal & being in the said dwelling house stealing certain articles. The jury found him guilty of burglary but not guilty of stealing, & recommended that he be treated as a first offender on the ground that he was too drunk to know what he was doing:—*Held*: taking the whole finding together & considering it with the evidence & summing up it was reasonably doubtful whether the jury had found the facts necessary to establish the offence of burglary & the conviction was quashed.—*R. v. O'CONNELL* (1913), 13 *S. R. N. S. W. 374*; 30 *N. S. W. W. N. 103*.—**AUS.**

**3302 iv.** ——— **]**—On an indictment for wounding with intent a verdict of guilty without malicious intent is an acquittal.—*SLAUGHENWHITE v. R.* (1904), 35 *S. C. R. 607*.—**CAN.**

**3302 v.** ——— **]**—*R. v. SNYDER* (1915), 34 *O. L. R. 318*; 8

*O. W. N. 594*; 25 *D. L. R. 1*.—**CAN.**

**3302 vi.** ——— **]**—Where a verdict finds certain facts specially, & concludes with a finding of guilty, in order that it should be treated as anything else than a general verdict of guilty, it should be shown that the jury in the rest of their finding have negatived a component part of the offence, or that there is something inconsistent with a verdict of guilty, or that the jury have proceeded on a wrong assumption as to the law.—*IT. v. BEN* (1895), 14 *N. Z. L. R. 321*.—**N.Z.**

**3302 vii.** ——— **]**—In a trial of a trainway motorman for manslaughter caused by accused letting his car collide with a lighted car standing stationary on the line, which was about to be coupled to a broken-down car, such collision causing a person about to couple the cars to be crushed to death between the buffers, the jury returned the following written answer to the question whether prisoner was guilty or not guilty: "We consider accused guilty of neglect of duty caused by extenuating circumstances, but not gross neglect, & strongly recommend him to mercy."—*Held*: the verdict was a general verdict of guilty, with a strong recommendation to mercy.—*R. v. DAWE* (1911) 30 *N. Z. L. R. 673*.—**N.Z.**

**3302 viii.** ——— **]**—Prisoner was tried upon an indictment containing four separate counts, charging him with stealing a sum of money; with stealing a cheque; with receiving the money; & with receiving the cheque. The judge directed the jury in the usual way as to the meaning of & the reason for the several counts. The jury handed to the judge the following answers or findings on the counts: "Prisoner did not steal the



not justify a conviction, the ct. may enter a judgment of acquittal.—*R. v. HUGGINS* (1730), 2 Raym. 1574; 17 State Tr. 309; 1 Barn. K. B. 358, 396; Fitz-G. 177; 2 Stra. 882; 92 E. R. 518.

**Annotations.**—*Refd.* *R. v. Burrill* (1735), 3 P. Wms. 439; *R. v. Francis* (1735), Cunn. 165; *Campbell v. R.* (1846), 11 Q. B. 799; *Winsor v. R.* (1866), L. R. 1 Q. B. 289. **Mentd.** *Scott v. Shepherd* (1773), 3 Wils. 403; *Jones v. Nicholls* (1829), 3 Moo. & P. 12; *R. v. Lea, Parry, Rea, Jones & Wright* (1837), 2 Mood. C. C. 9; *May v. Burdett* (1846), 16 L. J. Q. B. 64; *R. v. Murphy* (1869), L. R. 2 P. C. 535; *Manton v. Brocklebank* (1923), 92 L. J. K. B. 624.

**3303.** — **Effect of finding of facts on part of offences charged.**—If a special verdict upon an indictment for three offences finds facts which prove deft. guilty of two & refers it to the opinion of the ct. whether he is guilty of the facts charged in the indictment, they will adjudge him guilty of these two & not guilty of the rest.—*R. v. HAYES* (1729), 2 Stra. 843; 1 Barn. K. B. 48; 2 Ld. Raym. 1518; 93 E. R. 888.

**Annotations.**—*Consd.* *Latham v. R.* (1864), 5 B. & S. 635. *Refd.* *Bank of England v. Morrice* (1736), *Lee temp. Hard.* 219; *Shea v. R.*, *Dwyer v. R.* (1848), 3 Cox, C. C. 141. **Mentd.** *R. v. Gibson* (1734), Cunn. 29; *R. v. Atkinson* (1784), 1 Wms. Saund. 249; *Campbell v. R.* (1847), 11 Q. B. 814.

**3304.** — **Effect of variance between verdict & indictment.**—*DOWDALE'S CASE* (1605), 6 Co. Rep. 46 b; 77 E. R. 323; *sub nom.* *RICHARDSON v. DOWDALE*, Cro. Jac. 55.

**Annotations.**—*Refd.* *Orde v. Moreton* (1611), 1 Bulst. 129. **Mentd.** *Calvin's Case* (1609), 7 Co. Rep. 1 a; *Wey v. Rally* (1704), 6 Mod. Rep. 194; *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602; *Re Scott*, *Scott v. Scott*, [1916] 2 Ch. 268.

**3305.** — **—**—*R. v. DAWSON* (1716), 1 Stra. 19; 93 E. R. 358.

**3306.** — **—**—*R. v. MORGAN* (1610), 1 Bulst. 84, n.; 80 E. R. 783.

**Annotations.**—*Mentd.* *Wilson v. Law* (1694), 4 Mod. Rep. 290; *R. v. Yandell* (1792), 4 Term Rep. 521; *R. v. Middlesex* (1804), 4 East, 604; *Re Bartholemey & Morney* (1852), 1 E. & B. 8.

**3307.** — **—**—Where an indictment charged defts. with conspiring falsely to indict B. with intent to extort money, & the jury found them guilty of conspiring to indict with that intent, but not falsely:—*Held*: enough of the indictment was found to enable the ct. to give judgment.—*R. v. HOLLINGBERRY* (1825), 4 B. & C. 329; 6 Dow. & Ry. K. B. 345; 3 Dow. & Ry. M. C. 245; 3 L. J. O. S. K. B. 226; 107 E. R. 1081.

**Annotations.**—*Consd.* *Boulter v. R.* (1888), 21 Q. B. D. 284. *Refd.* *R. v. O'Connell* (1844), 5 State Tr. N. S. 1; *It. v. O'Brien* (1911), 6 Cr. App. Rep. 108.

notes & money; on a certain date he took the cheque in trust; not guilty of receiving the money; the jury cannot agree as to receiving the money":

—*Held*: the findings amounted to an acquittal on the first & third counts; the verdict on the second count was inconclusive, as prisoner might have converted the cheque subsequently to that date, & therefore there should be a new trial on that & the fourth count.—*It. v. CREAMER* (1912), 32 N. Z. L. R. 449.—**N.Z.**

**3302 ix.** — **—**—Accused was indicted for theft of four cows & three heifers; for theft of three cows; & that he did receive & have five cows before then stolen, he, when he received the said five cows, then well knowing that the same had been dishonestly obtained. To each of these counts he pleaded not guilty. The jury returned the following verdict in writing: "We find prisoner guilty of receiving stolen cattle & being a party to sale of same, but respectfully ask for leniency, as there is not sufficient evidence to show prisoner actually stole the cattle":—*Held*: the verdict was one of not guilty on the first & second counts; & one of guilty on the third count.—*R. v.*

*BOURKE* (1913), 32 N. Z. L. R. 821.—**N.Z.**

**3302 x.** — **—**—Accused was indicted for the manslaughter of her illegitimate child. The medical evidence was to the effect that the child died as the result of throttling. The jury found that the death of the child was caused by the mother when she was not in a mental condition to realise the effect of her act:—*Held*: the verdict was not ambiguous, but was a finding of guilty, the jury not having found that accused was incapable of understanding the nature & quality of the act, but only that she was not in a mental condition to realise the effect of the act.—*R. v. HOLDEN*, [1920] N. Z. L. R. 458.—**N.Z.**

**3304 i.** — **Effect of variance between verdict & indictment.**—Appets. were charged with stealing cattle & also with feloniously receiving cattle knowing them to have been stolen. The judge explained to the jury the verdict which they were entitled to return, describing the offence as "illegally using." The jury acquitted prisoners of the offences charged & found them guilty of "illegally using." The ct. having on a special case stated sustained the

**3308.** — **—**—*A party was indicted for a highway robbery, accompanied by violence, under 7 Will. 4 & 1 Vict. c. 87, s. 3. The jury pronounced the following verdict: "We find the prisoner guilty of an assault, but without any intention to commit any felony":—Held: such special finding did not take the case out of the operation of 7 Will. 4 & 1 Vict. c. 85, s. 11.—R. v. ELLIS* (1838), 8 C. & P. 654, C. C. R.

**Annotation.**—*Refd.* *R. v. Bird* (1851), 2 Den. 94.

**3309.** — **Amendment of indictment.**—On an indictment alleging an offence on a specific date the jury is entitled to find "Not Guilty" on that date, & if the indictment covers other dates "Guilty," the ct. is thereupon entitled to amend the date in the indictment to "some day in" the month in question.—*R. v. DOSSI* (1918), 87 L. J. K. B. 1024; 34 T. L. R. 498; 13 Cr. App. Rep. 158, C. C. A.

**Annotation.**—*Refd.* *R. v. James* (1923), 17 Cr. App. Rep. 116.

**3310.** — **Procedure where wrong verdict entered.**—Upon the trial of an indictment at quarter sessions, that ct. is the sole judge of the propriety of the entry of the verdict. Where, therefore, upon a special finding by the jury, amounting to an acquittal, the chairman directs a verdict of guilty to be entered, the Ct. of K. B. will not grant a *mandamus* requiring the minute of the verdict to be altered according to the fact. The only course open to the prisoner is to apply to the Crown for a pardon.—*R. v. SUFFOLK JJ.* (1835), 5 Nev. & M. K. B. 139; 3 Nev. & M. M. C. 221.

**3311.** — **Appeal against decision of court.**—On a trial for larceny of goods laid by the indictment in the high sheriff, the jury found that the prisoner had taken certain goods which were in the possession of the sheriff, & that the goods taken were the prisoner's own property, & that the sheriff had seized them in an execution against the prisoner's wife, being under the impression that they were her goods:—*Held*: on these findings the verdict was one of not guilty.—*R. v. KNIGHT* (1908), 73 J. P. 15; 25 T. L. R. 87; 53 Sol. Jo. 101; 1 Cr. App. Rep. 186, C. C. R.

**3312.** — **—**—*R. v. MURHEAD* (1908), 73 J. P. 31; 25 T. L. R. 88; 53 Sol. Jo. 164; 1 Cr. App. Rep. 189, C. C. A.

**Annotations.**—*Mentd.* *R. v. Brownlow* (1910), 74 J. P. 240; *Morison v. London County & Westminster Bank*, [1914] 3 K. B. 356.

conviction on the ground that the verdict returned was a substantially accurate description of the offence, the High Ct. being of opinion that that decision was obviously right refused to grant special leave to appeal.—*LILLICRAP v. R.* (1905), 2 C. L. R. 681.—**AUS.**

**3304 ii.** — **—**—*It. v. HIGGINS* (1905), 38 N. S. R. 328.—**CAN.**

**3304 iii.** — **—**—Accused was indicted for the crime of theft, in that he did wrongfully & unlawfully steal ten head of cattle. The jury found him guilty of theft of two cattle by fraudulent sale thereof, which cattle had been entrusted to him for safe keeping. On a question reserved as to whether the verdict could be sustained as a verdict of guilty under the indictment, the conviction was confirmed.—*R. v. MATTHEWS JAN* (1899), 16 S. C. 361; 9 C. T. R. 378.—**S. AF.**

**b. Benefit of doubt to accused.**—*R. v. WALKER* (1893), 1 Terr. L. R. 482.—**CAN.**

**c. Indictment for murder by poison.—Whether jury need be satisfied as to kind of poison.**—On an indictment for murder by poison, if it appear

*Sect. 7.—The hearing: Sub-sect. 16, B., C. & D. (a).]*

**3313.** — [—]—A verdict of "negligence" on an indictment under the Children Act, 1908 (c. 67), s. 17, is a verdict of not guilty, as mere negligence is not an offence within that section. Applt. was convicted of causing or encouraging the unlawful carnal knowledge of a girl under sixteen years of age. On the jury being asked their verdict the foreman said: "The man we find guilty of negligence with a recommendation to mercy, & the woman guilty of criminal neglect on all counts." The Recorder said: "Do you find that the man had the care of this child & caused or encouraged unlawful carnal knowledge? I don't think you ought to say simply neglect." The jury after further deliberation found a verdict of "Guilty of criminal neglect with a strong recommendation to mercy." The Recorder asked "Do you mean to say having the custody of this daughter, he, by his neglect, caused her unlawful carnal knowledge?" & the foreman assented. The girl consorted with bad characters. Applt. was warned of this. There was no evidence of the girl having been out on any specific night when applt. was at home, but he admitted that he took no steps beyond reproving the girl. Applt.'s wife was constantly in drink, & as applt. knew, often sent the girl to public-houses for drink. He was an engine-driver, & his work took him away at night during alternate weeks:—*Held*: there was no sufficient evidence on which the case could be submitted to the jury; no sufficient evidence on which applt. could be convicted, no sufficient evidence in proof of the crime, & the jury never found a verdict which was meant to convict him.—*R. v. CHAINEY*, [1914] 1 K. B. 137; 83 L. J. K. B. 306; 109 L. T. 752; 78 J. P. 127; 30 T. L. R. 51; 23 Cox, C. C. 620; 9 Ct. App. Rep. 175, C. C. A.

*C. Joint Indictment—Separate Verdicts.*

**3314. Either may be found guilty.]**—One offender only may be found guilty on a joint charge against three.—*R. v. GIBSON, MUTTON & WIGGS* (1785), 1 Leach, 357.

*Annotation*:—*Refd.* *R. v. Young* (1788), 1 Leach, 505.

**3315. — Two cannot be found guilty separately of separate parts of charge.]**—On an indictment against two, charging them with a joint offence, either may be found guilty; but they cannot be found guilty separately of separate parts of the charge.—*R. v. HEMPSTEAD* (1818), Russ. & Ry. 344, C. C. R.

*Annotations*:—*Refd.* *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *Latham v. R.* (1864), 5 B. & S. 635.

**3316. Verdict differing as to each—Must not involve finding of two offences under one count.]**—

(1) Where a count in an indictment contains only one charge against several defts., the jury cannot find any one of the defts. guilty of more than one charge. Where therefore, a count in an indictment charged several defts. with conspiring together to do several illegal acts, & the jury found one of them guilty of conspiring with some of the defts. to do one of the acts, & guilty of conspiring with others of the defts. to do another of the acts,

such finding is bad, as amounting to a finding that one deft. was guilty of two conspiracies, though the count charged only one.

(2) An indictment against different defts., consisted of several counts charging them with various illegal acts. Some of the counts were bad, & on some of the good counts there were bad findings. The judgment against each of the defts. was stated to be in respect of "his offences aforesaid":—*Held*: each count must be considered as charging a separate offence, & the expression "his offences aforesaid," must be treated as extending to all the offences of which each deft. had been found guilty; & as some of the counts & some of the findings were bad, such judgment could not be supported.—*O'CONNELL v. R.* (1844), 11 Cl. & Fin. 155; 5 State Tr. N. S. 1; 3 L. T. O. S. 429; 9 Jur. 25; 1 Cox, C. C. 413; 8 E. R. 1061, H. L.

*Annotations*:—*As to* (1) *Refd.* *R. v. Mitchel* (1848), 3 Cox, C. C. 1; *Latham v. R.* (1864), 5 B. & S. 635. *As to* (2) *Consd.* *R. v. Gompertz* (1846), 9 Q. B. 824; *Castro v. R.* (1881), 6 App. Cas. 229; *Enraght v. Penzance* (1882), 7 App. Cas. 240. *Refd.* *R. v. Downing & Powys* (1845), 1 Cox, C. C. 153; *Gregory v. Brunswick* (1846), 3 C. B. 481; *A.-G. v. Warren* (1848), 10 L. T. O. S. 445; *Campbell v. R.* (1848), 11 Q. B. 799; *Gregory v. R.* (1848), 15 Q. B. 957; *Shea v. R.*, *Dwyer v. R.* (1848), 3 Cox, C. C. 141; *Ryalls v. R.* (1849), 11 Q. B. 781; *Irvine (or Douglas) v. Kirkpatrick* (1850), 17 L. T. O. S. 32; *Ex p. Purdy* (1850), 9 C. B. 201; *Holloway v. R.* (1851), 17 Q. B. 317; *R. v. Eagleton* (1855), 24 L. J. M. C. 158; *Burton v. Low* (1867), 16 L. T. 385; *Mackonochie v. Penzance* (1881), 6 App. Cas. 424; *Combe v. De la Bere* (1882), 22 Ch. D. 316; *R. v. Bradlaugh* (1883), 15 Cox, C. C. 217; *R. v. Pierce* (1887), 3 T. L. R. 586; *R. v. Stephens* (1888), 4 T. L. R. 479. *Generally, Mentd.* *R. v. Ramsden & Verity* (1844), 2 L. T. O. S. 288, n.; *King v. R.* (1845), 9 Jur. 833; *Hayes & Rice v. R.*, *Foragay v. R.* (1846), 8 L. T. O. S. 50; *Re Dunn* (1847), 5 C. B. 215; *Douglas v. R.* (1848), 17 L. J. M. C. 176; *Dunn v. R.* (1848), 13 Jur. 233; *R. v. Duffly* (1848), 4 Cox, C. C. 294; *Wright v. R.* (1849), 14 Q. B. 148; *R. v. Rowlands* (1851), 2 Den. 364; *Ex p. Rose* (1852), 18 Q. B. 751; *Kendall v. Wilkinson* (1855), 24 L. J. M. C. 89; *New River Co. v. Hertford Land Tax Comrs.* (1857), 2 H. & N. 129; *A.-G. v. Sillem* (1864), 2 H. & C. 581; *R. v. Heane* (1864), 4 B. & S. 947; *Irwin v. Grey* (1867), L. R. 2 H. L. 20; *Mulcahy v. R.* (1868), L. R. 3 H. L. 306; *R. v. Murphy* (1869), L. R. 2 P. C. 535; *Brown v. Esmonde* (1870), 18 W. R. 711; *Anderson v. Morice* (1876), 1 App. Cas. 713; *White v. R.* (1876), 13 Cox, C. C. 318; *R. v. Parnell* (1881), 14 Cox, C. C. 508; *R. v. Manning* (1883), 12 Q. B. D. 241; *Mogul S.S. Co. v. McGregor, Gow* (1885), 15 Q. B. D. 476; *Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598; *R. v. Quinn* (1898), 19 Cox, C. C. 79; *R. v. Plummer*, [1902] 2 K. B. 339; *Sykes v. Barraclough*, [1904] 2 K. B. 675.

**3317. — Verdict of guilty as to some only.]**—If two defts. are indicted for jointly making a corrupt contract with a third person, for the procuring an East India cadetship, one of defts. may be convicted, though the other is acquitted.—*R. v. TAGGART & BASKCOMB* (1824), 1 C. & P. 201, N. P.

**3318. — —.]**—On a joint count in an indictment charging two prisoners with larceny, one may be convicted alone.—*R. v. RENDLE* (1909), 2 Cr. App. Rep. 33, C. C. A.

**3319. Verdict of greater offence as to some & of minor offence as to others.]**—Upon an indictment for burglary & larceny against two, one may be found guilty of the burglary & larceny, & the other of the larceny only.—*R. v. BUTTERWORTH* (1823), Russ. & Ry. 520, C. C. R.

**3320. — —.]**—On an indictment for feloniously wounding with intent to do grievous bodily harm, some of the prisoners may be convicted of

that death was occasioned by some kind of poison, it is not necessary that the jury should be satisfied as to what the poison was.—*M'CONKEY'S CASE* (1841), Ir. Cir. Rep. 77.—*IR.*

*d. Need not be as technical as an indictment.]*—*Scmble*: a special verdict need not be as technical as an indictment; it need not negative every possible fact.—*R. v. BOURKE* (1843),

5 J. L. R. 549.—*IR.*

**PART VII. SECT. 7, SUB-SECT. 16.—C.**

**3317 i. Verdict differing as to each—Verdict of guilty as to some only.]**—A. & C. were indicted for having a pistol in their possession on a certain day within a proclaimed district:—*Held*: though prisoners were jointly indicted, yet the jury might, after the

acquittal of one of them, find the other guilty.—*R. v. HOY & LARKIN* (1851), 5 Cox, C. C. 288.—*IR.*

**3319 i. — Verdict of greater offence as to some & of minor offence as to others.]**—Three persons being joined in an indictment for robbery, one cannot be found guilty of robbery & the rest of larceny.—*R. v. QUAIL* (1833), 1 Craw. & D. 191.—*IR.*

the felony, & another of them of an assault.—*R. v. ARCHER* (1843), 1 Car. & Kir. 174; 2 Mood. C. C. 283, C. C. R.

*Annotation*:—*Consd. R. v. Burns & Smith* (1849), 13 J. P. 138.

**3321.** ———.]—If several prisoners are jointly indicted for a felony, which includes an assault against the person, the jury are at liberty to find some guilty of the felony & others of an assault only.—*R. v. ELLIOTT* (1844), 1 Cox, C. C. 36.

*Annotation*:—*Consd. R. v. Burns & Smith* (1849), 13 J. P. 138.

**3322.** ———.]—B. was indicted with three others, for an assault with intent to do some grievous bodily harm. It was proved that he, with the other prisoners, had assaulted the prosecutor, & afterwards they had returned together & picked up some stones. Then B. withdrew, & the other prisoners threw the stones & wounded the prosecutor. The jury found the three prisoners who threw the stones, guilty of the felony, & B. guilty only of a common assault:—*Held*: B. was rightly convicted.—*R. v. PHILLIPS* (1848), 3 Cox, C. C. 225.

**3323.** ———.]—Upon a count of an indictment of three prisoners for feloniously wounding with intent to do grievous bodily harm, two were convicted of the felony, & the third of misdemeanour of unlawfully wounding:—*Semle*: it was competent to the jury to do so.—*R. v. CUNNINGHAM* (1859), Bell, C. C. 72; 28 L. J. M. C. 66; 32 L. T. O. S. 287; 23 J. P. 55; 5 Jur. N. S. 202; 7 W. R. 179; 8 Cox, C. C. 104, C. C. R.

*Annotations*:—*Mentd. The Ida* (1860), Lush. 6; *Whitstable Free Fishers v. Gann* (1861), 11 C. B. N. S. 387; *R. v. Keyn* (1876), 2 Ex. D. 63; *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877), 2 App. Cas. 394; *The Mecca* (1894), 71 L. T. 711.

**3324.** ——— *Verdict of guilty as to some & disagreement as to others.*]—*R. v. EVANS*, [1920] W. N. 392, C. C. A.

**3325.** *Joint charge of receiving—One act of receiving subsequent to other—Verdict against first receiver only.*]—*R. v. GRAY* (1851), T. & M. 411, C. C. R.

**3326.** *Offence which cannot be committed by one alone—Conspiracy.*]—An indictment for conspiracy charged that A., B. & C. did conspire together, & with divers other persons to the jurors unknown,

**3324 i.** ——— *Verdict of guilty as to some & disagreement as to others.*]—H. & W. were jointly indicted & tried for stealing. On the trial H. was found guilty, but the jury were unable to agree upon the verdict as to W., & were discharged from giving a verdict as to him:—*Held*: the verdict warranted the conviction of H.—*R. v. HAMILTON & WALSH* (1884), 23 N. B. R. 540.—*CAN.*

**3324 ii.** ———.]—A juror being ill & the jury having agreed as to one of the two prisoners:—*Held*: a verdict as to that one might be received & the jury might be discharged as to the other prisoner.—*R. v. LEARY & COOKE* (1844), 3 Craw. & D. 212.—*IR.*

**3326 i.** *Offence which cannot be committed by one alone—Conspiracy.*]—Several persons, who were railway officials, were indicted in one indictment with one count, with several other persons, for conspiring to defraud a railway co.:—*Held*: the jury having acquitted two of the prisoners & convicted six, there was no repugnance on the face of the record sufficient to justify the judge in arresting judgment. In an indictment for conspiracy it is sufficient to sustain the verdict as good if more than two are found guilty.—*R. v. QUINN* (1898), 33 I. L. T. 154.—*IR.*

etc. No evidence was offered affecting any other persons than A., B. & C. The jury found A. guilty, but acquitted B. & C. being of opinion that either B. or C. was guilty, but not being able to determine which of the two:—*Held*: the verdict was inconsistent, & A. was entitled to an acquittal.—*R. v. THOMPSON* (1851), 16 Q. B. 832; 20 L. J. M. C. 183; 17 L. T. O. S. 72; 15 J. P. 484; 15 Jur. 654; 5 Cox, C. C. 166; 117 E. R. 1100.

*Annotations*:—*Consd. R. v. Manning* (1883), 12 Q. B. D. 241. *Refd. R. v. Plummer*, [1902] 2 K. B. 339; *R. v. Stoddart* (1909), 25 T. L. R. 612.

**3327.** ———.]—Upon an indictment for conspiracy, where two defts. are indicted & tried together, either both must be convicted or both must be acquitted.—*R. v. MANNING* (1883), 12 Q. B. D. 241; 53 L. J. M. C. 85; 51 L. T. 121; 48 J. P. 536; 32 W. R. 720, D. C.

*Annotations*:—*Consd. R. v. Plummer*, [1902] 2 K. B. 339. *Refd. Mogul SS. Co. v. McGregor, Gow* (1889), 58 L. J. Q. B. 465.

**3328.** ———.]—*R. v. PLUMMER*, No. 2582, *ante*.

*See Part XXXIV., Sect. 25, post.*

**3329.** ——— *Riot.*]—On an indictment for riot, alleged to be by three persons at least at common law, less than three persons may be convicted.—*R. v. BEACH & MORRIS* (1909), 2 Cr. App. Rep. 189, C. C. A.

*See Part XVIII., Sect. 9, post.*

#### D. Verdict differing from Offence charged.

##### (a) In General.

**3330. General rule—At common law—Conviction of less aggravated offence.**]—Applt. & ten others were indicted for that they “unlawfully, riotously, & routously did assemble & gather together to disturb the peace of the King, & being so assembled in & upon B., then & there being, unlawfully, riotously, & routously did make & assault,” etc.:—*Held*: on this indictment the jury could convict applt. of an assault.—*R. v. O'BRIEN* (1911), 104 L. T. 113; 75 J. P. 192; 27 T. L. R. 204; 55 Sol. Jo. 219; 22 Cox, C. C. 374; 6 Cr. App. Rep. 108, C. C. A.

**3331.** ——— *Direction of jury by judge.*]—*R. v. NAYLOR*, No. 3167, *ante*.

**e. Husband & wife—Acquittal of wife—Effect of.**]—A. & B. were jointly indicted for receiving stolen goods. B. was acquitted, because it appeared that she was the wife of A.:—*Held*: prisoners being jointly indicted, the acquittal of B. operated as a discharge of A.—*R. v. CONNOLLY* (1838), Craw. & D. Abr. C. 280.—*IR.*

**f.** ———.]—Indictment charging husband & wife jointly with a felonious taking. The wife was acquitted, as being under the control of the husband:—*Held*: the husband was not entitled to an acquittal on the ground that the indictment charged the taking to be joint.—*COLLINS' CASE* (1841), Ir. Cir. Rep. 313.—*IR.*

#### PART VII. SECT. 7, SUB-SECT. 16.—D. (a).

##### 3330 i. General rule—At common law

prisoner with having feloniously caused guilty of common assault in the absence of any enactment giving a jury liberty so to find, the verdict cannot stand.—*R. v. LONGMUIR* (1869), 6 W. W. & A. B. 237.—*AUS.*

**3330 ii.** ———.]—If the judge allows the indictment to go generally to the jury, it is not competent for

him to withdraw from their consideration a verdict for any lesser offence which may be included in the indictment.—*R. v. SCHERF* (1908), 13 B. C. R. 407.—*CAN.*

**3330 iii.** ———.]—Where on an indictment for murder a prisoner, by virtue of Criminal Justice Administration Act, 1914 (c. 58), s. 39, pleads not guilty to the offence charged, but guilty of manslaughter, of which he could be lawfully convicted on the indictment, the A.-G., representing the Crown, on refusing to ask for judgment on such special plea, is entitled to have the trial for murder proceed.—*R. v. CLIFFORD* (1914), 49 I. L. T. 28.—*IR.*

**3331 i.** ——— *Direction of jury by judge.*]—If on a criminal trial the judge correctly instructs the jury on the essential ingredients of the offence

be disturbed by a suggestion that the jury, on one part of the evidence, might have found him guilty of a lesser offence, not referred to by counsel for the defence, if the judge had informed them that they were at liberty to do so.—*Ross v. R.*, [1922] V. L. R. 329.—*AUS.*

*Sect. 7.—The hearing: Sub-sect. 16, D. (a) & (b).]*

**3332.** ————.]—*R. v. PARKS*, No. 3169, *ante*.  
See, further, Sub-sect. 9, B., C.; sub-sect. 12, *ante*.

**3333. Indictment for full offence—Conviction of attempt—Murder—Prevention of Offences Act, 1851 (c. 19), s. 9.]—*R. v. CONNELL* (1853), 6 Cox, C. C. 178.**

*Annotation:—Distd. R. v. White*, [1910] 2 K. B. 124.

**3334.** ————.]—A person who upon an indictment charging him with murder is convicted under s. 9 of the Criminal Procedure Act, 1851 (c. 100), s. 9, of an attempt to murder, may be sentenced to penal servitude for life by virtue of the provisions of Offences against the Person Act, 1861 (c. 100), ss. 11–15.—*R. v. WHITE*, [1910] 2 K. B. 124; 79 L. J. K. B. 854; 102 L. T. 784; 74 J. P. 318; 26 T. L. R. 466; 54 Sol. Jo. 523; 22 Cox, C. C. 325; 4 Cr. App. Rep. 257, C. C. A.  
*Annotation:—Mentd. R. v. Robinson* (1915), 79 J. P. 303.

**3335.** ———— **House-breaking—Larceny Act, 1861 (c. 96), s. 57.]—**Upon an indictment, under the above Act, for breaking & entering a house with intent to commit a felony therein, prisoner may be convicted of the misdemeanour of attempting to commit a felony.—*R. v. BAIN* (1862), L. E. & Ca. 129; 31 L. J. M. C. 88; 5 L. T. 647; 26 J. P. 84; 8 Jur. N. S. 418; 10 W. R. 236; 9 Cox, C. C. 98, C. C. R.

**3336.** ———— **Rape.]—**H. was indicted for rape & W. for aiding & abetting. Both were acquitted of felony, but H. was found guilty of attempting to commit the rape, & W. of aiding H. in the attempt:—*Held: W.* was properly convicted.—*R. v. HAPGOOD & WYATT* (1870), L. R. 1 C. C. R. 221; 39 L. J. M. C. 83; 21 L. T. 678; 34 J. P. 181; 18 W. R. 356; 11 Cox, C. C. 471, C. C. R.

**3337.** ———— **Carnal knowledge.]—**Under an indictment for unlawfully assaulting & having carnal knowledge of a girl between ten & twelve years of age, contrary to the statute, etc., prisoner may be convicted of the attempt to commit that offence.—*R. v. RYLAND* (1868), 18 L. T. 538; 16 W. R. 941; 11 Cox, C. C. 101, C. C. R.

**3338.** ———— **Criminal Procedure Act, 1851 (c. 100), s. 9.]—**A prisoner was charged under Criminal Law Amendment Act, 1885 (c. 69), s. 5, with having had unlawful intercourse with a girl under the age of fourteen years. When before the

**3333 i. Indictment for full offence.**  
*Conviction of attempt—Murder.]—*On an information for murder, the prisoner can be found guilty of the attempt to commit murder.—*R. v. MATTHEWS* (1863), 2 N. S. W. S. C. R. 227.—*AUS.*

**3336 i.** ———— **Rape.]—**On the trial of prisoner for rape prosecutrix swore positively that the offence was fully completed. The jury found a verdict of attempting to commit the offence. On objection being taken that there was no legal evidence to support the finding as it did not appear that prisoner according to the evidence ought to have been charged with attempting to commit the offence & not with the actual commission thereof:—*Held: it* was competent for the jury on the evidence before them to find a qualified verdict.—*R. v. MITCHELL* (1870), 9 N. S. W. S. C. R. 282.—*AUS.*

**3336 ii.** ————.]—*R. v. WEBSTER* (1858), 9 L. C. R. 196.—*CAN.*

**3337 i.** ———— **Carnal knowledge.]—**Prisoner was tried on an information charging him with having carnal knowledge of a girl under the age of 10 years. The jury found he was guilty of an assault with intent to have carnal knowledge of the girl,

& that the girl was over 10 years of age & under 14:—*Held: prisoner* was not on his trial for the offence of carnally knowing a girl between the ages of 10 & 14, & he could not be convicted of an assault with intent carnally to know such girl.—*R. v. BUZZART* (1884), 5 N. S. W. L. R. 419; 1 N. S. W. W. N. 73.—*AUS.*

—.]—Applt. was charged under Criminal Code, s. 188, with having had carnal knowledge of a girl under 16 years of age. He was convicted of having attempted to have unlawful carnal knowledge of the girl & was sentenced.—*ABERNETHY v. R.* (1916), 18 W. A. L. R. 108.—*AUS.*

**g.** ———— **False pretences.]—***R. v. GORF* (1860), 9 C. P. 438.—*CAN.*

**h.** ————.]—On an indictment for the offence of having obtained money by false pretences, defts. cannot be convicted of the full offence when it is proved that by the discount of their promissory note they had only obtained a credit in account, such credit in account being a thing not capable of being stolen; but they might, if the evidence should establish an attempt to obtain the money, be convicted of such attempt.—*R. v. BOYD*, [1896] Q. R. 5 Q. B. 1.—*CAN.*

justices he gave evidence on oath:—*Held: on the charge above mentioned prisoner might be found guilty of an attempt to commit the offence, the case being within the provisions of Criminal Procedure Act, 1851 (c. 100), s. 9.—R. v. ADAMS* (1886), 50 J. P. 136.

**3339.** ———— **Although full offence impossible.]—**On an indictment charging a person with breaking & entering a house & stealing certain specified chattels, he cannot, though he broke into the house with an intent to steal whatever he might find, be convicted of breaking & entering the house & attempting to steal, under Criminal Procedure Act, 1851 (c. 100), s. 9, if the chattels in question had been removed from the house before the prisoner went to it.—*R. v. M'PHERSON* (1857), Dears. & B. 197; 26 L. J. M. C. 134; 29 L. T. O. S. 129; 21 J. P. 325; 3 Jur. N. S. 523; 5 W. R. 525; 7 Cox, C. C. 281, C. C. R.

*Annotation:—Refd. R. v. Collins* (1864), 9 Cox, C. C. 497.

**3340.** ————.]—*R. v. COLLINS*, No. 772, *ante*.

**3341.** ————.]—A conviction for an attempt at an offence may be supported, although the attempt could not possibly have culminated in the full offence in the manner intended.—*R. v. BROWN* (1880), 24 Q. B. D. 357; 59 L. J. M. C. 47; 61 L. T. 594; 54 J. P. 408; 38 W. R. 95; 16 Cox, C. C. 715, C. C. R.

*Annotations:—Folld. R. v. Ring, Atkins & Jackson* (1892), 61 L. J. M. C. 116. *Consd. R. v. Plummer*, [1902] 2 K. B. 339.

**3342.** ————.]—In order to prove that an attempt to commit felony has been committed, it is necessary to prove that had the attempt not been frustrated the felony could have been committed.—*R. v. RING, ATKINS & JACKSON* (1892), 61 L. J. M. C. 116; 66 L. T. 300; 56 J. P. 552; 8 T. L. R. 326; 17 Cox, C. C. 491, C. C. R.

See, further, Part 1, Sect. 6, sub-sect. 6, *ante*.

**3343. Indictment as principal—Conviction as accessory before the fact—Accessories & Abettors Act, 1861 (c. 94), ss. 1, 2.]—**On an indictment under Larceny Act, 1861 (c. 96), s. 91, there may be a conviction as an accessory before the fact by virtue of Accessories & Abettors Act, 1861 (c. 94), ss. 1, 2.—*R. v. GOODWIN* (1909), 3 Cr. App. Rep. 276, C. C. A.

**3344.** ———— **Conviction as accessory after the fact.]—**A prisoner indicted for larceny only cannot,

**k.** ———— **Grievous bodily harm.]—**Upon an indictment for doing grievous bodily harm, the jury may find a verdict of attempt to do grievous bodily harm.—*R. v. MCCARTHY* (1917), 41 O. L. R. 153; 13 O. W. N. 310; 11 Can. Crim. Cas. 448.—*CAN.*

**1. Conviction of minor charge—On charge for graver offence.]—**Deft. was indicted for that he "unlawfully

poison, with intent thereby to endanger the life of the said B." The judge, being of opinion that there was no evidence to support the charge, amended the indictment so that it read, "did cause to be administered to or taken by B. certain poison, with intent thereby to injure, aggrieve, or annoy the said B." The jury found the deft. guilty of the offence charged in the amended indictment. Upon a case stated by the judge:—*Held: deft.* if not proved guilty of the offence charged in the original indictment, might, without any amendment, have been convicted of the offence of administering poison with intent to injure, aggrieve, or annoy; &, as the grand jury assented to the indictment for the major offence, they must be found to have approved of an indictment for the minor offence.—*R. v.*

on such an indictment alone, be acquitted of the felony, & convicted of being an accessory after the fact.—*R. v. FALLON* (1862), *Le. & Ca.* 217; 32 *L. J. M. C.* 66; 7 *L. T.* 471; 27 *J. P.* 5; 8 *Jur. N. S.* 1217; 11 *W. R.* 74; 9 *Cox, C. C.* 242; *sub nom. R. v. FELLON*, 1 *New Rep.* 68, *C. C. R.*  
*Annotation* :—*Consd. R. v. Watson*, [1916] 2 *K. B.* 385.

**3345.** ———.]—On an indictment for murder a man cannot be convicted of manslaughter as an accessory after the fact.—*RICHARDS v. R.* (1897), 61 *J. P.* 389; 13 *T. L. R.* 254, *D. C.*  
*Annotation* :—*Consd. R. v. Watson*, [1916] 2 *K. B.* 385.

**3346.** ———.]—Deft. & one T. were indicted as principals for a misdemeanour. The jury convicted T. & returned a verdict against deft. of being an accessory after the fact:—*Held*: a verdict of guilty ought not to have been entered against deft. on that finding by the jury.—*R. v. BUBB* (1906), 70 *J. P.* 143, *C. C. R.*

**3347.** ———.]—On an indictment for receiving stolen property with guilty knowledge there cannot be a conviction for being an accessory after the fact.—*R. v. WATSON*, [1916] 2 *K. B.* 385; 85 *L. J. K. B.* 1142; 115 *L. T.* 159; 80 *J. P.* 391; 32 *T. L. R.* 580; 25 *Cox, C. C.* 470; 12 *Cr. App. Rep.* 62, *C. C. A.*

(b) *In Particular Cases.*

**3348. Indictment for murder—Verdict of manslaughter.]—MACKALEY'S CASE**, No. 3288, *ante*.

**3349.** ———.]—*BROMLEY'S CASE* (1630), *Het.* 66; 124 *E. R.* 347.

*Annotation* :—*Refd. Gray v. R.* (1844), 11 *Cl. & Fin.* 427.

**3350.** ———.]—*R. v. GREENWOOD* (1857), 7 *Cox, C. C.* 404.

*VOLL* (1920), 48 *O. L. R.* 437; 57 *D. L. R.* 440; 19 *O. W. N.* 270.—*CAN.*

*m.* ———.]—When a person is charged with an offence consisting of parts, a combination of some only of which constitutes a complete minor offence, he may be convicted of the latter without being specifically charged, but only when the graver charge gives notice of all the circumstances going to constitute the minor offence. Where a man charged with murder was convicted of abetment of it, the ct. annulled the conviction & sentence, & ordered him to be retried on the latter charge.—*R. v. CHAND NUR* (1874), 11 *Bom.* 240.—*IND.*

**PART VII. SECT. 7, SUB-SECT. 16.—D. (b).**

**3348 i. Indictment for murder—Verdict of manslaughter.]—Prisoner** was charged in the presentment with murder. The crime was attempting to procure abortion. The judge held there was no evidence of murder to go to the jury, but left it to them to say if she was guilty of manslaughter by criminal negligence. The jury convicted her:—*Held*: prisoner was rightly convicted.—*R. v. TAYLOR* (1886), 12 *V. L. R.* 845.—*AUS.*

**3348 ii.** ———.]—On a charge of murder the jury are entitled to return a verdict of manslaughter, though on the facts the case is one of murder or nothing. On the trial of prisoners for murder the jury after it had been in deliberation for some hours, returned into ct., & asked the judge whether it was competent for them to find a verdict of manslaughter. The judge replied that it was, but gave no direction on the law of manslaughter:—*Held*: he was not bound to give them any direction on that point, as the case was one of murder or nothing, & he had so directed the jury in his original summing up.—*R. v. GRIMES & LEE* (1894), 15 *N. S. W. L. R.* 209; 10 *N. S. W. W. N.* 211.—*AUS.*

**3348 iii.** ———.]—On a trial for murder the jury are entitled to bring

in verdict of manslaughter even though on the evidence the case is one of murder or nothing, & therefore where in answer to a question by the jury whether they were at liberty to find any other verdict than guilty or not guilty, the judge told them they were not:—*Held*: this was a misdirection.—*BROWN v. R.* (1913), 17 *C. L. R.* 570.—*AUS.*

**3348 iv.** ———.]—*R. v. DI FRANCESCO* (1918), 44 *O. L. R.* 75; 45 *D. L. R.* 488.—*CAN.*

*n.* ———.]—*Verdict of concealment of birth.*—On the trial of a mother & daughter for the murder of the infant child of the latter, the evidence which equally implicated both prisoners failed to establish the capital charge but was clear as to concealing the birth. The jury acquitted prisoner of murder & found the daughter guilty of concealing the birth of her child & the mother of being an accessory by aiding & assisting her daughter:—*Held*: mother was wrongly convicted.—*R. v. HARRISON* (1870), 9 *N. S. W. S. C. R.* 58.—*AUS.*

*o.* ———.]—On the trial of a prisoner for concealing the birth, on an indictment for the murder of an infant child, a verdict of the jury, "not guilty of the murder, but guilty of endeavouring to conceal the birth of the infant, which we find was prisoner's":—*Held*: bad, & judgment arrested.—*BUNION'S CASE* (1842), 1 *Ir. Clr. Rep.* 719.—*IR.*

*p.* ———.]—*Verdict of assault.*—On an indictment for murder, the jury found prisoner guilty of an assault only, & that such assault did not conduce to the death of deceased:—*Held*: on this finding prisoner could not be convicted of an assault.—*R. v. CREGAN* (1867), 1 *Han.* 36.—*CAN.*

*q.* ———.]—On an indictment for murder in the statutory form, not charging an assault, prisoner cannot be convicted of an assault; & his acquittal of the felony is therefore no bar to a subsequent indictment

**3351. ———.]—Verdict of concealment of birth—Coroner's inquisition.]—Upon a trial on the coroner's inquest for the murder of a bastard child, a woman may be found guilty of concealment.—*R. v. MAYNARD* (1812), *Russ. & Ry.* 240, *C. C. R.*  
*Annotation* :—*Refd. R. v. Cole* (1813), 3 *Camp.* 371.**

**3352.** ———.]—A woman tried on the coroner's inquest for the murder of her bastard child may be found guilty under 43 *Geo. 3, c. 58, s. 4*, of endeavouring to conceal the birth.—*R. v. COLE* (1813), 3 *Camp.* 371; 2 *Leach*, 1095.

**3353.** ———.]—43 *Geo. 3, c. 58*, which authorised the jury on an indictment for the murder of a child to find that the accused had endeavoured to conceal the birth, applies as well to proceedings under a coroner's inquisition, as under an indictment found by the grand jury (*HOLROYD, J.*).—*R. v. DOBSON* (1824), 1 *Lew. C. C.* 43.

**3354. Indictment for manslaughter—Verdict of cruelty to child—Children Act, 1908 (c. 67), s. 12 (4).]**—By sect. 12, sub-sect. 4, of above Act, "Upon the trial of any person over the age of sixteen indicted for the manslaughter of a child or young person of whom he had the custody, charge or care, it shall be lawful for the jury, if they are satisfied that the accused is guilty of an offence under this sect. in respect of such child or young person, to find the accused guilty of such offence."—*R. v. TONKS*, [1916] 1 *K. B.* 443; 85 *L. J. K. B.* 396; 114 *L. T.* 81; 80 *J. P.* 165; 32 *T. L. R.* 137; 60 *Sol. Jo.* 122; 25 *Cox, C. C.* 228; 11 *Cr. App. Rep.* 284, *C. C. A.*

**3355. Indictment for wounding with intent to**

for the assault.—*R. v. SMITH* (1874), 34 *U. C. R.* 552.—*CAN.*

*r.* ———.]—On an indictment for murder in the short form, a prisoner cannot be convicted of an assault.—*R. v. MULHOLLAND* (1881), 20 *N. B. R.* 512.—*CAN.*

*s.* *Indictment for infanticide—Verdict of concealment of birth.]—R. v. NORDEN* (1873), 12 *N. S. W. S. C. R.* 160.—*AUS.*

*t.* *Indictment for manslaughter—Verdict of assault.]—There can be no conviction for an assault unless the indictment charges an assault in terms, or a felony necessarily including it, which manslaughter is not. Where, therefore, the indictment was for manslaughter, charging that defts. "did feloniously kill & slay" one D.:—*Held*: a conviction for assault could not be sustained.—*R. v. DINGMAN* (1863), 22 *U. C. R.* 283.—*CAN.**

*a.* ———.]—On an indictment charging manslaughter by wounding, prisoner if acquitted of the felony cannot be convicted of an assault.—*R. v. SIROIS* (1887), 27 *N. B. R.* 610.—*CAN.*

*b.* ———.]—A prisoner having been arraigned upon two indictments, the one for manslaughter, the other for an aggravated assault, including a count for a common assault, & the latter indictment having been abandoned by counsel for the Crown, who had been put to their election, the jury may find prisoner guilty of a common assault, under the indictment for manslaughter.—*DORAN'S CASE* (1841), 1 *Ir. Clr. Rep.* 111.—*IR.*

**3355 i. Indictment for wounding with intent to do grievous bodily harm—Verdict of unlawful wounding.]—Two persons were indicted for assaulting & putting the prosecutor in bodily fear, & stealing money from his person, & immediately afterwards feloniously wounding him. The jury returned a verdict of assault, but the judge sent them back to reconsider it:—*Held*: he was right in doing so,**

*Sect. 7.—The*

**do grievous bodily harm—Verdict of unlawful wounding.]—***R. v. CUNNINGHAM*, No. 3323, *ante*.

**3356. ———.]—**Upon an indictment charging a felonious shooting with intent to do grievous bodily harm, & doing grievous bodily harm, it is not competent for the jury to convict of unlawfully wounding.—*R. v. MILLER* (1879), 14 Cox, C. C. 356.

**3357. ———.]—***R. v. WAUDBY*, No. 708, *ante*.

**3358. Indictment for wounding with intent to murder—Verdict of unlawful wounding.]—***R. v. PARKS*, No. 3169, *ante*.

**3359. Indictment for unlawful wounding—Verdict of assault.]—**Upon a count for assaulting, beating, wounding, & occasioning actual bodily harm against the statute prisoner may be convicted of a common assault.—*R. v. OLIVER* (1860), Bell, C. C. 287; 30 L. J. M. C. 12; 3 L. T. 311; 24 J. P. 742; 6 Jur. N. S. 1214; 9 W. R. 60; 8 Cox, C. C. 384, C. C. R.

*Annotation:—Folld. R. v. Guthrie* (1870), L. R. 1 C. C. R. 241.

**3360. ———.]—**Upon an indictment charging defts. in the first count with inflicting grievous bodily harm; in the second count with unlawfully & maliciously cutting, stabbing & wounding, & in the third count with assaulting & occasioning actual bodily harm; the jury returned a verdict of guilty of a common assault. The

& in directing the jury that they could find prisoners guilty of an assault with intent to rob, or stealing from the person, or an unlawful wounding, but not of common assault.—*R. v. WILLIAMS & FERGUSON* (1877), 3 C. A. 370; 2 J. R. N. S. 42.—**N.Z.**

**c. — Verdict of assault.]—**An indictment charging prisoner with having maliciously assaulted M. & cut him with a knife, with intent to do him grievous bodily harm, concluding *contra formam statuti*:—*Held*: bad, the means used to manifest the design to commit a felony not being set out with sufficient particularity. A conviction could not stand for an assault. If the indictment does not charge a felony including an assault, prisoner cannot be convicted of an assault.—*R. v. MAGEE* (1850), 2 All. 14.—**CAN.**

**d. — Verdict of wounding without intent.]—**An indictment charged accused with wounding with intent to do grievous bodily harm. The wounding was by a shot from a revolver. The jury were directed that if they thought that the revolver had been fired in a spirit of general bravado, not aiming at the injured person, but in a grossly careless & reckless manner, they might, though they should acquit of the crime charged, convict of wounding. No amendment of the indictment was applied for or made. The jury found a verdict of "wounding without intent." It was contended that this verdict could be supported as a verdict of guilty on the grounds that the indictment necessarily meant a charge of unlawfully wounding with intent, & that unlawfully wounding was a sufficient description of an offence:—*Held*: both these propositions were so doubtful that a verdict of not guilty ought to be entered.—*R. v. LOONEY* (1897), 16 N. Z. L. R. 269.—**N.Z.**

**3359 i. Indictment for unlawful wounding—Verdict of assault.]—**L. was tried on an indictment containing four counts. The first charged that he did unlawfully, etc., kick, strike, wound & do grievous bodily harm to W., with intent, etc., to maim; the second charged the assault as in first with intent to disfigure; the third

charged the intent to disable; the fourth charged the intent to do some grievous bodily harm. Prisoner was found guilty of a common assault:—*Held*: he was rightly convicted.—*R. v. LACKEY* (1877), 1 P. & B. 194.—**CAN.**

**e. Indictment for unlawful & malicious wounding—Verdict of unlawful wounding.]—**Prisoner was charged with unlawfully & maliciously wounding & was found guilty of unlawfully wounding:—*Held*: as prisoner was charged with a statutory offence he could be convicted of that offence only, & the words "& maliciously" necessary to uphold the conviction could not be inserted.—*R. v. ROTHE* (1873), 12 N. S. W. S. C. R. 164.—**AUS.**

**f. — Verdict of assault.]—**Deft. was charged in the information with unlawfully & maliciously wounding B. The jury were told that deft. might upon that information be found guilty of an assault occasioning bodily harm, & they found a verdict accordingly:—*Held*: conviction must be set aside as information did not contain a special count for an assault occasioning actual bodily harm.—*R. v. JENKINS* (1877), Knox, 295.—**AUS.**

**g. — Verdict of malicious wounding.]—**The conviction charged that prisoner did "unlawfully & maliciously cut & wound one K. with intent to do her grievous bodily harm":—*Held*: if not sufficient to charge a felony, it was a good conviction for a misdemeanour, the necessary statement of the intent being immaterial.—*Re BOUCHER* (1879), 4 A. R. 191.—**CAN.**

**h. Indictment for malicious wounding—Verdict of unlawful wounding.]—**On the trial of prisoner with unlawfully wounding with intent the judge told the jury that it was competent for them if they negatived the intent to find a verdict of maliciously wounding. The jury, however, in the place of finding prisoner guilty of maliciously wounding found him guilty of unlawfully wounding:—*Held*: the verdict did not amount to

chairman declined to take that verdict, on the ground that a common assault was not included in the indictment, & told the jury to reconsider their verdict. The jury then found defts. guilty, & a verdict was entered of guilty of an assault occasioning bodily harm, whereupon the chairman sentenced prisoners:—*Held*: the first verdict ought to have been taken, & the second ought not, & prisoners ought not to undergo the sentence; there had been a mistrial, & a *venire de novo* should issue.—*R. v. YEADON & BIRCH* (1861), Le. & Ca. 81; 31 L. J. M. C. 70; 5 L. T. 329; 26 J. P. 148; 7 Jur. N. S. 1128; 10 W. R. 64; 9 Cox, C. C. 91, C. C. R.

*Annotations:—Consd. R. v. Taylor* (1869), L. R. 1 C. C. R. 194; *R. v. Guthrie* (1870), 39 L. J. M. C. 95; *Crane v. Public Prosecutor* [1921] 2 A. C. 299. *Reid. R. v. Plummer*, [1902] 2 K. B. 339.

**3361. ———.]—**An indictment charged prisoner in the first count with "unlawfully & maliciously wounding," & in the second count with "unlawfully & maliciously inflicting grievous bodily harm." The jury found prisoner guilty of an assault:—*Held*: prisoner could be properly convicted of an assault on the indictment.—*R. v. TAYLOR* (1869), L. R. 1 C. C. R. 194; 38 L. J. M. C. 106; 20 L. T. 402; 33 J. P. 358; 17 W. R. 623; 11 Cox, C. C. 261, C. C. R.

*Annotations:—Folld. R. v. Guthrie* (1870), L. R. 1 C. C. R. 241. *Consd. R. v. Day & Cox* (1870), 22 L. T. 452; *R. v. Clarence* (1888), 22 Q. B. D. 23. *Reid. Bousler v. R.* (1888), 21 Q. B. D. 284; *R. v. Bostock* (1893), 17 Cox, C. C. 700. *Mentd. R. v. Miles* (1890), 24 Q. B. D. 423.

one of maliciously wounding & the conviction was set aside.—*R. v. LEE* (1894), 15 N. S. W. L. R. 445.—**AUS.**

**k. Indictment for wounding with intent—Verdict of guilty without malicious intent.]—**Upon an indictment for wounding by shooting with intent to disable, the jury is properly instructed that if such intent is negatived accused may still be convicted of the simple offence of wounding, if the jury find that accused pointed a loaded gun at another & fired it, & either knew, or ought to have known, that it was loaded. A verdict upon such indictment of "guilty without malicious intent" is a verdict of guilty of such lesser offence.—*SLAUGHERWHITE v. R.* (1904), 35 S. C. R. 607.—**CAN.**

**l. Indictment for shooting with felonious intent—Verdict of assault.]—**Upon an indictment for shooting with a felonious intent prisoner, if acquitted of the felony, may be convicted of common assault.—*R. v. CRONAN* (1874), 24 C. P. 106.—**CAN.**

**m. Indictment for shooting with intent to murder—Verdict of shooting with intent to maim, etc.]—**Upon an indictment for shooting with intent to murder, a verdict of guilty of shooting with intent to maim, disfigure, or disable, or to do some other grievous bodily harm, may be found.—*R. v. KERR* (1912), 21 W. L. R. 652; 3 D. L. R. 720.—**CAN.**

**n. — Verdict of assault.]—**Deft. was charged with shooting with intent to kill:—*Held*: upon his trial for that offence he might be convicted of a common assault.—*R. v. CHARTLAND* (1912), 21 W. L. R. 850; 20 Can. Crim. Cas. 116; 2 W. W. R. 773.—**CAN.**

**o. ———.]—**Upon the trial of accused upon an indictment for shooting with intent to kill or do grievous bodily harm, the judge refused to convict accused of the offence charged; but, a common assault being admitted, convicted the accused of that offence.—*R. v. JOHNSON* (1913), 24 W. L. R. 468; 10 D. L. R. 822.—**CAN.**

**p. Indictment for unlawfully inflicting grievous bodily harm—Verdict**



**3362.** *S. P.*—*R. v. CANWELL & DUNN* (1869), 20 L. T. 402, 403; 33 J. P. 358; 17 W. R. 623; 11 Cox, C. C. 261, 263, C. C. R.

**3363. Indictment for robbery with violence—Verdict of assault.**—If, on the trial of an indictment for a robbery with violence, the robbery be not proved, prisoner cannot be found guilty of the assault only, unless it appear that such assault was committed in the progress of something which, when completed, would be, & with intent to commit, a felony.—*R. v. GREENWOOD* (1846), 2 Car. & Kir. 330.

*Annotation* :—*Refd.* *R. v. Auty* (1847), 2 Cox, C. C. 282.

**3364.** ————*]*—Under Criminal Procedure Act, 1851 (c. 100), s. 11, if a robbery under aggravated circumstances be charged in the indictment :—*Held* : the jury may find an aggravated felonious assault with intent to rob.—*R. v. MITCHELL* (1852), 3 Car. & Kir. 181; 2 Den. 468; 21 L. J. M. C. 135; 19 L. T. O. S. 221; 16 J. P. 377; 16 Jur. 506; 5 Cox, C. C. 541, C. C. R.

*See, now*, Larceny Act, 1916 (c. 50), s. 44.

**3365. Indictment for assault with intent to rob—Verdict of assault—Not subsequent assault.**—On an indictment for an assault with intent to rob, prisoner cannot be convicted of a common assault for an assault committed subsequently to that in which the felonious intent is charged.—*R. v. SANDYS* (1844), 1 Cox, C. C. 8.

**3366.** ————*]*—Prisoners were indicted for feloniously assaulting prosecutor with intent to rob him. The jury found them guilty of an assault, but negatived the intent charged :—*Held* : prisoners could not, upon this indictment & finding, be convicted of a common assault.—*R. v. WOODHALL & WILKES* (1872), 12 Cox, C. C. 240.

**3367. Indictment for assault on gamekeepers—Verdict of assault—Separate count for assault abandoned.**—D. & E. were charged on an indictment for assaulting persons lawfully authorised

to seize prisoners, who were found on land at night, armed with a gun for the purpose of taking game. At the trial prosecutor's counsel abandoned the count for a common assault :—*Held* : a verdict of guilty of a common assault could not be given on the first count after the other count was abandoned.—*R. v. DAY & COX* (1870), 22 L. T. 452; 34 J. P. 355; 11 Cox, C. C. 505, C. C. R.

**3368. Indictment for riot & assault—Verdict of assault.**—On an indictment for a riot & an assault, defts. may be found guilty of the assault, & acquitted of the riot.—*R. v. HEMINGS* (1680), 2 Show. 93; 89 E. R. 816.

**3369.** ————*]*—Indictment for a riot & assault, acquittal of the riot is so of the assault.—*R. v. HEAPS* (1699), 2 Salk. 593; 91 E. R. 502; *sub nom.* *R. v. SUDBURY, HEAPES, ETC.*, 1 Ld. Raym. 484; 12 Mod. Rep. 262.

*Annotations* :—*Consd.* *R. v. O'Brien* (1911), 104 L. T. 113. *Refd.* *R. v. Kinnersley & Moore* (1719), 1 Stra. 193; *R. v. Nicols* (1742), 13 East, 412, n.; *R. v. Crispin* (1848), 17 L. J. M. C. 128; *R. v. Plummer*, [1902] 2 K. B. 339.

**3370.** ————*]*—*R. v. O'BRIEN*, No. 3330, *ante*.

**3371. Indictment for rape—Verdict of assault.**—Where a man is indicted for rape upon a child under the age of 12 years under 38 & 39 Vict. (c. 94), s. 3, he cannot upon that indictment be found guilty of an assault, indecent or otherwise.—*R. v. CATHERALL* (1875), 13 Cox, C. C. 109.

**3372.** ———— *Verdict of unlawful carnal knowledge—Criminal Law Amendment Act, 1885* (c. 69), s. 9.—By sect. 9 of the above Act, where a prisoner is charged with rape, if the jury shall be satisfied that he is guilty of an offence under sect. 5 of that Act, & are not satisfied that he is guilty of the felony, the jury may acquit him of the felony, & find him guilty of such offence.—*R. v. COTTON* (1896), 60 J. P. 824.

**3373.** ———— *Verdict of indecent assault—Criminal Law Amendment Act, 1885* (c. 69), s. 9.—The

for assault.—*R. v. CARVERY* (1920), 34 Can. Crim. Cas. 117.—*CAN.*

**q. Indictment for felonious stabbing—Verdict of assault.**—A prisoner having pleaded not guilty to an indictment for feloniously stabbing, cannot withdraw that plea, & submit to a common assault; but the jury may acquit of the felony, & find him guilty of the assault.—*MOORE'S CASE* (1842), 1r. Cir. Rep. 653.—*IR.*

**3363 i. Indictment for robbery with violence—Verdict of assault.**—Where prisoner acted in the *bona fide* belief that he had been swindled, & in the belief that he was entitled to retake the money, committed an assault for that purpose alone, & did retake the money, or a portion of it, in that sole & *bona fide* belief, the jury, on consideration of the facts, would be justified in acquitting him on a charge of robbery, although it was open to them, on the same facts, to convict for assault.—*R. v. FORD & ARMSTRONG* (1907), 13 B. C. R. 109.—*CAN.*

**r.** ———— *Verdict of larceny.*—Three persons being joined in an indictment for robbery, one cannot be found guilty of robbery & the rest of larceny.—*R. v. QUAIL* (1833), 1 Craw. & D. 191.—*IR.*

**s.** ————*]*—Upon an indictment for robbery, prisoner may be acquitted of the robbery, & convicted of the larceny.—*R. v. M'KENNA* (1826), 1 Craw. & D. 192, n.—*IR.*

**3366 i. Indictment for assault with intent to rob—Verdict of assault.**—Prisoners were indicted for assault with intent to rob. The jury found a verdict of assault. A motion in arrest of judgment on the part of prisoners on the ground that under the indict-

ment they could not be convicted of common assault was rejected :—*Held* : sustaining the verdict, a prisoner indicted for assault with intent to rob, may be convicted of simple assault.—*It. v. O'NEIL* (1881), 8 Q. L. R. 3.—*CAN.*

**t. Indictment for felonious assault—Verdict of assault.**—On an indictment for felonious assault, prisoner may be found guilty of an assault only.—*R. v. RYAN* (1868), 1 Han. 116.—*CAN.*

**a.** ————*]*—7 Will. 4 & 1 Vict. c. 85, s. 11, was enacted for the purpose of enabling juries to find prisoners guilty of an assault in cases where the indictment being for felony, the evidence had established an assault only, but not the felony, & did not apply to cases where it appeared that a felony had been committed.—*R. v. EVERS* (1838), Craw. & D. Abr. C. 284.—*IR.*

**b.** ————*]*—A prisoner may be found guilty of a common assault upon an indictment framed under 10 Geo. 4, c. 34, s. 29, & which did not contain a count for a common assault.—*R. v. STANLEY* (1841), Arm. M. & O. 199.—*IR.*

**c. Indictment for aggravated assault—Verdict of assault.**—When the evidence must sustain an indictment for an aggravated assault, it is improper to insert a count for a common assault. When the indictment is for aggravated assault only, the jury may find the prisoner guilty of a common assault; but *semble*, not without the express direction of the judge to that effect.—*R. v. SHORT* (1842), Arm. M. & O. 322.—*IR.*

**d. Indictment for riot & assault—**

*Verdict of riot.*—Deft. was indicted for a riot & assault, & the jury found him guilty of a riot, but not of the assault charge :—*Held* : a conviction for riot could not be sustained, the assault, the object of the riotous assembly, not having been executed, although deft. might have been guilty of riot or joining in an unlawful assembly.—*R. v. KELLY* (1857), 6 C. P. 372.—*CAN.*

**e. Indictment for demolishing house—Verdict of riot.**—*R. v. CASEY* (1874), 1 R. 8 C. L. 408.—*IR.*

**3371 i. Indictment for rape—Verdict of assault.**—*R. v. JOHN* (1886), 11 L. N. 313.—*CAN.*

**3371 ii.** ————*]*—A prisoner indicted for rape may be found guilty of common assault.—*R. v. EDWARDS* (1898), 29 O. R. 451.—*CAN.*

**3371 iii.** ————*]*—On an indictment for rape a conviction for assault with intent to commit rape is valid.—*JOHN v. R.* (1888), 15 S. C. R. 384.—*CAN.*

**3371 iv.** ————*]*—On a trial for rape the jury is at liberty to find prisoner guilty of an assault with intent to commit a rape, although the evidence of prosecutrix goes to show that the offence, if any, is that of rape.—*R. v. LOVEGROVE* (1885), 4 N. Z. L. R. C. A. 72.—*N.Z.*

**f. Verdict of minor offence—Under Criminal Law Amendment Act, 1885 (c. 69).—A jury may by virtue of the provisions of sect. 9 of the above Act, convict a panel of an offence under sect. 5, notwithstanding that the indictment does not set forth that Act.—*H.M. ADVOCATE v. WATSON* (1885), 13 R. (Ct. of Sess.) 6; 23 Sc. L. R. 267.—*SCOT.***

**g.** ————*]*—*H.M. ADVOCATE*



*Sect. 7.—The hearing: Sub-sect. 16, D. (b).]*

effect of the above Act is to set aside *R. v. Flattery* (2 Q. B. D. 410, C. C. R.), & it is a good defence to an indictment for rape that the carnal knowledge alleged in the indictment was had with the consent of the woman, even though such consent had been obtained by fraud, but the prisoner may be convicted of an indecent assault.—*R. v. O'SHAY* (1898), 19 Cox, C. C. 76.

*Annotation:—Dtd.* *R. v. Williams*, [1923] 1 K. B. 340. The decision in *R. v. O'Shay* was given under a misapprehension; it is not a binding authority (LORD HEWART, C.J.).

**3374. Indictment for assault & carnal knowledge—Verdict of assault.]—**Indictment, that prisoner "in & upon one D., a girl above the age of ten years, & under the age of twelve years, unlawfully did make an assault, & her, the said D., did then unlawfully & carnally know & abuse, against the form of the statute," etc. The offence of carnally knowing the girl was disproved, but the jury found prisoner guilty of a common assault:—*Held*: prisoner might be properly convicted of a common assault, on the ground that the indictment charged two distinct misdemeanours, *viz.* of assaulting & also of carnally knowing D., & prisoner might be found guilty of either of them.—*R. v. GUTHRIE* (1870), L. R. 1 C. C. R. 241; 39 L. J. M. C. 95; 22 L. T. 485; 34 J. P. 501; 18 W. R. 792; 11 Cox, C. C. 522, C. C. R.

*Annotations:—Consd.* *R. v. Bostock* (1893), 17 Cox, C. C. 700. *Refd.* *R. v. Coney* (1882), 8 Q. B. D. 534; *Boaler v. R.* (1888), 21 Q. B. D. 284.

**3375. ———.]—**Upon an indictment the first count of which charged prisoner under Criminal Law Amendment Act, 1885 (c. 69), s. 5, with unlawfully & carnally knowing a girl between the ages of thirteen & sixteen years, & the second count

*CATE v. BARBOUR* (1887), 1 White, 466.—**SCOT.**

**h. ———.]—**Under an indictment libelling only a common law charge of rape, it is competent, by virtue of sect. 9 of the above Act, where the girl assaulted is proved to be under thirteen years of age, for the jury to bring in a verdict of unlawfully defiling, or attempting to defile, under sect. 4 of that Act.—*H.M. ADVOCATE v. McLAREN* (1897), 2 Adam, 395; 25 R. (Cl. of Sess.) 25; 35 Sc. L. R. 52; 5 S. L. T. 170.—**SCOT.**

**k. ———.]—**Sect. 9 of the above Act provides that on any indictment charging the crime of rape, the jury may convict of any of the offences in sects. 3, 4, & 5, of that Act & acquit the panel of the charge of rape.—*H.M. ADVOCATE v. HENDERSON* (1888), 2 White, 157.—**SCOT.**

**l. ———.]—**In the course of the trial of an accused on a complaint which only libelled a common law charge of attempt to ravish, prosecutor withdrew the charge, & asked for, & obtained from the jury, a verdict of guilty of a contravention of sect. 5 of the above Act:—*Held*: while the power created by sect. 9 of the Act was available to a prosecutor although the Act had not been libelled in the complaint or indictment, it was not so available where accused was not charged with committing one of the specified crimes, but only with attempting to do so, & where the original charge had been withdrawn from the jury with the result that they could not, as required by sect. 9, acquit accused of that charge before finding him guilty of the minor offence; in any event, the verdict could not stand in respect that sect. 5 of the Act created more than one offence, & that it was impossible to tell from the verdict of the jury of which of

these offences accused had been found guilty.—*TOWNSEND v. H.M. ADVOCATE*, [1914] S. C. (J.) 85.—**SCOT.**

**m. Indictment for unlawful carnal knowledge—Verdict of indecent assault.]—**Indictment that prisoner "in & upon one R., a girl under the age of fourteen years, feloniously did make an assault, & her, the said R., then & there feloniously did unlawfully & carnally know & abuse," etc. The evidence showed that the girl was between the age of eight & nine years, & that the acts complained of were committed with her tacit consent, which consent was not procured by force or intimidation. The jury acquitted the prisoner of the felony, but found him guilty of indecent assault:—*Held*: the conviction was right.—*R. v. BRUCE* (1891), 7 Man. L. R. 627.—**CAN.**

**n. ———.]—***Verdict of assault.]—*Prisoner was indicted for carnally knowing a child under ten years of age, & being acquitted by the jury on this charge, was found guilty of a common assault, without the child's consent:—*Held*: the conviction was wrong, since an assault on the person is no legal ingredient in the offence charged.—*R. v. WELDON* (1845), 1 Legge, 250.—**AUS.**

**o. ———.]—**Deft. was charged with carnal knowledge of a girl under the age of ten years. The judge directed the jury that they might find deft. guilty of an assault with intent to commit the offence charged:—*Held*: he was not bound to tell them that they might also find deft. guilty of an attempt to commit the offence.—*R. v. KROGH* (1878), 1 N. S. W. S. C. R. N. S. 136.—**AUS.**

**p. Indictment for indecent assault—Verdict of assault.]—**Deft. was tried on an information which charged him with having committed an indecent assault on a female child under the

of which charged him with an indecent assault upon the girl:—*Held*: prisoner could be convicted of a common assault.—*R. v. BOSTOCK* (1893), 17 Cox, C. C. 700.

**3376. ———.]—**Prisoner was indicted under the statute for carnally knowing a child under the age of ten years:—*Held*: in default of proof of actual connection, prisoner might be convicted of an assault under 7 Will. 4 & 1 Vict., c. 85, s. 11.—*R. v. NICHOLLS* (1851), 15 J. P. 357.

**3377. Indictment for unlawful carnal knowledge—Verdict of indecent assault—Though accused incapable of committing full offence.]—***R. v. WILLIAMS*, No. 204, *ante*.

**3378. Indictment for incest—Verdict of indecent assault—Criminal Law Amendment Act, 1885 (c. 69), s. 9—Punishment of Incest Act, 1908 (c. 45), s. 4 (3).]**—S. was charged on an indictment with incest, contrary to Punishment of Incest Act, 1908 (c. 45), s. 1. The particulars of the offence alleged that he had had carnal knowledge of a female person who was to his knowledge his daughter, she then being a girl under the age of thirteen years, to wit, of the age of nine years. The jury convicted S. of indecent assault:—*Held*: by virtue of above Acts & since the offence was charged in respect of a girl under the age of thirteen years, the conviction was good.—*R. v. SIMMONITE*, [1916] 2 K. B. 821; 86 L. J. K. B. 15; 115 L. T. 616; 81 J. P. 80; 25 Cox, C. C. 544; 12 Cr. App. Rep. 142, C. C. A.

**3379. Indictment for burglary & larceny—Verdict of larceny.]—**On an indictment of burglary, prisoner may be acquitted of the breaking & found guilty of stealing in the dwelling-house to the amount of forty shillings.—*R. v. WITHAL* (1772), 1 Leach, 88, C. C. R.

age of twelve years. The judge in summing up told the jury they might find prisoner guilty of common assault, but he did not draw a distinction between the offences nor tell the jury that an assault must be either without or against consent. The jury found deft. guilty of a common assault. The facts showed that there was no consent:—*Held*: the verdict of common assault was admissible under the information, but as the attention of the jury was not called to the question of consent the conviction ought to be quashed.—*R. v. BRADY* (1876), 14 N. S. W. S. C. R. 468.—**AUS.**

**q. ———.]—**In support of a prosecution against deft. for having committed an indecent assault upon a girl of the age of thirteen years, deft. was acquitted of indecent assault, but convicted of simple assault:—*Held*: the conviction was valid.—*R. v. GRANTYERS*, [1893] Q. R. 2 Q. B. 376.—**CAN.**

**r. Indictment for unnatural offence—Verdict of assault.]—**Deft., a boy, under the age of fourteen years, was tried & convicted of the offence of committing an unnatural offence upon the person of a younger boy:—*Held*: deft. was incapable of committing the offence charged, & the conviction must, therefore, be set aside; if the act was committed against the will of the other party deft. could be punished for an assault.—*R. v. HARTLEN* (1893), 30 N. S. R. 317.—**CAN.**

**3379 i. Indictment for burglary & larceny—Verdict of larceny.]—**Prisoners, being armed, forcibly entered a dwelling-house, put the persons being therein in fear, & carried away the property specified in the indictment:—*Held*: although it appeared that a robbery had been committed, there might, nevertheless, be a conviction for

**3380.** — **Form of verdict.**—*R. v. HUNGERFORD* (1790), 2 East, P. C. 518.

**3381.** — **—**—*R. v. BUTTERWORTH*, No. 3319, ante.

**3382.** — **Or of housebreaking.**—On an indictment for burglary, by breaking into a house in the night time, & stealing to the value of £5 or more, prisoner may be convicted of burglary, or of housebreaking, or of stealing in a dwelling-house to the value of £5.—*R. v. COMPTON* (1828), 3 C. & P. 418.

**3383. Indictment for housebreaking—Verdict of larceny.**—*R. v. BULLOCK* (1825), 1 Mood. C. C. 3 24, n., C. C. R.

**3384. Indictment for warehouse breaking—Verdict of larceny.**—An indictment for breaking into a warehouse & stealing goods, stated the offence to have been committed in the parish of St. Peter the Great, in the county of W. It appeared that only part of the parish of St. Peter the Great was in the county of W.:—*Held*: the indictment could not be supported for the breaking into the warehouse, but it was sufficient for the larceny.—*R. v. BROOKES* (1842), Car. & M. 543.

**3385. Indictment for horse-stealing—Verdict of simple larceny.**—An indictment for horse-stealing must give the animal one of the descriptions mentioned in the statute. Therefore an indictment for stealing a colt, not saying whether it was horse or mare, will not be sufficient to take away clergy; but prisoner may be convicted for simple larceny.—*R. v. BEANEY* (1820), Russ. & Ry. 416, C. C. R.

**3386. Indictment for larceny—Verdict of cheating.**—On an indictment for felony, if the jury find a special verdict that the money was obtained by playing with false dice, the ct. may give judgment for the trespass & misdemeanour.—*LEESER'S CASE* (1618), Cro. Jac. 497; 79 E. R. 424.

*Annotation*:—*Refd. R. v. Westbeer* (1739), 1 Leach, 12.

**3387.** — **In dwelling-house—Verdict of larceny.**—Prisoners were indicted for stealing in a dwelling-house, persons being therein & put in fear:—*Held*: prisoners were properly convicted of larceny.—*R. v. ETHERINGTON* (1795), 2 Leach, 671; 2 East, P. C. 635, C. C. R.

*Annotation*:—*Refd. Peake v. Carrington* (1821), 5 Moore, C. P. 176.

**3388.** — **Of lead, fixtures, etc.—Verdict of simple larceny.**—A person on a count, in the usual form, for stealing lead affixed to a building, cannot be convicted of larceny.—*R. v. GOOCH & DEVONSHIRE* (1838), 8 C. & P. 293.

*Annotation*:—*Refd. R. v. Molloy*, [1921] 2 K. B. 364.

*larceny*.—*R. v. BLACKBURN* (1841), 2 Craw. & D. 188.—**IR.**

**s.** — **Verdict of minor offence.**—On a trial for offences, although the alleged intention, viz. to commit theft has failed, the ct. can convict accused of a minor offence if he has not been prejudiced thereby.—*KARALI PRASAD GURU v. R.* (1916), 1 L. R. 44 Cal. 358.—**IND.**

**t. Indictment for burglary—Verdict of recel.**—Pltf. was tried on an indictment found against him for a charge of burglary, & the jury rendered a verdict of guilty of recel, upon which verdict pltf. in error was sentenced to be confined for two years in the penitentiary:—*Held*: no such verdict could be rendered on the charge of burglary for which pltf. in error was tried, & no judgment be pronounced on such verdict, which was accordingly set aside.—*ST. LAURENT v. R.* (1881), 7 Q. L. R. 47.—**CAN.**

**a. Indictment for larceny—Verdict of embezzlement of proceeds of sale.**—Prisoner was indicted for larceny of bottles belonging to his master who had commissioned him to sell them,

but did not return to his employment or give up the proceeds:—*Held*: he could not be convicted of embezzling the proceeds.—*R. v. MOHOMET* (1881), 2 N. S. W. L. R. 89.—**AUS.**

**b.** — **Verdict of false pretences.**—A deft. indicted for a misdemeanour for obtaining money under false pretences, cannot under C. S. C. c. 99, s. 62, be found guilty of larceny. That clause only authorises a conviction for the misdemeanour though the facts proved amount to larceny. Where a deft. on such an indictment had been found guilty of larceny:—*Held*: the ct. had no power under C. S. U. C. c. 112, s. 3, to direct the verdict to be entered as one of guilty, without the additional words.—*R. v. EWING* (1862), 21 U. C. R. 523.—**CAN.**

**c.** — **—**—*R. v. BERTLES* (1863), 13 C. P. 607.—**CAN.**

**d.** — **Verdict of recel.**—K. was tried on an indictment libelling two charges of sheep-stealing. The jury brought in a verdict of "not guilty under the first charge, & under the second charge find accused guilty of reset":—*Held*: this verdict was

**3389.** — **—**— **Larceny Act, 1916 (c. 50), s. 8 (1).**—On an indictment under above Act, for stealing fixtures prisoner cannot be convicted of simple larceny.—*R. v. MOLLOY*, [1921] 2 K. B. 364; 90 L. J. K. B. 862; 85 J. P. 233; 37 T. L. R. 611; 65 Sol. Jo. 534; 27 Cox C. C. 34; 15 Cr. App. Rep. 170, C. C. A.

**3390.** — **As a servant—Verdict of simple larceny.**—An indictment charged that prisoner whilst servant of A. stole the money of A. It appeared that prisoner was not the servant of A. but the servant of B.:—*Held*: prisoner might be convicted of simple larceny.—*R. v. JENNINGS* (1858), Dears. & B. 447; 30 L. T. O. S. 292; 22 J. P. 97; 4 Jur. N. S. 146; 6 W. R. 231; 7 Cox, C. C. 397, C. C. R.

**3391.** — **As bailee—Whether verdict of obtaining by false pretences good—If offence is in fact larceny.**—Applt. was tried on an indictment which charged her with larceny as a bailee. The jury acquitted applt. on the charge of larceny but convicted her of obtaining by false pretences:—*Held*: the conviction must be quashed. Under Larceny Act, 1916 (c. 50), s. 44, the jury can find prisoner guilty of obtaining the goods by false pretences, but only in circumstances which amount to an acquittal of the larceny.—*R. v. FISHER* (1921), 91 L. J. K. B. 145; 86 J. P. 29; 66 Sol. Jo. 109; 16 Cr. App. Rep. 53, C. C. A.

**3392. Indictment for receiving—Verdict good though property embezzled & not stolen.**—On a charge for receiving goods knowing them to have been feloniously stolen & carried away, prisoner may be convicted if the goods have been embezzled, & he received them knowing them to have been embezzled.—*R. v. FRAMPTON* (1858), Dears. & B. 585; 27 L. J. M. C. 229; 31 L. T. O. S. 137; 22 J. P. 338; 4 Jur. N. S. 560; 6 W. R. 514; 8 Cox, C. C. 16, C. C. R.

**3393.** — **Knowing goods to be "feloniously stolen"—Verdict of common law misdemeanour of receiving.**—An indictment which alleges that prisoner unlawfully received certain good well knowing them to have been feloniously stolen, against the form of the statute, etc., but not containing the words "& feloniously" after unlawfully, is a good indictment for the common law misdemeanour of receiving.—*R. v. GARLAND*, [1910] 1 K. B. 154; 79 L. J. K. B. 239; 102 L. T. 254; 74 J. P. 135; 26 T. L. R. 130; 22 Cox, C. C. 292; 3 Cr. App. Rep. 199, C. C. A.

**3394. Indictment for uttering counterfeit coin**

competent, & contained sufficient specification of the crime of which the jury convicted accused.—*KENNEY v. H.M. ADVOCATE* (1896), 2 Adam. 51; 23 R. (Ct. of Sess.) 28; 33 Sc. L. R. 265; 3 S. L. T. 236.—**SCOT.**

**e.** — **Verdict of misdemeanour.**—Prisoner having picked up certain goods that had floated away from the wreck of a steamer, appropriated them to his own use. He was indicted for larceny, the property in the goods being laid in the captain of the steamer, but at the trial the judge instructed the jury that they could not convict him of larceny. The prosecution then claimed a conviction for a misdemeanour, & the jury found accordingly:—*Held*: the conviction must be sustained.—*R. v. MARTIN* (1872), 9 N. S. R. 124.—**CAN.**

**f. Indictment for stealing & receiving—Verdict of illegally using.**—Appets. were charged with stealing cattle & also with feloniously receiving cattle knowing them to have been stolen. The judge explained to the jury the verdict which they were entitled to return describing it as

*Sect. 7.—The hearing: Sub-sect. 16, D. (b), E. & F.]*

**after previous conviction—Verdict of uttering only.]**

—Prisoner was indicted for the felony of uttering counterfeit coin after a previous conviction for a like offence. The jury found him guilty of the uttering, but negatived the previous conviction:—*Held*: he could not be convicted of the misdemeanour of uttering.—*R. v. THOMAS* (1875), L. R. 2 C. C. R. 141; 44 L. J. M. C. 42; 31 L. T. 849; 39 J. P. 212; 23 W. R. 344; 13 Cox, C. C. 52.—C. C. R.

*Annotation*:—*Consd. R. v. Russell* (1910), 6 Cr. App. Rep. 78.

**3395. Indictment for perjury—Verdict of swearing false oath.]**—A false oath, sworn in an affidavit for the purpose of procuring the registration of a bill of sale, is a misdemeanour at common law, of which a person may be found guilty upon an indictment for setting out the facts, & concluding with the usual averment of "wilful & corrupt perjury," which concluding words may be rejected as surplusage.—*R. v. HODGKISS* (1869), L. R. 1 C. C. R. 212; 39 L. J. M. C. 14; 21 L. T. 564; 34 J. P. 104; 18 W. R. 150; 11 Cox, C. C. 365, C. C. R.

*Annotations*:—*Consd. Boaler v. R.* (1888), 21 Q. B. D. 284. *Refd. R. v. Thomas* (1875), 31 L. T. 849.

**3396. Indictment for composing, printing, & publishing libel—Verdict of publishing only.]**—Deft. may be found guilty upon a count in an information which charges him with having composed, printed & published a libel, if he is proved to have published without having composed it.—*R. v. HUNT* (1811), 2 Camp. 583; 31 State Tr. 367.

*Annotation*:—*Mentd. Darby v. Ouseley* (1856), 1 H. & N. 1.

**3397. Indictment for publishing defamatory libel "knowing the same to be false"—Verdict of publishing only.]**—On an indictment for publishing a defamatory libel "knowing the same to be false" deft. may be convicted of merely publishing a defamatory libel.—*BOALER v. R.* (1888), 21 Q. B. D. 284; 57 L. J. M. C. 85; 59 L. T. 554; 52 J. P. 791; 37 W. R. 29; 4 T. L. R. 565; 16 Cox, C. C. 488; *subsequent proceedings, sub nom. R. v. BOALER* (1892), 67 L. T. 354, D. C.

*Annotation*:—*Refd. R. v. Munslow* (1895), 11 T. L. R. 213.

"illegally using." The jury acquitted prisoner of the offences charged & found them guilty of "illegally using." The ct. having on a special case stated sustained the conviction on the ground that the verdict returned was a substantially accurate description of the offence, the High Ct. being of opinion that that decision was obviously right refused to grant special leave to appeal.—*LILLICRAP v. R.* (1905), 2 C. L. R. 681.—*AUS.*

**g. Indictment for forgery—Verdict of uttering forged paper.]**—*R. v. PAXTON* (1867), 3 C. L. J. N. S. 117.—*CAN.*

**h. Indictment for fraudulent conversion—Verdict of unlawful appropriation.]**—A conviction for unlawfully appropriating money so as to deprive of the advantage, etc., thereof, is good, although accused might, upon the evidence, have been convicted of a fraudulent conversion as trustee.—*R. v. MCINTOSH*, [1893] Q. R. 3 Q. B. 287; 23 S. C. R. 180.—*CAN.*

**k. Indictment for administering poison with intent to endanger life—Verdict of with intent to injure.]**—Deft. was indicted for that he "unlawfully did cause to be taken by B. certain poison, with intent thereby to endanger the life of the said B." The judge amended the indictment so that it read, "did cause to be administered to or taken by B. certain poison, with intent thereby to injure, aggrieve, or annoy the said B." The jury found

deft. guilty of the offence charged in the amended indictment:—*Held*: an act of one person which is intended to endanger the life of another person includes an act to injure, aggrieve, or annoy such other person; & deft.

in the original indictment, might, without any amendment, have been convicted of the offence of administering poison with intent to injure, aggrieve, or annoy.—*R. v. VARTY* (1898), 42 Q. B. D. 127. 52 D. L. R. 440; 19 O. W. N. 270.—*CAN.*

**PART VII. SECT. 7, SUB-SECT. 16.—E.**

**3398 i. "Guilty but insane"—Must be specific.]**—*H.M. ADVOCATE v. SMITH & CAMPBELL* (1855), 2 Irv. 1.—*SCOT.*

**3398 ii.** ———.]—*H.M. ADVOCATE v. TIERNEY* (1875), 3 Couper, 152.—*SCOT.*

**3398 iii.** ———.]—Prisoner was indicted for arson. In summing up judge directed jury that there was no evidence before them as to prisoner's mental condition to justify them in finding that prisoner was incapable of understanding the nature & quality of the act & of knowing it was wrong. The jury said they found prisoner guilty & handed to him the following document: "We find prisoner guilty of setting fire to P.'s house & wish to add a rider that we think accused was not responsible for his actions at the

*E. Special Verdict of Insanity.*

**3398. "Guilty but insane"—Must be specific.]**—The special verdict of "Guilty, but insane" must be found in unequivocal language.—*R. v. HARDING* (1908), 25 T. L. R. 139; 1 Cr. App. Rep. 219, C. C. A.

**3399. Whether right of appeal—Criminal Appeal Act, 1907 (c. 23), s. 3.]**—When a special verdict is returned under Trial of Lunatics Act, 1883 (c. 38), s. 2 (1), to the effect that accused was guilty of the act or omission charged against him in the indictment as an offence, but was insane at the time when he did the act or made the omission, & an order for his detention is thereupon made under that Act, s. 2 (2), accused is a person convicted on indictment within the meaning of sect. 3 of the above Act, & therefore has the right of appeal given by that sect.—*R. v. IRELAND*, [1910] 1 K. B. 654; 79 L. J. K. B. 338; 102 L. T. 608; 74 J. P. 206; 26 T. L. R. 267; 54 Sol. Jo. 543; 22 Cox, C. C. 322; 4 Cr. App. Rep. 74, C. C. A.

*Annotations*:—*Consd. R. v. Machardy*, [1911] 2 K. B. 1144; *Felstead v. R.*, [1914] A. C. 534. *Mentd. Oaten v. Auty*, [1919] 2 K. B. 278.

**3400.** ———.]—Where upon the trial of an indictment a special verdict is returned under Trial of Lunatics Act, 1883 (c. 38), s. 2 (1), that accused was guilty of the act or omission charged against him, but was insane so as not to be responsible according to law for his actions at the time when he did the act or made the omission, & an order for his detention is thereupon made under that Act, s. 2 (2), the accused is a person convicted on indictment within the meaning of sect. 3 of the above Act, & the finding that accused was guilty of the act or omission charged against him being a conviction, he has a right of appeal against the conviction.—*R. v. MACHARDY*, [1911] 2 K. B. 1144; 80 L. J. K. B. 1215; 105 L. T. 556; 76 J. P. 6; 28 T. L. R. 2; 55 Sol. Jo. 757; 22 Cox, C. C. 614; 6 Cr. App. Rep. 272, C. C. A.

*Annotations*:—*Consd. R. v. Hill* (1911), 105 L. T. 751; *Felstead v. R.*, [1914] A. C. 534.

**3401.** ———.]—Upon an indictment for felonious wounding, applt. was found guilty, but insane. At the trial applt., who was undefended, pleaded that what he did was done in self-defence.

time":—*Held*: this verdict was one of guilty, the rider being simply a statement to induce the ct. to deal leniently with prisoner.—*R. v. ALDRED* (1914), 33 N. Z. L. R. 926.—*N.Z.*

for theft was that he was too drunk to form a criminal intent. Tl admitted the theft & did not drunkenness. There was no evidence of plea of insanity on the part of either of prisoners. The jury returned a verdict "Guilty with no criminal intent. Act committed while under the influence of temporary insanity":—*Held*: verdict was ambiguous & uncertain, & a new trial was ordered.—*R. v. ADAMS & CARR*, [1916] 35 N. Z. L. R. 356.—*N.Z.*

**3398 v.** ———.]—Accused was indicted for the manslaughter of her illegitimate child. The medical evidence was to the effect that the child died as the result of throttling. The jury found that the death of the child was caused by the mother when she was not in a mental condition to realise the effect of her act:—*Held*: the verdict was not ambiguous, but was a finding of guilty, the jury not having found that accused was incapable of understanding the nature & quality of the act, but only that she was not in a mental condition to realise the effect of the act.—*R. v. HOLDEN*, [1920] N. Z. L. R. 458.—*N.Z.*

The only question the judge left to the jury was whether the applt. was insane:—*Held*: applt.'s defence, however weak, should have been left to the jury; failure to so leave it amounted to a miscarriage of justice; & therefore, the conviction must be quashed.

We have no means of going into the question of insanity since the decision in *R. v. Machardy*, No. 3400, *ante* (DARLING, J.).—*R. v. HILL* (1911), 105 L. T. 751; 78 J. P. 49; 28 T. L. R. 15; 22 Cox, C. C. 625; 7 Cr. App. Rep. 26, C. C. A.

*Annotation*:—*Mentd.* *R. v. Immer*, *R. v. Davis* (1917), 26 Cox, C. C. 186.

**3402.** ———.]—A special verdict given under Trial of Lunatics Act, 1883 (c. 38), s. 2 (1), is one & indivisible & is a verdict of acquittal. Therefore accused who by the special verdict is found guilty of the act charged but insane at the time is not a convicted person within sect. 3 of the above Act, & cannot appeal from that part of the verdict which finds that he was insane at the time of doing the act.—*FELSTEAD v. R.*, [1914] A. C. 534; 83 L. J. K. B. 1132; 111 L. T. 218; 78 J. P. 313; 30 T. L. R. 469; 58 Sol. Jo. 534; 24 Cox, C. C. 243; 10 Cr. App. Rep. 129, H. L.; *affg. sub nom.* *R. v. FELSTEAD* (1913), 30 T. L. R. 143, C. C. A.

*Annotations*:—*Apld.* *R. v. Taylor*, [1915] 2 K. B. 709. *Refd.* *Re Houghton*, *Houghton v. Houghton*, [1915] 2 Ch. 173. *Mentd.* *Oaten v. Auty*, [1919] 2 K. B. 278; Public Prosecutions Director v. Beard, [1920] A. C. 479.

**3403.** ———.]—The Ct. of Criminal Appeal has no jurisdiction, either under the above Act, or on a case stated under Crown Cases Act, 1848 (c. 78), s. 1, to entertain an appeal by a person against whom a special verdict has been found that he was guilty of the act charged against him, but that he was insane at the time, inasmuch as he is not a convicted person within the above-mentioned statutes.—*R. v. TAYLOR*, [1915] 2 K. B. 709; 84 L. J. K. B. 1671; 113 L. T. 513; 79 J. P. 439; 31 T. L. R. 449; 59 Sol. Jo. 530; 25 Cox, C. C. 84; 11 Cr. App. Rep. 198, C. C. A.

#### F. Verdict of Not Guilty.

**3404. Effect of—No appeal lies.**—A new trial cannot be had on an acquittal in criminal cases.—*R. v. READ* (1660), 1 Lev. 9; 83 E. R. 271.

*Annotations*:—*Refd.* *R. v. Bear* (1697), 2 Salk. 646. *Mentd.* *Smith v. Dormer v. Parkhurst* (1738), Andr. 315.

**3405.** — Accused entitled to immediate discharge—Liability for detention.]—Pltf. was tried & acquitted at quarter sessions, & the chairman directed that he should be discharged. He was, however, taken by the prison warders to the cells below the ct. & was there detained until a warder had questioned him as to his name, parentage, & other particulars, & had taken a

note of his answers & of his personal & physical characteristics. He was then allowed to go. He then brought an action against the gaoler of the prison for damages for this unlawful detention:—*Held*: the gaoler was liable.—*MEE v. CRUICKSHANK* (1902), 86 L. T. 708; 66 J. P. 89; 18 T. L. R. 271; 20 Cox, C. C. 210.

**3406.** — Debars reference to previous convictions.]—A judge has no right to make public a prisoner's previous convictions after that prisoner has been tried & acquitted.—*R. v. SMITH* (1917), 87 L. J. K. B. 676; 118 L. T. 179; 34 T. L. R. 9; 26 Cox, C. C. 153; 13 Cr. App. Rep. 9, C. C. A.

**3407. Second indictment to be tried—Right of prosecution to trial by another jury.**—Where a prisoner has been acquitted on one indictment the prosecution have no right to claim that a second indictment should be tried before another jury.—*R. v. SIMS* (1904), 69 J. P. 8.

**3408. Whether accused entitled to copy of the record.**—If A. be indicted of felony, & acquitted, & he has a mind to bring an action, the judge will not permit him to have a copy of the record, if there was probable cause of the indictment & he cannot have a copy without leave (HOLT, C.J.).—*GROENVELT v. BURRELL* (1697), as reported in 1 Ld. Raym. 252; 91 E. R. 1064;

*Annotations*:—*Mentd.* *R. v. Green* (1714), Gilb. 231; *R. v. Dublin* (Dean & Chapter) (1722), 1 Stra. 536; *R. v. Scarborough Bailiffs* (1728), 1 Barn K. B. 113; *R. v. Preston, Cheshire* (1735), 2 Stra. 1040; *Evans v. Harrison* (1762), Wilm. 130; *Crowther v. Ramsbottom* (1798), 7 Term Rep. 654; *R. v. Despard* (1798), 7 Term Rep. 736; *Brittain v. Kinnaird* (1819), 1 Brod. & Bing. 432; *R. v. Rogers* (1822), 1 Dow. & Ry. K. B. 156; *Scott v. Bye* (1824), 2 Bing. 344; *Basten v. Carew* (1825), 3 B. & C. 649; *Tingle v. Roston* (1825), 3 L. J. O. S. C. P. 100; *Garnett v. Ferrand* (1827), 6 B. & C. 611; *Lucas v. Nockolls* (1833), 10 Bing. 157; *Bristol Grdns. v. Wait* (1834), 1 Ad. & El. 264; *Daniell v. Phillips* (1835), 1 Cr. M. & It. 662; *Ridgway v. Hungerford Market Co.* (1835), 4 Nev. & M. K. B. 797; *Baillie v. Kell* (1838), 4 Bing. N. C. 638; *R. v. Thomas* (1838), 8 Ad. & El. 183; *Ex p. Bartlett* (1843), 7 Jur. 649; *Lindsay v. Leigh* (1848), 12 Jur. 286; *R. v. Hallett* (1851), 5 Cox, C. C. 238; *Ex p. Napton Overseers* (1856), 20 J. P. 581; *Hooper v. Lane* (1857), 6 H. L. Cas. 443; *Phillips v. Whitsea* (1860), 2 F. & E. 804; *Ex p. Fernandez* (1861), 9 W. R. 832; *Kemp v. Neville* (1861), 10 C. B. N. S. 523; *R. v. Saddlers' Co.* (1863), 10 H. L. Cas. 404; *Wildes v. Russell* (1866), L. R. 1 C. P. 722; *Grinwood v. Moss* (1872), L. R. 7 C. P. 360; *R. v. Nicholson, etc.*, *Bolton JJ.*, *R. v. Greenhalgh, etc.*, *Bolton JJ.*, *Ex p. Bamber* (1899), 81 L. T. 257; *Serjeant v. Nash* (1903), 89 L. T. 112.

**3409.** —.]—A prisoner upon his acquittal is not entitled *ex debito justitiæ* to a copy of his indictment.—*R. v. BRANGAN* (1742), 1 Leach. 27.

**3410.** —.]—*Qu.*: whether a person tried for felony, & acquitted, has a right to have a copy of the record of his acquittal.—*BROWNE v. CUMMING* (1829), 10 B. & C. 70; 5 Man. & Ry. K. B. 118; 2 Man. & Ry. M. C. 614; 8 L. J. O. S. K. B. 89; 109 E. R. 377.

#### PART VII. SECT. 7, SUB-SECT. 16. — F.

**3404 i. Effect of—No appeal lies.**—*Qu.*: whether it is proper to grant a new trial, where an individual or a corp. has been once acquitted on an indictment, even in cases of misdemeanour.—*R. v. GRAND TRUNK RY. Co.* (1857), 15 U. C. R. 121.—*CAN.*

1. *Preferring new charge.*—Deft. was committed for trial on a charge of larceny. He was tried & acquitted. After the acquittal, & while deft. was still in custody, the prosecuting attorney applied for leave to prefer another charge. Leave was given, & the prosecuting attorney preferred a charge upon which deft. had not been committed. Deft. consented to be tried on the second charge & was tried & convicted. A case was reserved for

the opinion of the ct. as to whether the judge of the county ct. was justified in allowing the second charge to be preferred:—*Held*: inasmuch as prisoner was tried & acquitted on the only charge on which he was committed, & inasmuch as that matter was completely disposed of, the judge had no further jurisdiction, & deft. was entitled to his discharge.—*R. v.* (1893), 25 N. S. R. 124.—*CAN.*

m. —.]—Deft. was committed for trial charged with an assault upon L. He was tried & acquitted. The prosecuting attorney thereupon preferred a charge of an assault upon M. Objection was taken to the jurisdiction of the ct. to try deft. upon this charge, but the objection having been overruled, deft. consented to be tried, & was tried & convicted:—*Held*: the judge had no jurisdiction to try deft.

for the offence for which he was convicted.—*R. v. SMITH* (1893), 25 N. S. R. 138.—*CAN.*

n. —.]—When the ct. held that an indictment for forgery, on which prisoner had been tried, could not be sustained, it refused to

with forging the name of one M. as maker of the promissory note in question.—*R. v. DEACON* (1841), 2 Craw. & D. 245.—*IR.*

**3408 i. Whether accused entitled to copy of the record.**—After an acquittal no copy of an indictment should be furnished without the order of the judge or the fiat of the A.-G.—*HEANEY v. LYONS* (1835), Ber. 55.—*CAN.*

**3408 ii.** —.]—*R. v. SENEAL* (1862), 8 L. C. J. 286.—*CAN.*

7.—*The hearing: Sub-sect. 16, G., H. & I.**G. Retirement of Jury to consider Verdict.*

**3411. Jury must not separate—Nor converse with strangers.]**—The record, in a case of felony at the quarter sessions, after stating the indictment, plea of not guilty, & verdict of guilty thereon, added, that, because it appeared to the justices, that after the jury had retired, one of them had separated from his fellows, & conversed respecting his verdict with a stranger, it was considered that the verdict was bad, & it was therefore quashed, & a *venire de novo* awarded to the next sessions:—*Held*: the judgment was right.—*R. v. FOWLER* (1821), 4 B. & Ald. 273; 106 E. R. 937.

*Annotations*:—*Consd.* *R. v. Ketteridge*, [1915] 1 K. B. 467. *Refd.* *R. v. Murphy* (1869), L. R. 2 P. C. 535; *Crane v. Public Prosecutor*, [1921] 2 A. C. 299. *Mentd.* *Campbell v. R.* (1847), 11 Q. B. 814; *R. v. Charlesworth* (1861), 1 B. & S. 460; *Winsor v. R.* (1866), L. R. 1 Q. B. 289; *R. v. Berger* (1894), 63 L. J. Q. B. 529.

**3412.** ———. ]—*R. v. KETTERIDGE*, No. 3232, ante.

**3413. Necessity for privacy.]**—The presence of a stranger in the room with a jury for a substantial time while they are considering their verdict is of itself sufficient to invalidate their verdict.—*GOBY v. WETHERILL*, [1915] 2 K. B. 674; 84 L. J. K. B. 1455; 113 L. T. 502; 79 J. P. 346; 31 T. L. R. 402, D. C.

*Annotation*:—*Refd.* *Fanshaw v. Knowles*, [1916] 2 K. B. 538.

PART VII. SECT. 7. SUB-SECT. 16.—*G.*

**3411 i. Jury must not separate—Nor converse with strangers.]**—The verdict of the jury is vitiated by the mere fact of one of them having, without the leave of the ct. & after their retirement to consider their verdict, spoken to or held any communication with a person not a juror. It is not necessary for the ct. to inquire into the nature of the subject matter of the conversation or communication.—*BENI MADAB KUNDU v. R.* (1918), 1 L. R. 46 Calc. 207.—*IND.*

**3411 ii.** ———. ]—A jury cannot, in a criminal case, be allowed to separate after the delivery of the judge's charge until they are finally discharged; nor, except by consent, can they, even in custody of the sheriff, be removed to any place outside the precincts of the ct. for their better accommodation. Where the jury, although agreed upon their verdict, were not able to draw it up in proper form before 12 o'clock upon Saturday night, the ct., in the absence of any arrangement for the reception of their verdict by consent, directed them to be locked up until Monday, with permission to go to church on Sunday, in the custody of the sheriff.—*It. v. O'CONNELL* (1845), 1 Cox, C. C. 410.—*IR.*

**3413 i. Necessity for privacy.]**—Deft. was indicted & tried for the crime of rape, committed upon the person of a girl a few weeks over the age of fourteen years. The jury found prisoner guilty, & he was sentenced to imprisonment for the term of one year. Before sentence there was a motion on behalf of prisoner to reserve a case, upon affidavits of two of the jurors to the effect that while they were deliberating in their room they called the sheriff in & asked him "whether they could report that there had been sexual connection, but with consent, & recommend prisoner to mercy," to which the sheriff replied, "No, that they would be obliged to report deft. guilty or not guilty, & that if they found him guilty with a recommendation to mercy, the judge would give him a light sentence." This was denied by the sheriff, who

swore that all he said in reply to the question asked him was: "Whatever your verdict is, bring it into ct."—*Held*: as the case as reserved called upon the ct. to first decide the question of fact whether anything was said to the jurors by the sheriff to which objection could be taken, the ct. for this reason had no jurisdiction to deal with the question, & the conviction should be quashed.—*R. v. BARNES* 42 N. S. R. 55; 4 E. L. R. 234.

**3413 ii.** ———. ]—The fact that the constable in charge of a jury was in the room with them for a considerable time while they were considering their verdict:—*Held*: not to necessitate the discharging of the jury & trying accused over again, it being evident that the judge was of opinion, agreed with by the ct., that as the constable did not speak to the jurors or in any way seek to influence their verdict during the time he was in the room, his mere presence there could not lead to any miscarriage of justice.—*R. v. CORRIGAN*, [1919] 2 W. W. R. 81.—*CAN.*

**3414 i. Questions by jury—Must be asked publicly.]**—A prisoner was charged with perjury. After the jury had retired to consider their verdict & after they had been absent several hours, they sent a message to the judge, who had also left the ct., asking a question on a matter material to one of the issues being tried. The judge without communicating with prisoner or his counsel, sent an answer in writing by the sheriff to the jury. This answer was merely a repetition of what the judge had said in his direction & contained no new matter. The jury brought in a general verdict of guilty. Some days afterwards prisoner's attorney on discovering that a communication had taken place between the judge & jury asked the judge to state a special case upon the ground that the trial was rendered a nullity by reason of this communication:—*Held*: the communication between judge & jury being on a matter material to the issue should have taken place in open ct. in the presence of prisoner or his counsel, & as it had taken place in the absence of prisoner & his counsel the trial was a nullity.—

**3414. Questions by jury—Must be asked publicly.]**—If a jury, after retiring to consider their verdict, address a question in writing to the bench, it should be asked publicly.—*R. v. LENTON* (1919), 14 Cr. App. Rep. 105, C. C. A.

**3415.** ———. **Must not be answered by an official of the court.]**—After a jury had retired to consider their verdict the clerk of assizes went to their room in order to ascertain if they had agreed or were likely to agree. While there he answered questions put to him by jurymen & gave them certain advice. The jury convicted applt. who sought to prove the above facts by the evidence of three of the jurymen:—*Held*: the evidence was inadmissible; but the ct., acting on the report of the clerk himself, quashed the conviction on the ground that the procedure was irregular & the interference with the jury substantial, so they were unable to say that the jury, in the absence of such interference, would have convicted applt.—*R. v. WILLMONT* (1914), 78 J. P. 352; 30 T. L. R. 499; 10 Cr. App. Rep. 173, C. C. A.

*Annotations*:—*Consd.* *Goby v. Wetherill* (1915), 113 L. T. 502. *Refd.* *Ellis v. Decheer* (1922), 127 T. L. R. 431.

**3416. Illness of juror—Attendance of doctor.]**—Where a prisoner is tried for a capital offence, & the jury after the lapse of a reasonable time are unable to agree on a verdict, it is in the discretion of the presiding judge to discharge them, if he thinks a case of necessity for so doing is made out;

*R. v. FITZGERALD* (1889), 15 V. L. R. 11. 40.—*AUS.*

**3414 ii.** ———. ]—*R. v. GRIMES & LEE* (1894), 15 N. S. W. L. R. 209; 10 N. S. W. W. N. 211.—*AUS.*

**3414 iii.** ———. ]—At the trial of deft. on a charge of rape, there was evidence after the offence, prosecutrix & her husband consulted a solr. who gave them a letter addressed to one of them & enclosed in an unsealed envelope addressed to deft. The letter was shown to deft. & returned to the solr. but it was not produced at the trial nor was evidence of its contents given. While the jury were deliberating the judge received a request from the foreman, asking to see the letter. The judge instructed the Registrar to inform the foreman that the letter was not available. The jury found deft. guilty. Counsel asked the judge to state a case whether he was right in giving instructions to the jury in the way he did:—*Held*: application should be refused.—*R. v. BATTERMAN* (1915), 34 O. L. R. 225; 8 O. W. N. 554.—*CAN.*

*o.* ———. *After retirement—To witness already examined & cross-examined.]*—On a trial for murder, the jury, who had retired to consider of their verdict, returned to the box, & desired to put a question to a witness who had been examined & cross-examined already:—*Held*: such re-examination was not allowable.—*R. v. LEARY & COOKE* (1844), 3 Craw. & D. 212.—*IR.*

*p. Illness of juror—Separation of jury—Attendance of doctor.]*—After the jury had been given in charge, one of the jurymen was taken with a fit & removed, in charge of the sheriff & his physician, to his residence. The remainder of the jury subsequently adjourned to the sick man's house, where upon his recovery a verdict of guilty was rendered:—*Held*: after the verdict had been recorded, it could not be disturbed.—*R. v. PETER* (1869), 1 B. C. R. pt. 1, 2.—*CAN.*

*Agreement as to prisoner.]*—A juror being ill & the jury having agreed as to one of two prisoners:—*Held*: a verdict as to that one might be received & the jury discharged as to the other prisoner.—

& the fact of the jury having been locked up for eighteen hours, & there being no prospect of their agreeing, & the duty of the presiding judge requiring his presence at the next circuit town, is a sufficient case of necessity to justify the discharge of the jury. But if at the next assizes prisoner wishes to object to his being then tried, on the ground that the first jury were improperly discharged, he should plead the facts that will show this by a plea in the nature of a plea *puis darrein continuance*.

If after a jury are locked up to consider their verdict in a capital case, one of them is ill, the judge will allow a medical man to see him, & anything which the medical man in his discretion will give him *bonâ fide* as medicine, he may have, but not sustenance; but if it be proved by the medical man that if one of the jurors is further confined to deliberate, it will be dangerous to his life, & the jury state that they are not likely to agree on their verdict, the judge will discharge them, but the judge will not discharge the jury from any consideration of the time during which they have been locked up.—*R. v. NEWTON* (1849), 3 Car. & Kir. 85; *subsequent proceedings, sub nom. Re NEWTON*, 13 Q. B. 716.

*Annotation*:—*Refd. Winsor v. R.* (1866), 30 J. P. 374.

See, further, JURIES.

#### H. Announcing the Verdict.

**3417. Whether prisoner must be present.]**—*R. v. LADSLINGHAM* (1670), T. Raym. 193; 83 E. R. 101; *sub nom. R. v. LEGINGHAM*, 2 Keb. 687; *sub nom. R. v. LEDGINGHAM*, 1 Vent. 97.

*Annotations*:—*Refd. R. v. Carlile* (1831), 9 L. J. O. S. K. B. 250; *Winsor v. R.* (1866), 12 Jur. N. S. 91.

**3418. — In misdemeanour.]**—*R. v. WOODFALL*, No. 3272, *ante*.

**3419. By foreman of jury—Whether assent of jury presumed.]**—In general the assent of all the jury to the verdict pronounced by the foreman in their presence & hearing, is to be conclusively inferred & no affidavit can in any case be admitted

to the contrary. But if all the jury were not present when a verdict of guilty was delivered, & it is therefore uncertain whether they all heard the verdict pronounced by the foreman the ct. will with the consent of deft. grant a new trial.—*R. v. WOOLER* (1817), 6 M. & S. 366; 2 Stark. 111; 105 E. R. 1280.

*Annotation*:—*Fold. Ellis v. Deheer*, [1922] 2 K. B. 113.

**3420. — Affidavits by jurymen that they did not hear or assent to verdict—Ground for new trial.]**—On an application for a new trial of an action tried before a jury, on the ground that the verdict as delivered by the foreman was not the verdict of the whole jury, the ct. admitted affidavits of certain of the jurors that they did not hear the verdict delivered & did not assent to it, & accepting those statements to be true:—*Held*: they were not precluded from granting a new trial by the fact that the objection to the verdict was not taken until after the jury had been discharged.—*ELLIS v. DEHEER*, [1922] 2 K. B. 113; 91 L. J. K. B. 937; 127 L. T. 431; 86 J. P. 169; 38 T. L. R. 605; 66 Sol. Jo. 537; 20 L. G. R. 625, C. A.

#### I. Reconsidering the Verdict.

**3421. Judge may refuse to accept verdict.]**—*R. v. SMITH* (1804), 1 Russell on Crimes & Misdemeanours, 8th ed. 726.

*Annotation*:—*Consd. R. v. Meany* (1862), Le. & Ca. 213.

**3422. —**At sessions the jury gave a special verdict, which was, in fact, a verdict of not guilty, & it was entered in the books of the clerk of the peace. Afterwards the chairman told the jury they must reconsider their verdict; & they gave a verdict of guilty generally, & the verdict was then altered in the book of the clerk of the peace:—*Held*: the ct. would refuse to interfere by *mandamus* to cancel the alterations.—*R. v. HEWES* (1835), 3 Ad. & El. 725; 5 L. J. M. C. 45; 111 E. R. 589; *sub nom. R. v. HUGHES*, 1 Har. & W. 313.

*Annotations*:—*Mentd. Rochester Corpn. v. R.* (1858), E. B. & F. 1024; *Coombe v. Edwards* (1878), 42 J. P. 820.

*R. v. LEARY & COOKE* (1844), 3 Craw. & D. 212.—*IR.*

**r. Right of jury to take indictment with it.]**—The jury may be allowed to take the indictment with it when it retires to consider its verdict.—*It. v. PARKIN*, [1922] 1 W. W. R. 732; 66 D. L. R. 175; 37 Can. Crim. Cas. 35; 31 Man. L. R. 438.—*CAN.*

**s. Discovery of new witness for defence—After retirement of jury—Whether jury recalled.]**—*R. v. WYLLIE* (1880), 3 L. N. 139.—*CAN.*

**t. Failure to supply refreshments to jury—Effect of.]**—No substantial miscarriage of justice is occasioned by failure to supply a jury with refreshment during a period of eight hours.—*R. v. MURRAY & MAHONEY* (No. 2), [1917] 1 W. W. R. 404; 10 Alta. L. R. 275; 27 Can. Crim. Cas. 247; 33 D. L. R. 702.—*CAN.*

#### PART VII. SECT. 7, SUB-SECT. 16.—H.

**3419 i. By foreman of jury—Whether assent of jury presumed.]**—*R. v. FORD* (1853), 3 C. P. 209.—*CAN.*

**3420 i. — Affidavits by jurymen that they did not hear or assent to verdict—Ground for new trial.]**—Where the jury have given their verdict through their foreman, & such verdict has been entered up, the judge cannot subsequently grant a new trial upon affidavits of some of the jurors stating that the verdict so given was not the verdict of the jury.—*R. v. CARROLL* (1886), 12 V. L. R. 859.—*AUS.*

**a. — Adding material words to verdict.]**—Where, after the delivery of a unanimous verdict of the jury, con-

victing accused of the charge of rioting in connection with certain land & the crops thereon, possession of which was claimed by the complainant as well as by accused, the foreman of the jury attempted to add that "the land & the crops are all theirs," meaning that they belonged to accused, but was stopped by the judge on the ground that the verdict was quite clear in its terms, & it was therefore unnecessary to hear anything further from them:—*Held*: it was undesirable to stop the jury at such a stage of the proceedings; the words the foreman attempted to add to the verdict were very material, & accused having been seriously prejudiced by the procedure adopted by the judge, there should be a new trial.—*NARAYAN CHANGA v. R.* (1902), 1 L. R. 30 Calc. 485.—*IND.*

**b. Interpretation.]**—On the trial of defts. on an indictment charging them with robbery with violence & wounding, on the jury bringing in a finding of "guilty of assault," the chairman questioned the Crown attorney as to its meaning, when he replied: "Assault as charged in the indictment." The chairman then asked the foreman, when he replied: "We mean inflicting the blow with a bottle as described, but not guilty of robbery," & on being questioned as to which prisoner, replied: "Both," whereupon the chairman indorsed the verdict on the record as follows: "Guilty of assault as charged, but not guilty of robbery," he so interpreting the finding:—*Held*: the verdict was not properly interpreted & acted upon by the chairman, & was not rightly

recorded, & a new trial was directed.—*R. v. EDMONSTONE* (1907), 10 O. W. R. 1065; 15 O. L. R. 325.—*CAN.*

**c. Guilty of crime "as laid before them."]**—In a trial before a sheriff & a jury, the jury returned a verdict of guilty of the crime charged "as laid before them." In a suspension:—*Held*: there was no sufficient objection to the verdict in point of form.—*LLOYD v. H.M. ADVOCATE* (1899), 1 F. (Ct. of Sess.) 31.—*SCOT.*

#### PART VII. SECT. 7, SUB-SECT. 16.—I.

**3421 i. Judge may refuse to accept verdict.]**—A., being charged with obtaining money by false pretences, it appeared that A. had drawn & passed at G. a cheque on the O. Bank at Y. The jury found A. was "guilty of drawing the cheque but intended to have provided funds to meet it if he had had sufficient time." The judge refused to accept this as verdict of not guilty & insisted on an unambiguous verdict. The jury retired, & presently returned a verdict of guilty:—*Held*: the first finding was sufficiently ambiguous to justify the judge in the course he pursued, & conviction was sustained.—*It. v. SHADFORTH* (1866), 5 N. S. W. S. C. R. 337.—*AUS.*

**3421 ii. —**Where prisoner was charged with arson, the jury, after an hour's deliberation, came into ct. with a verdict of not guilty; the judge refused to receive the verdict, & having read over certain portions of the evidence to the jury sent them back to reconsider their verdict. The jury returning into ct. a few minutes after with the same verdict. Prisoner was



*Sect. 7.—The hearing: Sub-sect. 16, I., J. & K.; sub-sect. 17, A. & B. (a).]*

**3423. — Unless jury insist—Second verdict the final one.]**—Where a jury return what the judge considers to be an improper verdict, he may direct them to reconsider it, & is not bound to record it unless they insist upon his doing so. Where the jury reconsider their verdict & alter it, the second is the real verdict of the jury.—*R. v. MEANY* (1862), *Le. & Ca.* 213; 1 *New Rep.* 66; 32 *L. J. M. C.* 24; 7 *L. T.* 393; 26 *J. P.* 822; 8 *Jur. N. S.* 1161; 11 *W. R.* 41; 9 *Cox, C. C.* 231, *C. C. R.*

**3424. — Disclosure of document containing refused verdict.]**—A judge is not bound to disclose a document from the jury purporting to contain a verdict which he does not accept.—*R. v. ROBINSON* (1922), 16 *Cr. App. Rep.* 140, *C. C. A.*

**3425. Effect of refusal to accept verdict—Misconception of law by judge.]**—*R. v. YEADON & BIRCH*, No. 3360, *ante*.

**3426. Ground for reconsideration—First verdict found on evidence of unsworn witness.]**—On an indictment for felony, after the jury had delivered a verdict of guilty, it was discovered that one of the witnesses for the prosecution had given his evidence without having been previously sworn:—*Held*: the proper course to pursue was to direct the jury to reconsider the case, dismissing from their minds the evidence of that particular witness.—*R. v. JAMES* (1852), 6 *Cox, C. C.* 5.

**3427. — First verdict not clear.]**—Where part of the finding of a jury is not clear in law, though another part of the finding is an acquittal on certain counts, the judge is entitled to direct them to reconsider their verdict.—*R. v. HUTCHINSON* (1911), 7 *Cr. App. Rep.* 19, *C. C. A.*

**3428. — —.]**—The ct. will not entertain a case for the appt. inconsistent with the defence set up at the trial. A verdict that the prisoner "killed" the deceased "without intending" to do so, is incomplete, & the judge may properly direct the jury to reconsider it.—*R. v. PHILPOT* (1912), 7 *Cr. App. Rep.* 140, *C. C. A.*

**3429. — —.]**—In this case a jury had given their verdict in a somewhat ambiguous form, but it appeared to be one of not guilty. On the suggestion of the judge they reconsidered it, & did not insist on their first verdict being recorded as one of not guilty, but, having been referred to the evidence, brought in a second verdict of guilty:—*Held*: the verdict of guilty was rightly recorded.—*R. v. CRISP* (1912), 76 *J. P.* 304; 28 *T. L. R.* 296; 7 *Cr. App. Rep.* 173, *C. C. A.*

#### *J. Amending the Verdict.*

**3430. Surplusage may be rejected.]**—Surplusage shall be rejected in a verdict in an indictment.—*R. v. URYLN* (1671), 2 *Saund.* 308; 85 *E. R.* 1107.

**3431. Amendment not allowed—From judge's notes.]**—*R. v. KEITE*, No. 3271, *ante*.

**3432. — From clerk's notes.]**—Verdict general or special may be amended by the clerk's notes in civil cases, but not in criminal.—*R. v. BOLD* (1708), 1 *Salk.* 53; 91 *E. R.* 52.

*Annotation:—Mentd.* *Selwood v. Methlyn* (1729), 1 *Barn. K. B.* 254.

remanded.—*R. v. CUNNINGHAM* (1859), 4 *Nfld. L. R.* 398.—*NFLD.*

**d. Ground for reconsideration — Dissent of juror.]**—The jury in a criminal trial may be sent back for further deliberation when, upon being polled, one of the jurors dissents from the verdict of guilty announced by the foreman; & a subsequent unanimous verdict of guilty may properly be accepted.—*R. v. BURDELL* (1906), 11

*O. L. R.* 440; 7 *O. W. R.* 164.—*CAN.*

#### **PART VII. SECT. 7, SUB-SECT. 16.—J.**

**e. Amendment not allowed.]**—Prisoners were charged with larceny of certain goods, & in a second count with receiving the same goods. The jury found both prisoners guilty of larceny & receiving, & were discharged. Objection was then taken

**3433. Amendment allowed.]**—Special verdict amended in a criminal prosecution.—*ANON.* (1706), 11 *Mod. Rep.* 84; 88 *E. R.* 910.

**3434. — From minutes.]**—If there be minutes to amend a special verdict by, it may be amended even in capital cases (*LORD MANSFIELD*).—*R. v. HAZEL* (1785), 1 *Leach*, 368.

*Annotations:—Refd.* *R. v. Dudley* (1884), 49 *J. P.* 69. *Mentd.* *R. v. O'Connell* (1844), 3 *L. T. O. S.* 323.

**3435. — Judge's notes.]**—Perjury was assigned on the following averments in evidence given by deft.: that A. promised V. £6 for his vote, & gave V.'s wife a sovereign. The jury after retiring found a verdict of not guilty on the first assignment, for want of sufficient evidence, & guilty on the second assignment. The verdict was so entered. The judge did not, at the time, make any note of his summing-up, but did so afterwards; & having a distinct remembrance of it, & no doubt of the jury's intention, he on summons allowed the *postea* to be amended by entering a verdict of guilty on the first & third assignments, & not guilty on the second:—*Held*: (1) the amendment ought not to have been made, there being no note of a judge, or other document to amend by; (2) where there is such note or other document, the verdict may, on proper grounds, be amended in a criminal as well as in a civil case.—*R. v. VIERER* (1840), 12 *Ad. & El.* 317; 4 *Per. & Dav.* 161; 9 *L. J. M. C.* 120; 4 *Jur.* 628; 113 *E. R.* 833.

*Annotation:—As to* (1) *Refd.* *R. v. Fall* (1841), 10 *L. J. Q. B.* 145.

**3436. — Mistake in announcing verdict.]**—Though a verdict is recorded, yet if it appear promptly that it is not according to the intention of the jury, it may be vacated & set right.—*R. v. PARKIN* (1824), 1 *Mood. C. C.* 45, *C. C. R.*

**3437. — —.]**—On the trial of an indictment for larceny, one of the jurors delivered a verdict of not guilty, which was entered in the minutes of the clerk of the peace, according to the usual practice. Prisoner was discharged out of the dock. Immediately he was discharged, & before the jury had left the box, others of the jury interfered, & said the verdict was guilty. Prisoner was brought back to the dock, & the jury was again asked what their verdict was. They all answered guilty, & the person who delivered the first verdict said, that he had said guilty. The chairman, thereupon, ordered a verdict of guilty to be recorded:—*Held*: the verdict of guilty was rightly recorded.—*R. v. VODDEN* (1853), *Dears. C. C.* 229; 23 *L. J. M. C.* 7; 22 *L. T. O. S.* 107; 17 *J. P.* 744; 17 *Jur.* 1014; 2 *W. R.* 55; 6 *Cox, C. C.* 226, *C. C. R.*

#### *K. Disagreement of Jury.*

**3438. Minority may give way to substantial majority.]**—A judge is entitled to suggest that the minority of a jury may subordinate their view to that of a substantial majority.—*R. v. QUARTERMAINE* (1919), 14 *Cr. App. Rep.* 109, *C. C. A.*

**3439. Discretion of judge to discharge jury.]**—*R. v. COBBETT* (1831), 2 *State Tr. N. S.* 789.

*Annotations:—Consd.* *R. v. Winsor* (1866), 10 *Cox, C. C.* 276. *Refd.* *R. v. Charlesworth* (1861), 1 *B. & S.* 460.

on behalf of one of prisoners that the verdict was irregular. The jury who had not left precincts of ct. were recalled by the judge & returned verdict of larceny against each prisoner upon which prisoners were sentenced:—*Held*: the first verdict was illegal, & second verdict a nullity & conviction must be set aside.—*R. v. ATKINSON & CLUTTON* (1907), 7 *S. R. N. S. W.* 713.—*AUS.*



**3440.** — **What is sufficient ground for discharge.**—*R. v. NEWTON*, No. 3416, *ante*.

**3441.** — **Not subject to review.**—Discharge of jury at a former trial no bar to a second trial, although the cause of discharge of jury does not appear upon the record, & they were not discharged from any real necessity:—*Held*: the judge presiding at the trial was sole judge as to whether a necessity for such a proceeding as discharging the jury had arisen; a discretionary power was vested in him, he must exercise his discretion, & there was no appeal to any other tribunal as to whether in exercising that discretion he had done so rightly.—*R. v. DAVISON* (1860), 2 F. & F. 250; 8 Cox, C. C. 360.

*Annotations*:—*Consd.* *R. v. Charlesworth* (1861), 1 B. & S. 460. *Refd.* *Winsor v. R.* (1866), L. R. 1 Q. B. 390; *R. v. Lewis* (1909), 78 L. J. K. B. 722; *R. v. Richardson* (1913), 108 L. T. 384.

**3442.** — **—**—*Held*: The record of a conviction for felony showed that on the trial of the indictment, the jury being unable to agree, the judge discharged them; that prisoner was given in charge of another jury at the next assizes, & a verdict of guilty returned, & judgment & sentence passed. On writ of error:—*Held*: the judge had a discretion to discharge the jury, which a ct. of error could not review.—*WINSOR v. R.* (1866), L. R. 1 Q. B. 390; 7 B. & S. 490; 35 L. J. M. C. 161; 14 L. T. 567; 30 J. P. 374; 12 Jur. N. S. 561; 14 W. R. 695; *sub nom.* *R. v. WINSOR*, 10 Cox, C. C. 327, Ex. Ch.

*Annotations*:—*Fold.* *R. v. Lewis* (1909), 78 L. J. K. B. 722. *Refd.* *R. v. Richardson*, [1913] 1 K. B. 395. *Mentd.* *Droege v. Stuart*, *The Karnak* (1869), L. R. 2 P. C. 505; *R. v. Murphy* (1869), L. R. 2 P. C. 535; *R. v. Littlechild*, *R. v. Heslop* (1871), 40 L. J. M. C. 137; *R. v. Payne* (1872), 41 L. J. M. C. 65; *R. v. Bradlaugh* (1883), 15 Cox, C. C. 217; *Crane v. Public Prosecutor*, [1921] 2 A. C. 299.

**3443.** — **May be exercised by justices at**

**quarter sessions.**—Where at quarter sessions two cts. are constituted for the trial of prisoners, & at a trial in one ct. the jury disagree, the jurisdiction to discharge the jury is not vested in the chairman of the ct. of trial alone, but may lawfully be exercised by other justices.

*Qu.*: if it is necessary condition of a valid discharge of the jury at a criminal trial that prisoner should be present, when the discharge is ordered.—*R. v. RICHARDSON*, [1913] 1 K. B. 395; 82 L. J. K. B. 333; 108 L. T. 384; 77 J. P. 248; 29 T. L. R. 228; 57 Sol. Jo. 247; 23 Cox, C. C. 332; 8 Cr. App. Rep. 159, C. C. A.

**3444.** — **Whether presence of accused necessary.**—*R. v. RICHARDSON*, No. 3443, *ante*.

*See* Nos. 3264, 3265, *ante*.

## SUB-SECT. 17.—JUDGMENT.

### A. *The Allocutus.*

**3445. Necessity for—In treason.**—*R. v. SPEKE* (1689), 3 Salk. 358; Comb. 144; 91 E. R. 872.

*Annotation*:—*Refd.* *O'Brien v. R.*, etc. (1849), 3 Cox, C. C. 360.

**3446.** — **—**—*R. v. GEARY* (1689), 2 Salk. 630; 1 Show. 131; 91 E. R. 532.

### B. *Respite and Arrest of Judgment.*

#### (a) *Respite.*

**3447. Grounds for respite—Illness of accused.**—Convict for a libel being ill, was bailed before judgment.

The offence is so great that an adequate punishment may endanger his life, & to lessen the judgment would be an ill precedent; therefore bail him for the present & we will give judgment when

ponement to enable him to consider his course, & subsequently intimated that he did not intend to proceed with the prosecution:—*Held*: accused was not entitled to a formal verdict of acquittal.—*R. v. PAIZEE* (1917), S. R. 15.—S. AF.

## PART VII. SECT. 7, SUB-SECT. 17.—A.

**m. Necessity for—In capital felonies.**—In capital felonies, the allocutus is an essential formality, the omission of which renders the sentence void; & accordingly where, prior to sentence, it has been omitted to inquire of prisoner, if he have anything to say why sentence should not be pronounced, a writ of error will lie; but in such case, accused is not entitled to an order that "he may depart without delay," but will be sent back to the ct. ofoyer & terminer to be sentenced anew.—*CAYOTTE v. R.* (1887), 13 Q. L. R. 214.—CAN.

**n. Omission of words "against him"**—*Effect of.*—The allocutus "why the ct. here should not proceed to judgment & execution," omitting the words "against him," is sufficient when, looking to the record of the previous proceedings, it may reasonably be intended that prisoner was addressed, & that the verdict had been pronounced in his case.—*O'NEILL IN ERROR v. R.* (1854), 24 L. T. O. S. 35.—IR.

## PART VII. SECT. 7, SUB-SECT. 17.—B. (a).

**o. Grounds for respite—Error in sentence.**—*W. & L.* were charged on information with robbery. They were found guilty & sentenced to imprisonment & to a whipping & flogging respectively. Prisoner's counsel took no objection to the sentence. The sect. under which they were charged

## PART VII. SECT. 7, SUB-SECT. 16.—K.

**3440 i. Discretion of judge to discharge jury.**—*What is sufficient ground for discharge.*—A juror being ill, & the jury having agreed as to one of two prisoners:—*Held*: a verdict as to that one might be received & the jury might be discharged as to the other prisoner.—*R. v. LEARY & COOKE* (1844), 3 Caw. & D. 212.—IR.

**3440 ii.** — **—**—*Held*: In a capital case, in the absence of any fatality or evidence necessity, a judge has no discretionary power of discharging a jury without their giving a verdict, because, after a long deliberation, they state that they cannot agree. It is no sufficient reason, *per se*, for their discharge, that, in the judge's opinion, more than a reasonable & sufficient time has elapsed to enable them, if they could at all, to agree.—*CONWAY & LYNCH v. R.* (1845), 4 L. T. O. S. 458.—IR.

**1. Jury discharged—Necessity for return of names of jurors.**—*Sect.* 29 of Jury Act, 1862, does not imperatively require that the names of jurymen should be returned to the box after verdict, when the jury have been discharged because of their inability to agree, & the same issue is tried again at the same session of the ct.—*R. v. GILLEN* (1914), S. A. L. R. 196.—AUS.

**g. Ground for new trial—By whom obtained.**—Where, on the trial of prisoners indicted for breaking & entering a bank, the jury disagreed, & there was no time left for a second trial during the then sittings of the ct.:—*Held*: a trial could be obtained by the issue of a commission by the Govt., & the ct. could not order a new trial of the cause, or discharge the prisoners on their own recognisances.—*R. v. WATSON* (1876), 11 N. S. R. (2 R. & C.) 1.—CAN.

**h. — Retrial on original indictment & plea.**—*Sect.* 403 of the Criminal Procedure Code protects an accused against a subsequent trial for the same offences, & on the same facts, for any other offences for which a different charge from the one made against him "might have been made," but was not made, & not when such different charge was made at the previous trial, & the jury disagreed as to it. Where a prisoner is unanimously acquitted of some of the charges, & the jury are divided as to the rest & discharged, & he is "retried" under sect. 308 of the Criminal Procedure Code before a different jury, he is not being "tried again" within sect. 403, but his retrial is on the original indictment & plea, & the ct. continues the trial before another jury, & the process may continue till a verdict is passed on all the counts.—*R. v. NIRMAL KANTA ROY* (1914), 1 L. R. 41 Calc. 1072.—IND.

**k. — Accused released.**—In a trial for murder the jury disagreed & accused was remanded under custody. The A.-G. thereupon ordered prisoner to be liberated, & he was discharged from custody. Two years later he was re-arrested on the same charge & brought to trial. A plea of *autrefois acquit* was raised, & the judge directed a verdict of acquittal to be entered, but suspended the order pending an application to have the order set aside or amended. On appeal:—*Held*: prisoner was not liable to be retried. *Qu.*: whether the judge presiding at the second trial had the power to suspend the order for acquittal.—*R. v. KELIJANA* (1909), 30 N. L. R. 437.—S. AF.

**l. — Withdrawal of indictment—Whether accused entitled to acquittal.**—Accused had been put upon his trial, & the jury disagreed & were discharged. The A.-G. thereupon asked for a post-

**Sect. 7.—The hearing: Sub-sect. 17, B. (a) & (b) & C.]**

he is better (LORD PARKER, C.J.).—*R. v. BISHOP* (1716), 1 Stra. 9; 93 E. R. 351.

**3448. — Plea of pregnancy—Application of plea.]**—Where the death sentence is respited until a woman is delivered of her child & before execution she is found to be with child again, there shall not be a further respite of sentence.—ANON. (1536), Bro. N. C. 48; 73 E. R. 868.

**3449. — —.]**—*R. v. BAYNTON* (1702), 14 State Tr. 597.

**3450. — —.]**—*R. v. WYCHERLEY* (1838), 8 C. & P. 262.

**3451. — —.]**—Where a woman who had been condemned to death did not, when called upon to say why execution should not be done upon her, plead her pregnancy, the ct. would not permit that question to be formally inquired into, at the suggestion of her counsel that she was in fact with child.—*R. v. HUNT* (1847), 2 Cox, C. C. 261.

**3452. — —.]**—*R. v. THOMAS* (1906), 70 J. P. Jo. 316.

**3453. By court of quarter sessions.]**—A ct. of quarter sessions has power to respite a judgment from one session to another, without adjourning the session.—*KEEN v. R.* (1847), 10 Q. B. 928; 2 New Mag. Cas. 271; 3 New Sess. Cas. 25; 16 L. J. M. C. 180; 9 L. T. O. S. 313; 12 J. P. 4; 11 Jur. 1060; 2 Cox, C. C. 341; 116 E. R. 352.

**Annotations:—***Consd. R. v. Westmoreland JJ.* (1868), L. R. 3 Q. B. 457. *Refd. Campbell & Haynes v. R.* (1848), 2 New Mag. Cas. 356; *R. v. Belton* (1848), 12 J. P. 232; *R. v. Staffordshire JJ.* (1857), 3 Jur. N. S. 1148; *R. v. McLain, R. v. Barr* (1922), 91 L. J. K. B. 562.

(b) Arrest of Judgment.

**3454. Motion in arrest of judgment—Necessity for presence of accused.]**—A motion cannot be made in arrest of judgment, or mitigation of punishment, on a conviction for a misdemeanour, unless deft. be present.—*R. v. BUCKERIDGE* (1683), 2 Show. 297; *Skin.* 159; 89 E. R. 950.

**3455. — —.]**—When a man is convicted of forgery or perjury, the ct. said they never allowed of any motion to be made in behalf of him, but upon his being brought into ct., though upon a conviction for a trespass or riot they did.—*R. v. ROWSE* (1729), 1 Barn. K. B. 148; 94 E. R. 102.

**3456. — —.]**—Deft., after conviction must be in ct. to move for a new trial.—*R. v. GIBSON* (1734), 2 Barn. K. B. 412; *Cunn.* 29; 7 Mod. Rep. 205; *Ridg. temp. II.* 50; *Sess. Cas. K. B.* 123; 2 Stra. 968; 94 E. R. 587.

**Annotation:—***Mentd. O'Neill v. Fitzgerald* (1829), 3 BH. N. S. 24.

**3457. — —.]**—When conviction is removed

does not authorise whipping or flogging although the sect. dealing with robbery in company does so. The error was not discovered until the sittings had been closed. When the judge, discovering the error, reopened the ct., respited the sentences & stated a case:—*Held:* the sentence must be amended by striking out so much as directed the whipping & flogging.—*R. v. WISNER* (1896), 7 Q. L. J. 52.—**AUS.**

**p. — Doubt as to admissibility of evidence—& jurisdiction.]**—Prisoner was found guilty at the assizes, but the judge who presided at the trial, having entertained some doubts as to the admissibility of part of the evidence for the prosecution, did not pronounce or record sentence, but bound prisoner by recognisance to appear & receive sentence at the ensuing assizes, reserving the question of the admissibility of the evidence for the consideration

of the twelve judges. A majority of the twelve judges having decided that the evidence was properly received, the conviction was held good. The next judge of assize entertaining doubts as to his jurisdiction, the offence not being a capital felony, declined to pronounce sentence. Prisoner was, thereupon, bound by recognisance to

The proceedings having been removed by *certiorari*:—*Held:* had

*R. v. CHARLETON* (1839), 2 Jebb & S. 54; 2 L. L. R. 50; 1 Craw. & D. 315.—**IR.**

**PART VII. SECT. 7, SUB-SECT. 17.—B. (b).**

**g. Grounds for arrest of judgment—Charge not sustained—Evidence proving offence of different character.]**

by *certiorari*, no motion can be in arrest of judgment, unless deft. be personally present.—*R. v. SPRAGG* (1760), 2 Burr. 930; 97 E. R. 637.

**3458. — May be made after judgment by default.]**—Upon an indictment deft. may move in arrest of judgment after a judgment by default.—*R. v. DEMAN* (1706), 2 Ld. Raym. 1221; 92 E. R. 306.

**3459. Grounds for arrest of judgment—Court satisfied no offence committed.]**—*R. v. WADDINGTON* (1800), 1 East, 143; 102 E. R. 56.

**Annotations:—***Refd. R. v. Plummer*, [1902] 2 K. B. 339. *Mentd. Mogul SS. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598.

**3460. — Repeal of statute.]**—*R. v. M'KENZIE* (1820), Russ. & Ry. 429, C. C. R.

**Annotations:—***Fold. R. v. Denton* (1852), Dears. C. C. 3. *Consd. R. v. Ellis, Ex p. Amalgamated Engineering Union* (1921), 125 L. T. 397.

**3461. — —.]**—A rule in arrest of judgment was made absolute on the ground that the conviction being founded on a process subsequently made void by statute, could not be supported.—*R. v. MAWGAN (INHABITANTS)* (1838), 8 Ad. & El. 496; 3 Nev. & P. K. B. 502; 1 Will. Woll. & H. 438; 7 L. J. M. C. 98; 2 J. P. 517; 2 Jur. 841; 112 E. R. 927.

**Annotations:—***Fold. R. v. Denton* (1852), 18 Q. B. 761. *Distd. R. v. McLain, R. v. Barr* (1922), 91 L. J. K. B. 562. *Refd. Barrow v. Arnaud* (1846), 8 Q. B. 595; *Spencer v. Hooton, Spencer v. Newton & Pycroft, Briggs v. G. N. Ry., Parkinson v. Wigan Coal & Iron Co., Harrison v. Wigan Coal & Iron Co.* (1920), 37 T. L. R. 280.

**3462. — —.]**—After a statute has been repealed it cannot be acted upon in respect of a proceeding under it, commenced before its repeal, & in this respect there is no valid distinction between matters of form & substance. Where, therefore, between the finding of an indictment for non-repair of a road & plea pleaded, the statute upon which alone the indictment could be supported was repealed, & afterwards the indictment was proceeded with & a conviction obtained, the ct. arrested the judgment.—*R. v. DENTON (INHABITANTS)* (1852), Dears. C. C. 3; 18 Q. B. 761; 21 L. J. M. C. 207; 19 L. T. O. S. 216; 16 J. P. 471; 17 Jur. 453; 118 E. R. 287, C. C. R.

**Annotations:—***Distd. R. v. McLain, R. v. Barr* (1922), 91 L. J. K. B. 562. *Mentd. R. v. Houghton* (1853), 1 E. & B. 501.

**3463. — Defective indictment—Effect of arrest of judgment.]**—*VAUX'S CASE* (1590), 4 Co. Rep. 44 a; 76 E. R. 992.

**Annotations:—***Refd. Willmott v. Tiler* (1701), 12 Mod. Rep. 448; *Jones v. Givin* (1712), Gilb. 185; *R. v. Aylett* (1785), 1 Term Rep. 63; *R. v. Willey* (1813), 1 M. & S. 183; *R. v. Drury* (1849), 18 L. J. M. C. 189. *Mentd. Wrote v. Wiggles* (1591), 4 Co. Rep. 45 b; *R. v. Rhodes & Cole* (1703), 2 Ld. Raym. 886; *Gray v. R.* (1844), 11 Cl. & Fin. 427.

Where a prisoner was convicted on an indictment containing two counts, charging separate offences, & sentenced, & the evidence did not sustain the charge in one of the counts, but proved an offence of a different character, the judgment was arrested.—*It. v. HATHWAY* (1866), 6 All. 382.—**CAN.**

**not guilty.]**—where three persons have been jointly indicted for a conspiracy to murder, & severally pleaded not guilty, but have severed in their challenges, & the Crown has, consequently, proceeded to try one of such prisoners:—*Held:* upon conviction of such prisoner, judgment must follow, although the others have not been tried, & the possibility of the other prisoners being found not guilty, although such a verdict would be a ground for reversing the judgment, is not a sufficient reason for holding

**3464.** —[R. (1660), 5 State Tr. 947; Kel. 7; 84 E. R. 1056. Annotations:—*Refd.* R. v. Kinloch (1746), Fost. 16, 25. *Mentd.* Crosthwaite v. Gardner (1852), 18 Q. B. 640.

**3465.** —[Judgment will not be arrested if the ground of objection does not appear clearly upon the record.—FRANCE v. WHITE (1840), 1 Man. & G. 731; 1 Scott, N. R. 604; 4 Jur. 746; 133 E. R. 526; *sub nom.* FRAME v. WHITE, 9 L. J. C. P. 337.

**3466.** —[The want of a scierter is an objection to an indictment for false pretences. But many objections fatal on demurrer are not available in arrest of judgment as in that stage of the case it is considered that everything put in issue was proved on the trial (WIGHTMAN, J.).—R. v. BOWEN (1849), 13 Q. B. 790; 4 New Sess. Cas. 62; 19 L. J. M. C. 65; 13 L. T. O. S. 282; 13 Jur. 1045; 3 Cox, C. C. 483; 13 J. P. Jo. 394; 116 E. R. 1465.

**3467.** —[After verdict it cannot be objected in arrest of judgment that the name of the parish in which the house was situated, & the name of the owner of the house were not proved.—R. v. TIDD (1849), 13 J. P. 556.

**3468.** —Civil proceedings instituted.]—Deft. being brought up for judgment for an assault, & it appearing that the prosecutor had commenced an action, which was still depending, for the same assault, the ct. refused to pass any judgment except that deft. should give security for his good behaviour, he having used violent language towards the prosecutor in addressing the ct., & this, although, at the time of deft. being brought up, the prosecutor offered to discontinue the action.—R. v. MAHON (1836), 4 Ad. & El. 575; 111 E. R. 903.

**3469.** —Alleged perjury by witnesses at trial.]—Deft. was convicted upon the testimony of two witnesses upon an information for being concerned in unshipping uncustomed goods; it was moved on behalf of deft. that the ct. would stay entering judgment on the *postea*, because the witnesses were perjured & were intended to be prosecuted for perjury; the ct. refused to stay judgment on this allegation, there being no precedent of any such thing. But the chief baron seemed to think it might be done, if there had been an indictment of perjury actually found.—R. v. BELLING (1728), Bunb. 256; 145 E. R. 665.

**3470.** —[Indictment of witness for perjury no reason why the judgment should be postponed against the person convicted.—R. v. HAYDON (1763), 3 Burr. 1387; 97 E. R. 888.

**3471.** —[The ct. will not, after verdict, arrest a judgment on affidavit that a bill has been found against a witness indicted for perjury on a material point of evidence given by him on the trial.—A.-G. v. WOODHEAD (1815), 2 Price, 3; 146 E. R. 2.

Annotation:—*Refd.* Thurtell v. Beaumont (1823), 1 Bing. 339.

*C. Whether Presence of the Accused Necessary.*

**3472.** Where sentence of corporal punishment involved.]—Sentence of corporal punishment not

such judgment, & all the legal consequences of such conviction of such prisoner, irregular.—R. v. AHEARNE (1852), 6 Cox, C. C. 6.—IR.

*a. Discretion of Crown.*—Deft. was convicted of libel, & released from custody upon entering into a recognisance with sureties to appear & receive judgment when called upon. The private prosecutor obtained a rule nisi calling on deft. to show cause why he should not be ordered to appear at the assizes to receive judgment,

on the ground that he had failed to be of good behaviour since entering into the recognisances, by reason of his having published further libels:—*Held:* it is only upon motion of the Crown in such cases that the recognisance of deft. & his bail are estreated, or judgment moved against the offender.—R. v. YOUNG (1901), 21 C. L. T. 463; 2 O. L. R. 228.—CAN.

*t. After verdict.—Must be by court's own motion.*—Defts. at their trial upon indictments for murder

to be pronounced on a person in his absence.—ANON. (1774), Lofft, 400; 98 E. R. 715.

**3473.** —[R. v. BITHELL (1695), 1 Ld. Raym. 47; 91 E. R. 928; *sub nom.* R. v. BETHEL, 5 Mod. Rep. 19.

Annotations:—*Refd.* Re Hammond (1846), 9 Q. B. 92. *Mentd.* R. v. Mount (1875), 1 L. R. 6 P. C. 283.

**3474.** —[Judgment which involves corporal punishment cannot be given against any man in his absence.—R. v. DUKE (1697), Holt, K. B. 399; 1 Salk. 400; 90 E. R. 1120; *sub nom.* R. v. HARRIS & DUKE, 1 Ld. Raym. 267; Skin. 684; Comb. 447; 12 Mod. Rep. 156.

Annotation:—*Refd.* R. v. Templeman (1702), 1 Salk. 55.

**3475.** —[After pleading guilty to an indictment, deft. may give evidence that justifies the fact in mitigation of punishment.

Judgment for a fine may be given in deft.'s absence upon an undertaking by a stranger but not for any corporal punishment.

Upon submitting to a fine after confessing indictment, affidavits may be read to prove that the prosecutor made the assault; otherwise after conviction.—R. v. TEMPLEMAN (1702), 7 Mod. Rep. 40; 1 Salk. 55; 87 E. R. 1081.

**3476.** —[Personal appearance will not be dispensed with on giving judgment, where the sentence may possibly be a corporal punishment.—R. v. HANN (1765), 3 Burr. 1786; 97 E. R. 1099.

Annotation:—*Mentd.* R. v. Davie (1781), 2 Doug. K. B. 588.

**3477.** Where sentence of corporal punishment not involved.]—It is not a matter of course to dispense with deft.'s presence upon giving judgment, where no corporal punishment is to be inflicted.—R. v. HARWOOD (1738), Andr. 152; 2 Stra. 1088; 95 E. R. 340.

**3478.** Where fine only inflicted.]—R. v. TEMPLEMAN, No. 3475, *ante*.

**3479.** —[R. v. WOODWARD (1831), 4 C. & P. 540, n.

**3480.** —[We do not think it necessary to postpone sentence because this is not a case for imprisonment; a moderate fine will meet the justice of the case (*per Cur.*).—R. v. KINGLAKE (1870), 34 J. P. Jo. 327.

**3481.** Felony.]—R. v. HALES, No. 3090, *ante*.

**3482.** In misdemeanour—Special causes for absence.]—The ct. cannot compel a prosecutor to pay the expense of bringing deft. in custody up to receive judgment for a misdemeanour; but if deft. is too poor to come up at his own expense, they will pass judgment upon him in his absence.—R. v. BOLTZ (1826), 5 B. & C. 334; 8 Dow. & Ry. K. B. 65; 4 L. J. O. S. K. B. 262; 108 E. R. 125.

**3483.** —[A justice convicted of a misdemeanour in his office, must attend in person to receive the judgment of the ct.; but upon an affidavit of age & infirmity, the ct. will dispense with his personal attendance.—R. v. CONSTABLE (1826), 3 B. & Ad. 659, n.; 7 Dow. & Ry. K. B. 663; 3 Dow. & Ry. M. C. 488; 110 E. R. 241.

**3484.** —[R. v. RYDER BURTON (1874), 38 J. P. Jo. 758.

**3485.** Indictment removed to Queen's Bench Division—Judgment for abatement of nuisance.]—

made application to the judge to reserve & state cases for the opinion of the ct. No objection was taken to the charge to the jury. Verdict of guilty in each case. After verdict but before sentence in the case of L. counsel for accused stated he wished to move for a reserved case & also leave to appeal:—*Held:* after verdict any reservation of a case must be of the ct.'s own motion.—R. v. PERTELLA, R. v. LEE CHUNG (1908), 9 W. L. R. 241.—CAN.

**Sect. 7.—The hearing: Sub-sect. 17, C., D., E. & F.]**

Where deft. indicted for a nuisance in obstructing a navigable river, allows judgment to go by default, & is under no recognisances to appear in the Queen's Bench for judgment, the ct. will not in his absence give judgment that the nuisance be abated, though notice has been left at his residence of the intention of the Crown to pray for judgment; the proper course being to sue out a writ of *capias* & proceed to outlawry.—*R. v. CHICHESTER* (1851), 17 Q. B. 504; 2 Den. 458; 18 L. T. O. S. 138; 15 J. P. 784; 15 Jur. 1131; 117 E. R. 1375, C. C. R.

*Annotation:—*Refd. *R. v. Williams* (1870), 18 W. R. 806.

**3486. — Discretion of court.]—***R. v. WILLIAMS* (1870), 18 W. R. 806; 34 J. P. Jo. 307.

**D. Evidence to aid Determination of Sentence.**

**3487. Whether admissible—On plea of guilty.]—**When prisoner pleads guilty the judge may before passing sentence, in order to form an opinion as to the degree of culpability, hear evidence as to the motive which induced prisoner to commit the offence; but where the offence is, by statute, punishable by a more severe sentence if accompanied by circumstances of aggravation, such circumstances may be taken into account in passing sentence only if they have been charged in the indictment & be proved to the satisfaction of the jury or admitted by a plea of guilty.—*R. v. BRIGHT*, [1916] 2 K. B. 441; 85 L. J. K. B. 1638; 115 L. T. 488; 80 J. P. 407; 32 T. L. R. 600; 25 Cox, C. C. 540; 12 Cr. App. Rep. 69, C. C. A.

*Annotation:—*Refd. *R. v. Wheeler*, [1917] 1 K. B. 283.

**3488. — —.]—**Where prisoner pleads guilty to a misdemeanour at sessions of oyer & terminer, such as those of the Central Criminal Ct., he cannot be heard either by himself or his counsel in mitigation of punishment. Any facts which it is wished to convey to the ct. with that object must be in the form of affidavits. If in such affidavits irrelevant & scandalous matter be contained, the ct. will order them to be removed from the files of the ct.—*R. v. GREGORY* (1843), 1 Car. & Kir. 228; 2 L. T. O. S. 193; 1 Cox, C. C. 31.

**3489. — —.]—**When prisoner pleads guilty to an offence, the circumstances of which are not fully disclosed in the indictment, the ct. will require them to be proved before passing sentence.—*R. v. GUMBRECHT* (1843), 1 L. T. O. S. 623.

**3490. — Police evidence—Written report.]—**After conviction, the judge may receive from a police officer a written report of prisoner's antecedents.—*R. v. M'GARRY* (1908), 1 Cr. App. Rep. 193, C. C. A.

**3491. — — Strictness of proof—Aggravation of offence.]—**An officer of the ct. ought not to give informal information to the ct. in aggravation of deft.'s offence.—*R. v. KENDRICK* (1911), 6 Cr. App. Rep. 117, C. C. A.

**3492. — — Challenge of statement—Prevention of Crimes Act, 1903 (c. 59), s. 10 (5).]**—The practice of the police giving the ct., when about to pass sentence, all the information they possess about deft., though it may be hearsay or not strictly proved, is legal, & is recognised by the above Act.

If prisoner challenges any statement it is the duty of the judge to inquire into it; if necessary he should adjourn the matter, & if it is of sufficient

importance he may require legal proof of it. Or he may ignore it, & if he does so he should state that he is not taking it into consideration. If prisoner does not challenge the statements, the ct. may take them into consideration (*LORD ALVERSTONE, C.J.*).—*R. v. CAMPBELL* (1911), 75 J. P. 216; 27 T. L. R. 256; 55 Sol. Jo. 273; 6 Cr. App. Rep. 131, C. C. A.

**3493. — — —.]—**Applt. applied for leave to appeal against sentence, & the application was referred to the full ct. because of a statement made by a police sergeant to which attention had been drawn by applt.

Police officers ought to be most careful in their statements, but this statement went further than anything for which justification could be found in the documents. A statement made to the ct. by the police should be precise & accurate (*LORD READING, C.J.*).—*R. v. STRATTON* (1914), 10 Cr. App. Rep. 35, C. C. A.

**3494. — — —.]—**When police officers give evidence after conviction for the information of the ct. as to the antecedents of prisoner, it is their bounden duty to exercise the most scrupulous care to ensure the accuracy of their statements.—*R. v. ELLEY* (1921), 85 J. P. 144; 15 Cr. App. Rep. 143, C. C. A.

**3495. — Sentence must be limited to charge proved or admitted—Acts subsequent to the trial may be taken into consideration.]—**Where deft. is brought up for judgment, his acts subsequent to the trial may be considered, either by way of aggravating or mitigating the punishment. But in such cases the ct. will take care not to inflict a greater punishment than the principal charge itself will warrant.—*R. v. WITHERS* (1789), 3 Term Rep. 428; 100 E. R. 657.

**3496. — — —.]—***R. v. BRIGHT*, No. 3487, ante.

**3497. Counsel on both sides may be heard.]—**When any deft. shall be brought up for sentence on any indictment or information after verdict, the affidavits produced shall be first read & then any affidavits produced on the part of the prosecution shall be read, after which counsel for deft. shall be heard, & lastly counsel for the prosecution.

When any deft. shall be brought up for sentence after judgment by default the prosecutor's affidavits shall be first read then the deft.'s affidavits; after which counsel for the prosecution shall be heard, & lastly counsel for deft.

If no affidavits shall be produced, counsel for deft. shall be first heard, & then counsel of the prosecution (*LORD KENYON, C.J.*).—*R. v. BUNTS* (1788), 2 Term Rep. 683; 100 E. R. 368.

*Annotation:—*Refd. *R. v. Despard* (1828), 6 L. J. O. S. M. C. 102.

**3498. — —.]—**Where some defts. suffer judgment by default, & others are convicted, after trial, all defts. must begin in addressing the ct. touching the punishment; & the prosecutor has the reply.—*R. v. DESPARD* (1828), 2 Man. & Ry. K. B. 406; 1 Man. & Ry. M. C. 444; 6 L. J. O. S. M. C. 102; *sub nom.* *R. v. SUTTON*, 7 Ad. & El. 594, n.; 112 E. R. 594.

*Annotation:—*Mentd. *Mansell v. R.* (1857), 8 E. & B. 54.

**3499. — —.]—**Where deft., having pleaded guilty to an indictment, is brought up for judgment, counsel for the Crown is to be heard before counsel for the deft.; & the affidavits in aggravation are to be read before the affidavits in mitigation.—

R. v. DIGNAM (1837), 7 Ad. & El. 593; 112 E. R. 593.

*Annotation* :—*Mentd.* R. v. Holbeck Overseers (1851), 16 Q. B. 404.

**3500. Whether evidence by affidavit admissible.**—R. v. BUNTS, No. 3497, *ante*.

**3501.** ———.]—R. v. ELLIS (1826), 6 B. & C. 145; 9 Dow. & Ry. K. B. 174; 5 L. J. O. S. M. C. 25.

*Annotations* :—*Mentd.* R. v. Salisbury (1831), 5 C. & P. 155; R. v. Westwood (1831), 4 C. & P. 547; R. v. Holden (1833), 5 B. & Ad. 347; R. v. Mansfield (1841), Car. & M. 140; R. v. Palmer (1856), 2 Jur. N. S. 235; R. v. Wright (1858), 7 Cox, C. C. 413; R. v. Ball, R. v. Ball, [1911] A. C. 47.

**3502.** ———.]—R. v. DIGNAM, No. 3499, *ante*.

**3503.** ——— **Deponent under control of defendant.**]

—R. v. ARCHER (1788), 2 Term Rep. 205, n.; 100 E. R. 112.

*Annotations* :—*Consd.* R. v. Wilson (1791), 4 Term Rep. 487. *Distd.* R. v. Pinkerton (1802), 2 East, 357. *Mentd.* R. v. Willett (1795), 6 Term Rep. 294.

**3504.** ———.]—R. v. PINKERTON (1802), 2 East, 357; 102 E. R. 405.

**3505.** ——— **In mitigation of punishment.**]

R. v. TEMPLEMAN, No. 3475, *ante*.

**3506.** ——— **When facts should have been proved at the trial.**]

—R. v. ROCH (1755), Say. 233; 96 E. R. 863.

**3507.** ———.]—R. v. WILSON (1791), 4 Term Rep. 487; 100 E. R. 1134.

**3508.** ———.]—R. v. HALPIN (1829), 9 B. & C. 65; 4 Man. & Ry. K. B. 8; 2 Man. & Ry. M. C. 63; 7 L. T. O. S. M. C. 75; 109 E. R. 25.

**3509.** ———.]—R. v. COX (1831), 4 C. & P. 538.

**3510.** ———.]—R. v. LLOYD (1832), 4 B. & Ad. 135; 2 L. J. K. B. 214; 110 E. R. 406.

*Annotations* :—*Refd.* R. v. Nott (1843), 4 Q. B. 768. *Mentd.* R. v. Castro (1874), L. R. 9 Q. B. 350.

**3511.** ———.]—R. v. GREGORY, No. 3488, *ante*.

**3512.** ——— **Affidavit in aggravation of offence.**]

—R. v. TURNER (1718), 1 Stra. 139; 93 E. R. 435.

**3513.** ———.]—R. v. SHARPNESS (1786), 1 Term Rep. 228; 99 E. R. 1066.

**3514.** ———.]—R. v. ARCHER, No. 3503, *ante*.

**3515.** ———.]—R. v. WILSON, No. 3507, *ante*.

**3516.** ———.]—R. v. MORGAN (1809), 11 East, 457; 103 E. R. 1080.

#### *E. By whom Judgment pronounced.*

**3517. Death of judge since trial.**—R. v. SHIPTON (1730), 1 Barn. K. B. 401; 94 E. R. 270.

**3518.** ———.]—Prisoner was convicted at borough quarter sessions, but sentence was postponed pending the hearing of an appeal to the C. C. A. The appeal was dismissed. The recorder having died before the next quarter sessions :—*Held* : the new recorder had jurisdiction to pass sentence upon prisoner.—R. v. PEPPER, R. v. PLATT, [1921] 3

K. B. 167; 90 L. J. K. B. 1152; 85 J. P. 264; 37 T. L. R. 863; 65 Sol. Jo. 715; 16 Cr. App. Rep. 12, C. C. A.

*Annotation* :—*Mentd.* R. v. Hales (1923), 17 Cr. App. Rep. 193.

**3519. High treason—Hostilities outside realm.**]

—R. v. LYNCH (1903), as reported in 67 J. P. 41; 19 T. L. R. 163.

*Annotations* :—*Mentd.* R. v. Casement, [1917] 1 K. B. 98; R. v. Middlesex Regiment Commanding Officer, 30th Battalion, *Ex p.* Freyberger, [1917] 2 K. B. 129; Tingley v. Müller, [1917] 2 Ch. 144; *Re* Chamberlain's Settlement, [1921] 2 Ch. 533; *Fasbender v. A.-G.*, *Kramer v. A.-G.*, [1922] 2 Ch. 850.

#### *F. Form and Record of Judgment.*

**3520. Time & place of punishment—Not part of sentence.**]

—The time & place of execution of a convicted felon is no part of the sentence.—DOYLE & VALLINE'S CASE (1768), 1 Leach, 67.

**3521.** ———.]—It is not the ordinary practice of any ct. of criminal jurisdiction, to make the day upon which execution of any corporal punishment is to be done, a part of the original sentence. The time of inflicting such punishment is usually left either to the discretion of the officer to whom the execution of the sentence belongs, or is appointed by a particular rule of the ct. or statute which awards the punishment.—ATKINSON v. R. (1785), 3 Bro. Parl. Cas. 517; 1 E. R. 1471.

*Annotations* :—*Mentd.* R. v. Holt (1793), 5 Term Rep. 436; R. v. Gregory (1847), 16 L. J. Q. B. 281.

**3522.** ———.]—In murder it is not essential to award the day of execution in the sentence, the statute in that respect being only directory; & if a wrong day is awarded it will not vitiate the sentence if the mistake is discovered & set right during the assizes.—R. v. WYATT (1812), Russ. & Ry. 230, C. C. R.

**3523. Consecutive sentences may be awarded—General rule.**]

—Consecutive sentences should be imposed sparingly.—R. v. CLARKE (1913), 9 Cr. App. Rep. 116, C. C. A.

**3524. Accused already serving one term.**]

—A judgment of imprisonment against a deft. to commence from & after the determination of an imprisonment to which a prisoner has been already sentenced for another offence is good in law.—WILKES v. R. (1769), 4 Bro. Parl. Cas. 360; Wilm. 322; 2 E. R. 244; *sub nom.* R. v. WILKES, 4 Burr. 2527; 19 State Tr. 1075, H. L.

*Annotations* :—*Consd.* Castro v. R. (1881), 6 App. Cas. 229.

*Refd.* Butt v. Conant (1820), 1 Brod. & Bing. 548; O'Connell v. R. (1844), 11 Cl. & Fin. 155; R. v. Cuthbush (1807), L. R. 2 Q. B. 379; R. v. Martin, [1911] 2 K. B. 450.

*Mentd.* Entick v. Carrington (1765), 2 Wils. 275; Barrington v. R. (1789), 3 Term Rep. 499; Steel v. Sowerby (1795), 6 Term Rep. 171; Thellusson v. Woodford (1798), 4 Ves. 227; Wood v. Plant (1807), 1 Taunt. 44; Beauchamp v. Tomkins (1810), 3 Taunt. 141; Moody v. Stracey (1812), 4 Taunt. 588; Stockdale v. Hansard (1839), 2 Per. & Dav. 1; Gray v. R. (1844), 6 State Tr. N. S. 117; *Re* Reay (1847), 8 L. T. O. S. 476; Douglas v. R. (1848), 12 Jur. 974; Wray v. Toke (1848), 17 L. J. M. C. 183; Wright v. R. (1849), 14 Q. B. 148; Eastern Archipelago Co. v. R. (1853), 2 E. & B. 856; *Ex p.* Newton (1855), 4 E. & B.

judge at a subsequent assizes has jurisdiction to pronounce sentence upon a  
assizes, as well in misdemeanours.—  
R. v. CHARLETON (1839), 2 Jebb & S. 54; 2 L. L. R. 50.—*IR.*

**e. Court of Criminal Appeal.**]

—In a case where a prisoner pleaded guilty to an indictment for larceny, which set forth a previous conviction for felony, & the judge, feeling doubts as to his power to pass sentence of transportation, reserved the question for the consideration of the Ct. of Criminal Appeal, without sentencing prisoner :—*Held* : that the ct. of criminal appeal had no jurisdiction to entertain such a case.—R. v. BYRNE (1850), 1 I. C. L. R. 100.—*IR.*

#### PART VII. SECT. 7, SUB-SECT. 17.— E.

**b. Capital sentence—Court of King's Bench.**]

—A criminal convicted at a ct. of oyer & terminer of a capital felony may be brought up to the Ct. of K. B. for sentence.—R. v. KENNEY (1836), 5 O. S. 317.—*CAN.*

**c. Another judge of same court.**]

—Whereas an accused is convicted before one judge of the Sessions with jurisdiction to try indictable offences under Criminal Code, Part XVIII., & before sentence is pronounced, the judge becomes incapacitated or unable for any reason to pronounce sentence, another judge of the same court within the same territorial district, may impose the sentence.—R. v.

DESMARAIS (1922), Q. R. 34 S. C. 513; 40 Can. Crim. Cas. 214.—*CAN.*

**d. Next judge of assize.**]

—Prisoner was found guilty at the assizes, but the judge who presided at the trial did not pronounce or record sentence, but bound the prisoner by recognisance to appear & receive sentence at the ensuing assizes. The next judge of assize entertaining doubts as to his jurisdiction, the offence not being a capital felony, declined to pronounce sentence. Prisoner was, thereupon, bound by recognisance to appear in the Ct. of Q. B., & receive sentence. The proceedings having been removed by *certiorari* :—*Held* : next going judge of assize had jurisdiction to pronounce sentence; a

*Sect. 7.—The hearing: Sub-sect. 17, F. & G.]*

869; *R. v. Charlesworth* (1861), 1 B. & S. 460; *Castro v. Murray* (1875), 32 L. T. 675; *Bradlaugh v. R.* (1878), 3 Q. B. D. 607; *Hines v. Hines & Burdett*, [1918] P. 364; *Gibbs v. Gibbs & Heathcote* (1920), 123 L. T. 206.

**3525. — Accused found guilty on more than one charge.]—***R. v. WILLIAMS* (1790), 1 Leach, 529, C. C. R.

*Annotation:—**Refd. R. v. Castro* (1880), 5 Q. B. D. 490.

**3526. — —.]—**In an indictment for perjury, C. was charged in one count with committing the offence in an action in the Ct. of Common Pleas, & in another count with the like offence in a Chancery suit brought by him to prevent the setting up of certain defences. C. was tried at bar, & the jury found him guilty of the offences "charged in & by both counts of the indictment," whereupon he was sentenced to the maximum term of seven years' penal servitude on each count, the second term to commence at the expiration of the first:—*Held*: (1) the verdict was a sufficient finding of guilty on each count; (2) 2 Geo. 2, c. 25, does not necessarily require the infliction of a sentence under the previous law as well as that authorised by the Act; (3) the perjury committed in the Chancery suit was a separate & distinct offence from that committed in the action at common law; (4) separate judgments might be awarded upon several counts in one indictment charging distinct misdemeanours; & successive maximum terms of penal servitude might be inflicted in respect of each count.—*CASTRO v. R.* (1881), 6 App. Cas. 229; 50 L. J. Q. B. 497; 44 L. T. 350; 45 J. P. 452; 29 W. R. 669; 14 Cox, C. C. 546, H. L.; *affg. S. C. sub nom. R. v. CASTRO* (1880), 5 Q. B. D. 490, C. A.

*Annotations:—**Refd. R. v. Thompson*, [1914] 2 K. B. 99. *Mentd. R. v. Cox & Railton* (1884), 1 T. L. R. 181; *Dixon v. Farrer* (1886), 17 Q. B. D. 658.

**3527. — — Effect of reversal of judgment as to one charge.]—**Judgment was given that on each of four counts of an information deft. be imprisoned; on the first count "for the space of two months now next ensuing;" on the second count, "for the further space of two months, to be computed from & after the end & expiration of his imprisonment" for the offence mentioned in the first count; on the third count, for the further space of two months, to be computed in like manner from the end of the imprisonment on the second count; & on the fourth count, for the further space of two months, to be computed in like manner from the end of the imprisonment on the third count. The third count was adjudged on error to be insufficient:—*Held*: the sentence on the fourth count was not thereby invalidated, & the imprisonment on it was to be computed from the end of the imprisonment on the second count.—*GREGORY v. R.* (1850), 15 Q. B. 974; 19 L. J. Q. B. 766; 15 Jur. 79; 5 Cox, C. C. 252; 117 E. R. 326, Ex. Ch.

*Annotation:—**Refd. R. v. Castro* (1880), 5 Q. B. D. 490.

**3528. Judgment should be for each separate charge.]—**On a conviction of two separate offences of uttering counterfeit coin, in two counts, one judgment for two years' imprisonment under 2 Will. 4, c. 34, s. 7, is bad.—*R. v. ROBINSON* (1834), 1 Mood. C. C. 413, C. C. R.

*Annotations:—**Consd. Castro v. R.* (1881), 6 App. Cas. 229. *Refd. R. v. Clarke* (1853), 22 L. J. M. C. 135.

**PART VII. SECT. 7, SUB-SECT. 17.—**  
**F.**

**1. Effect of general judgment on several charges—Where all except one withdrawn.]—**At the trial of prisoner on an indictment charging in separate

counts burglary & larceny, the former charge was withdrawn. The jury returned a general verdict of guilty, which was entered up:—*Held*: as the judge had a note of the withdrawal of the count for burglary, & of a direction by him to the jury that the

**3529. — Identical concurrent sentences.]—**An indictment contained four counts for extortion, & three counts for uttering forged licences. The jury having returned a verdict of guilty upon all the counts, the ct. passed sentence of the same identical term of imprisonment upon each count separately.—*R. v. CARTER* (1845), 4 L. T. O. S. 352; 9 Jur. 178; 9 J. P. Jo. 100.

**3530. Effect of general judgment on several charges—Where some counts are not good counts.]—***O'CONNELL v. R.*, No. 3316, *ante*.

**3531. — —.]—**Where upon an indictment containing nine counts, the ct. of quarter sessions gave a general judgment that deft. be transported beyond the seas for the term of fourteen years; & a writ of error was brought on the ground that some of the counts were bad:—*Held*: the fourteen years must be taken to be the same fourteen years upon each count, & under 11 & 12 Vict. c. 78, s. 5, the Ct. of Error, if there were one good count in the indictment, would be bound either to pronounce the judgment which ought to have been pronounced in the ct. below, or to remit the record to the sessions, in order that that ct. should pronounce the proper judgment.—*HOLLOWAY v. R.* (1851), 17 Q. B. 317; 2 Den. 287; 17 L. T. O. S. 182; 15 J. P. 629; 117 E. R. 1300; *sub nom. R. v. HOLLOWAY*, 15 Jur. 825.

*Annotations:—**Refd. Latham v. R.* (1864), 5 B. & S. 635; *R. v. Noel* (1914), 10 Cr. App. Rep. 255.

**3532. — — In felony.]—**The first count of an indictment charged a stealing in the dwelling-house of D., above the value of £5. The second count charged simple larceny of the monies of D., on the day & year aforesaid. The jury process was to try "whether the prisoners are guilty of the felony aforesaid," & the verdict was "that they are guilty of the felony aforesaid." The ct. adjudged the prisoners to be transported for ten years:—*Held*: (1) the indictment charged two felonies, & in that respect was good; (2) if the two counts necessarily charged the same offence, the indictment would have been bad in arrest of judgment; (3) the word "felony" is not *nomen collectivum*; (4) by the verdict the prisoners were found guilty upon one count only, not saying which; (5) the verdict was, therefore, bad for uncertainty; (6) the judgment was also erroneous, not being warranted by the last count, & the ct. not being at liberty to apply the judgment to that part of the record, *viz.* the first count, which would support it.—*CAMPBELL v. R.* (1847), 11 Q. B. 814; 2 New Mag. Cas. 354; 17 L. J. M. C. 89; 10 L. T. O. S. 396; 12 Jur. 117; 2 Cox, C. C. 463; 116 E. R. 680, Ex. Ch.; *affg.* (1846), 11 Q. B. 799.

*Annotations:—**Refd. Ryalls v. R.* (1848), 11 Q. B. 781; *R. v. Charlesworth* (1861), 1 B. & S. 460; *Winsor v. R.* (1866), L. R. 1 Q. B. 289; *It. v. Castro* (1880), 49 L. J. Q. B. 747; *R. v. Pierce* (1887), 56 L. J. M. C. 85; *R. v. Paul* (1890), 25 Q. B. D. 202; *Crane v. Public Prosecutor*, [1921] 2 A. C. 299.

**3533. — — In misdemeanour.]—**The first count of an indictment charged an assault with intent to ravish; the second a common assault. The jury found deft. guilty of the misdemeanour & offence in the indictment specified, & the ct. adjudged him for the misdemeanour, to be imprisoned two years, & kept to hard labour:—*Held*: the word "misdemeanour" was *nomen collectivum*, & the finding of the jury, therefore,

only question for them was whether prisoner was guilty of larceny, he could subsequently order the entry of the verdict to be amended by adding the words "of larceny."—*It. v. O'CONNOR* (1883), 1 N. Z. L. R. C. A. 274.—N.Z.



was in effect that deft. was guilty of the whole matter charged by the indictment, & consequently, that the judgment was warranted by the verdict.—*R. v. POWELL* (1831), 2 B. & Ad. 75; 9 L. J. O. S. M. C. 71; 109 E. R. 1071.

*Annotations*.—*Consd.* O'Connell v. R. (1844), 11 Cl. & Fin. 155. *Refd.* Campbell v. R. (1847), 11 Q. B. 814; Ryalls v. R. (1849), 11 Q. B. 795; Castro v. R. (1881), 6 App. Cas. 229.

**3534.** ————*Ryalls v. R.*, No. 2006, *ante*.

**3535. Record of sentence—Reference to statute unnecessary.**—It is not necessary in recording sentence to refer to the statute which gives the punishment.—*MURRAY v. R.* (1845), 7 Q. B. 700; 14 L. J. Q. B. 357; 5 L. T. O. S. 241; 10 J. P. 21; 9 Jur. 596; 1 Cox, C. C. 202; 115 E. R. 653.

#### G. Alteration of Judgment.

**3536. Alteration of sentence by court of trial—Before termination of sessions or term.**—Sessions may alter and set aside their own orders the same sessions.—*ST. ANDREWS, HOLBORN (INHABITANTS) v. ST. CLEMENT DANES (INHABITANTS)* (1704), 2 Salk. 606; Holt, K. B. 511; 91 E. R. 514; *sub*

**3535 i. Record of sentence—Reference to statute unnecessary.**—An indictment for subornation of perjury concluding "against the peace," does not render erroneous a sentence awarding a statutable punishment, subornation of perjury remaining a common law offence, & the statute merely regulating the punishment.—*R. v. ROWE* (1830), 3 Ir. T. Rec. 1st ser. 153.—*IR.*

**g. Fine & imprisonment in alternative.**—A conviction adjudging deft. to be imprisoned for twenty days, or pay £5 & costs, is bad.—*R. v. WORTMAN* (1858), 4 All. 73.—*CAN.*

**h.** ————*Plif.* was charged with lewd conduct & keeping a room or house of prostitution, & was fined \$50, & in event of non-payment, ordered to be imprisoned two months. There was evidence that the magistrate ordered him into custody, where he remained till the fine was paid, but this was not put to the jury.—*Held*: the conviction in the alternative was bad, & the imprisonment thereunder unlawful.—*MARTER v. PRYOR* (1883), 16 N. S. R. (4 R. & G.) 498.—*CAN.*

**k. Ownership of property not specified.**—A conviction for fraudulently taking away lumber, describing it as "the property of another," is defective; it should state the name of the owner.—*Ex p. HOLDER* (1866), 6 All. 338.—*CAN.*

**l. Offence incorrectly described.**—The conviction charged that prisoner did "unlawfully & maliciously cut & wound one Mary Kelly, with intent then & there to do her grievous bodily harm:—*Held*: the addition of the words "with intent to do grievous bodily harm" did not vitiate the conviction, & prisoner might be lawfully convicted of the statutory misdemeanour of malicious wounding.—*R. v. BOUCHER* (1879), 8 P. R. 20; 4 A. R. 191.—*CAN.*

**m. Venue of crime not stated.**—Prisoner was convicted of keeping a house of ill-fame.—*Held*: the conviction was bad on its face for uncertainty in not naming a place where the offence was committed.—*R. v. CYR* (1887), 12 P. R. 24.—*CAN.*

**n. Omission of adjudication of forfeiture of fine imposed.**—Prisoner was convicted of keeping a house of ill-fame.—*Held*: it was defective because it did not contain an adjudication of forfeiture of the fine imposed.—*R. v. CYR* (1887), 12 P. R. 24.—*CAN.*

**o. Right of accused to copy of**

*record of acquittal.*—The books, indictments, & records of the ct. of quarter sessions, which are in the hands of the clerk of the peace, are public documents which every one who is interested has a right to see; & a deft. who has been tried & acquitted at the sessions is entitled to a copy of the record of acquittal, & it is not necessary to obtain the fiat of the A.-G. therefor.—*R. v. SCULLY, SCULLY v. PETERS* (1901), 21 C. L. T. 432; 4 O. L. R. 394.—*CAN.*

**p. Warrant of commitment—Certified copy of sentence sufficient.**—The certified copy of sentence is sufficient warrant for the imprisonment of a convict in the penitentiary, & it is not necessary that it should contain every essential averment of the conviction.—*SMITHMAN v. R.* (1904), 35 S. C. R. 490.—*CAN.*

**q.** ————*Necessity for statement of time from which imprisonment runs.*—A warrant of commitment need not state the time from which the term of imprisonment shall begin to run, as terms of imprisonment commence on & from the day of the passing of the sentence.—*Ex p. SMITHMAN* (1904), 35 S. C. R. 189.—*CAN.*

**r.** ————*Necessity for description of venue.*—Where the venue is mentioned in the margin of a commitment, in the case of an offence which does not require local description, it is not necessary that the warrant should describe the place where the offence was committed.—*Ex p. SMITHMAN* (1904), 35 S. C. R. 189.—*CAN.*

**s.** ————*Incomplete.*—The warrant of commitment stated that the deft. "did steal a certain waggon," etc., without alleging the absence of colour of right, & without laying in any person the property in the waggon:—*Held*: that the warrant contained a sufficiently definite statement of the alleged crime of theft.—*R. v. LEET* (1900), 20 C. L. T. 46.—*CAN.*

**t. Insufficient description of those convicted.**—A conviction of "Roske & Messenger," even if meant to be of two individuals named, is bad because of insufficiency of description of those convicted.—*Re ROSKE & MESSENGER*, [1919] 1 W. W. R. 341.—*CAN.*

**a. Ownership of property incorrectly stated.**—*Semble*: a conviction is not invalid because it convicts accused for stealing goods, "the property of Sheldon's Store," the goods being stolen on the premises called

*nom. ST. CLEMENT PARISH v. ST. ANDREW, HOLBORN PARISH*, 6 Mod. Rep. 287.

*Annotations*.—*Refd.* *R. v. General Assessment Sessions JJ.* (1887), Ryde Rat. App. 268. *Mentd.* Whitaker v. Wisbey (1852), 12 C. B. 44.

**3537.** ————*R. v. PRICE* (1805), 6 East, 323; 2 Smith, K. B. 525; 102 E. R. 1310.

*Annotation*.—*Refd.* *R. v. Castro* (1880), 5 Q. B. D. 490.

**3538.** ————*The justices at sessions may alter their judgment during the continuance of the sessions.*—*R. v. LEICESTERSHIRE JJ.* (1813), 1 M. & S. 442; 105 E. R. 165.

*Annotations*.—*Mentd.* Penney v. Slade (1839), 5 Bing. N. C. 319; *R. v. Grant* (1849), 13 Jur. 1026; *R. v. Walsall Overseers* (1878), 3 Q. B. D. 457; *Ex p. Evans*, [1894] A. C. 16.

**3539.** ————*A record will not be amended after the term in which it has been filed.*—*ANON.* (1824), M'Cle. 251; 148 E. R. 106.

**3540.** ————*Clerical error in record.*—*ANON.* (1837), 1 J. P. 187, n.

**3541.** ————*The ct. of trial has power to amend a clerical error in the order of commitment.*—*R. v. WOOLLEY* (1909), 3 Cr. App. Rep. 57, C. C. A.

**3542. Alteration of sentence by superior court—Erroneous judgment.**—A sentence depending upon

Sheldon's Store but being owned by Sheldon's Storage & Commission Co., Ltd.—*IT. v. PAISCH* (1920), 2 W. W. R. 80; 32 Can. Crim. Cas. 316.—*CAN.*

**b. Alternative conviction—Doubt as to guilt of several offences accused is guilty of.**—Judgment in the alternative cannot be passed in cases in which it is doubtful whether accused is guilty of any one of the several offences charged, but where it is doubtful of which of those offences he is guilty, such an alternative conviction is illegal.—*R. v. JAMURHA* (1875), 7 N. W. 137.—*IND.*

**c. Solitary confinement—Only when authorised by statute.**—Sentence of solitary confinement cannot be pronounced upon a prisoner, except in a case where it is expressly authorised by statute.—*HOLLAND v. R.* (1840), 2 Jebb & S. 357; 2 I. L. R. 335; 1 Cr. & Dix 545.—*IR.*

**d. Omission of word "unlawfully."**—The omission of the word "unlawfully" is no objection to a conviction where the word is not used as part of the description of the offence in the statute creating it.—*R. v. MELLISH, Re REID*, 2 J. R. 127.—*N.Z.*

**e. Date of offence not specifically stated.**—*Semble*: where the offence is a continuing one a conviction is not bad merely because it does not state specifically the date of the offence.—*Re WHITE* (1907), 26 N. Z. L. R. 1268.—*N.Z.*

#### PART VII. SECT. 7, SUB-SECT. 17.—G.

**3536 i. Alteration of sentence by court of trial—Before termination of sessions or term.**—When the judge omitted, in pronouncing judgment on a conviction for murder, to order that the bodies of prisoners should be buried within the precincts of the gaol as directed by the 4 & 5 Will. IV. c. 26, s. 2; but, on a subsequent day, on ruling the book at the close of the same assizes, in the absence of prisoners, ordered the clause in question to be inserted.—*Held*: the sentence was illegal, notwithstanding 6 & 7 Will. IV. c. 30, s. 2.—*R. v. HARTNETT & CASEY* (1840), Jebb Cr. & Pr. Cas. 302.—*IR.*

**3542 i. Alteration of sentence by superior court—Erroneous judgment.**—*F.* was indicted for a previous conviction & subsequent felony, convicted, & sentenced to five years' penal servitude. Upon writ of error by the



*Sect. 7.—The hearing: Sub-sect. 17, G. & H. Part VIII. Sect. 1: Sub-sect. 1.]*

time, passed for a period longer than the law authorises, cannot be reduced so as to carry it into effect for the prescribed legal time.

Nor can the judgment in such a case, when impeached upon error, be remitted to the inferior ct. to amend; it must be reversed.—*R. v. ELLIS* (1826), 5 B. & C. 395; 8 Dow. & Ry. K. B. 173; 4 Dow. & Ry. M. C. 29; 5 L. J. O. S. M. C. 1; 108 E. R. 147.

*Annotations:—Folld. R. v. Bourne* (1837), 7 Ad. & El. 58; *R. v. Silversides* (1842), 3 Q. B. 406; *Drury v. R.* (1849), 3 Cox, C. C. 252. *Refd. Campbell v. R.* (1847), 11 Q. B. 814.

**3543.** ———.]—An erroneous judgment cannot be remitted by the Ct. of K. B. to the sessions to be corrected, nor can the former ct. pronounce another.—*R. v. BOURNE* (1837), 7 Ad. & El. 58; 6 L. J. M. C. 129; 112 E. R. 393; *sub nom. BOURNE v. R.*, 2 Nev. & P. K. B. 248; Nev. & P. M. C. 339; Will. Woll. & Dav. 455; 1 J. P. 186; 1 Jur. 542.

*Annotations:—Consd. Holloway v. R.* (1851), 17 Q. B. 317. *Refd. O'Connell v. R.* (1844), 1 Cox, C. C. 413; *Gregory v. Brunswick* (1846), 3 C. B. 481; *Campbell v. R.* (1847), 11 Q. B. 814; *R. v. Drury* (1849), 3 Cox, C. C. 544. *Mentd. Pollitt v. Forrest* (1847), 11 Q. B. 962; *Douglas v. R.* (1848), 12 Jur. 974.

**3544.** ———.]—A ct. of quarter sessions having, on conviction under the first mentioned Act, passed sentence of imprisonment with hard labour, this ct., on error, reversed the judgment & discharged deft.—*R. v. SILVERSIDES* (1842), 3 Q. B. 406; 11 L. J. M. C. 82; 6 J. P. 584; 114 E. R. 563; *sub nom. SILVERSIDES v. R.*, 2 Gal. & Dav. 617; 6 Jur. 805.

*Annotation:—Refd. Campbell v. R.* (1847), 11 Q. B. 814.

**3545.** ———.]—H. was convicted of obtaining goods by false pretences, & also pleaded guilty to a charge of having been previously convicted

of a like offence. He was sentenced to seven years' penal servitude:—*Held*: the term of seven years was wrong, & ought to have been for five years.—*R. v. HORN* (1883), 48 L. T. 272; 47 J. P. 344; 15 Cox, C. C. 205, C. C. R.

**3546.** ———.]—Where, though the prosecution has abandoned a count in the indictment, a general verdict has been returned, the ct. may amend the record of the verdict.—*R. v. PROCTOR* (1923), 17 Cr. App. Rep. 124, C. C. A.

**3547.** ———.]—**Offence by undischarged bankrupt.**—The punishment to which by Bkpey. Act, 1883 (c. 52), s. 31, an undischarged bkpt. who obtains credit without disclosing the fact that he is an undischarged bkpt. is liable, is imprisonment with hard labour for one year under Debtors Act, 1869 (c. 62), s. 13, not imprisonment for two years under sect. 13 of that statute. If a statute provides two degrees of punishment & it is doubtful which is the proper punishment for an offence, the ct. will apply the lighter.—*R. v. TURNER*, [1904] 1 K. B. 181; 73 L. J. K. B. 46; 89 L. T. 676; 68 J. P. 15; 52 W. R. 214; 20 T. L. R. 67; 48 Sol. Jo. 85; 20 Cox, C. C. 590, C. C. R.

**3548.** ———.]—**Clerical error in record.**—Prisoner was found guilty of an attempted larceny, but the record as drawn up stated that he was guilty of the felony:—*Held*: if this mistake had not been made a sentence of three years' penal servitude could not have been passed. The sentence was accordingly reduced to one of twenty months' imprisonment with hard labour, & the record amended to accord with the verdict.—*R. v. MALOY* (1914), 10 Cr. App. Rep. 52, C. C. A.

*See Criminal Appeal Act, 1907 (c. 23).*

### H. Place of Judgment.

**3549.** **Trial in one county.—Sentenced in another county.**—*R. v. HALES*, No. 3090, *ante*.

## Part VIII.—Special Pleas.

### SECT. 1.—PLEA OF AUTREFOIS ACQUIT AND AUTREFOIS CONVICT.

#### SUB-SECT. 1.—IN GENERAL.

**3550.** **May be joined with plea of not guilty.**—To an appeal of manslaughter, a plea of *autrefois convict* & not guilty of the felony & murder aforesaid, is not bad.—*BRADLEY v. BANKS* (1611), Cro. Jac. 283; 1 Bulst. 141; Yelv. 204; 79 E. R. 243.

*Annotations:—Mentd. Wilson v. Law* (1694), 1 Ld. Raym. 20; *R. v. Tuchin* (1704), 2 Ld. Raym. 1061; *Billingsley v. Taps* (1732), 2 Barn. K. B. 137.

**3551.** ———.]—*R. v. WELSH* (1828), MS. Car. Supp. 56, cited in Archbold's Criminal Pleading, 28th ed. p. 159.

**3552.** **Issue of autrefois acquit & not guilty—**

Crown for the purpose of amending the sentence, seven years being the minimum under the circumstances, neglect of the provisions of the statute regulating the procedure upon indictment for subsequent felony, 24 & 25 Vict. c. 96, s. 116, was inferable from the record:—*Held*: these provisions were material, & the ct. quashed the conviction & discharged the prisoner.—*R. v. FOX* (1866), 15 W. R. 106.—IR.

#### PART VIII. SECT. 1, SUB-SECT. 1.

**1.** **May be joined with plea of not guilty.**—At "speedy trial."—Before pleading either "guilty" or "not guilty," to a charge of stealing at a

"speedy trial," deft. filed a special plea of *autrefois convict*, alleging that he had, on Sept. 24, 1913, been convicted by two justices of the same offence. Evidence in support of the plea was tendered, & argument heard. The judge decided against deft.: & thereupon he pleaded "not guilty." Deft. was convicted.—*Held*: at a speedy trial accused, upon pleading "not guilty," has the right to raise as a defence the fact of a previous conviction for the same offence.—*R. v. TAYLOR* (1914), 26 W. L. R. 652.—CAN.

**3553.** **Cannot be pleaded after plea of not guilty.**—Where, on an indictment for murder, prisoner, by virtue of

Not triable at the same time.]—The jury cannot be charged at the same time to try the two issues of *autrefois acquit*, & not guilty.—*R. v. ROCHE* (1775), 1 Leach, 134.

*Annotation:—Mentd. R. v. Sawyer* (1815), 2 Car. & Kir. 101.

**3553.** **Cannot be pleaded after plea of not guilty.**—Applt. & another person were charged upon a coroner's inquisition with the murder of a child, & applt. was also charged alone upon an indictment with the manslaughter of the child, to both of which they pleaded respectively not guilty. Counsel for the prosecution offered no evidence upon the coroner's inquisition for murder, & the jury by direction of the judge found a verdict of not guilty upon the inquisition. Before the jury

Criminal Justice Administration Act, 1914, s. 39 (1), pleads not guilty to the offence charged, but guilty of manslaughter, of which he could be lawfully convicted on the indictment, A.-G., on refusing to ask for judgment on such special plea, is entitled to have the trial for murder proceed. Such plea, of itself, does not place the prisoner in peril, & accordingly, does not entitle him before sentence to tender a second plea of *autrefois convict*.—*R. v. CLIFFORD* (1914), 49 L. L. T. 28.—IR.

**3553 ii.** ———.]—The only cases in which a plea of *autrefois acquit* or *autrefois convict* can now be established

were sworn to try the indictment applt. handed in an additional plea of *autrefois acquit*, & the jury having been sworn, applt. was first tried upon that plea. By direction of the judge, the jury found against applt. on that plea, & he was then tried upon his plea of not guilty & was convicted. Upon appeal against the conviction on the ground that the judge ought to have held that the plea of *autrefois acquit* was good:—*Held*: applt., after having pleaded not guilty to the indictment, was not entitled to plead *autrefois acquit* in addition thereto so long as the plea of not guilty stood upon the record, & therefore he could not rely upon that plea as a ground for quashing the conviction.—*R. v. BANKS*, [1911] 2 K. B. 1095; 81 L. J. K. B. 120; 106 L. T. 48; 75 J. P. 567; 27 T. L. R. 575; 55 Sol. Jo. 727; 22 Cox, C. C. 653; 6 Cr. App. Rep. 276, C. C. A.

**3554. Effect of informality.]**—*R. v. CHAMBERLAIN*, No. 2402, ante.

**3555.** —[At the trial for manslaughter of prisoner who was undefended, a discussion took place between the judge & counsel for the prosecution as to whether a plea of *autrefois convict* could be established. The judge decided that the plea could not be established & proceeded with the trial, & the jury convicted prisoner. Prisoner having appealed:—*Held*: the mere technicality that there had been no formal plea of *autrefois convict*, & no certificate drawn up did not prevent the Ct. of Criminal Appeal from doing what was right, & prisoner was therefore entitled to appeal as if there had been a plea of *autrefois convict*, & the judge had held there was no case to go to the jury upon the plea.

Applt. was summarily convicted under Children Act, 1908 (c. 67), s. 12 (1), of wilfully neglecting her children in a manner likely to cause injury to their health. One of the children having subsequently died, applt. was thereupon indicted for manslaughter of the child, & was convicted:—*Held*: under sect. 12 (4) it is not open to a jury, if they come to the conclusion on the facts that accused is guilty of manslaughter, to return a verdict of wilful neglect, & therefore, applt. had not been put in peril twice for the same offence, & could not sustain a plea of *autrefois acquit*.—*R. v. TONKS*, [1916] 1 K. B. 443; 85 L. J. K. B. 396; 114 L. T. 81; 80 J. P. 165; 32 T. L. R. 137; 60 Sol. Jo. 122; 25 Cox, C. C. 228; 11 Cr. App. Rep. 284, C. C. A.

**3556. Record must prove plea.]**—Indictment charged that deft. on, etc., in the second year of the reign of the present King, kept a gaming house. Plea, that on, etc., in the fourth year of the reign of the present King, deft. was arraigned upon an indictment, which charged that deft. on Jan. 18, in the fifty-seventh year of the reign of the late King, & on divers other days & times between

that day & the day of taking the inquisition, kept a gaming house, etc., to the nuisance of the subjects of our lord the King, & against the peace of our lord the King, etc. The plea then averred the identity of the offences described in the two indictments, & the acquittal of deft. Upon demurrer to this plea, concluding with a prayer of judgment of *respondeas ouster*:—*Held*: (1) the plea was bad, because the indictment upon which the acquittal was alleged to have taken place, on the face of it, charged an offence committed in the reign of the late King, & it was not competent to deft. to show by averment that it was for the same offence as that charged in the indictment before the ct. because that would be in effect to contradict the record; (2) the Crown was entitled to final judgment, notwithstanding the form in which the demurrer concluded.

A plea of *autrefois acquit* must show that deft. was *legitimo modo acquietatus*, viz. that he was acquitted upon an indictment sufficient to induce punishment if he had been convicted, & charging the same offence (*ABBOTT, C.J.*).—*R. v. TAYLOR* (1824), 3 B. & C. 502; 5 Dow. & Ry. K. B. 422; 2 Dow. & Ry. M. C. 487; 3 L. J. O. S. K. B. 68; 107 E. R. 820.

*Annotations*:—*As to* (1) *Refd.* *R. v. Jennings* (1844), 4 L. T. O. S. 233. *Generally*, *Mentd. Ex p. Bartlett* (1843), 7 Jur. 649; *Gray v. R.* (1844), 6 State Tr. N. S. 117.

**3557.** —[A plea of *autrefois convict* stated that prisoner was indicted, convicted, & sentenced at a session of the peace held by adjournment on Friday, July 5. The record produced in support of the plea stated that the indictment was found at a session commenced & held on Monday, July 1; that the ct. was adjourned till Tuesday, July 2; & that the ct. having re-assembled on Thursday, July 4, was adjourned to Friday, July 5, when prisoner was tried & convicted:—*Held*: the plea of *autrefois convict* was not proved by the record, inasmuch as, for want of an adjournment from Tuesday to Thursday, the proceedings on the Friday were *coram non judice*, & therefore a nullity.—*R. v. BOWMAN* (1834), 6 C. & P. 337.

*Annotation*:—*Mentd.* *R. v. Hughes* (1835), 1 Har. & W. 313.

**3558. Verdict of jury final.]**—Four persons were tried for a rape, upon an indictment containing counts charging each as principal, & the others as aiders & abettors. They were acquitted, & it being proposed on the following day to try three of them for another rape upon the same person, the second indictment being exactly the same as the first, with the omission only of the fourth prisoner, they pleaded *autrefois acquit* to the second indictment, averring the identity of the offences. To this plea there was a replication that the offences were different. Prisoners' counsel put in the commitment & the former indictment, & also the minutes of the former acquittal, written

are those provided for in Crimes Act, 1908, s. 403. An accused who desires to plead *autrefois acquit* or *autrefois convict* may lose his right to do so by pleading "not guilty" when arraigned on the indictment.—*R. v. HOLLAND* (1914), 33 N. Z. L. R. 931.—*N.Z.*

**g. Cannot be pleaded after plea of guilty.]**—If prisoner wishes to plead *autrefois convict* or *autrefois acquit* he must do so by special plea. It is too late to claim to set up such plea after the plea of guilty.—*R. v. CAMPBELL* (1913), 33 N. Z. L. R. 804.—*N.Z.*

**h. Cannot be raised on appeal.]**—A plea of *autrefois convict* cannot be raised for the first time on appeal.—*R. v. BURNS* (1902), 19 S. C. 477; 12 C. T. R. 882.—*S. AF.*

**k. Identity of offences—Onus of J.—VOL. XIV.**

*proof.*]—T. was convicted on May 16 for selling liquor between Jan. 21 & Apr. 18 preceding. He was subsequently convicted for unlawfully keeping liquor for sale between Feb. 14 & Mar. 24, in the same year:—*Held*: the onus was on him to prove that the two charges were identical.—*R. v. MARSH, Re TENNANT* (1886), 25 N. B. R. 371.—*CAN.*

**l.** —[Where a person is convicted of an offence committed at a time falling within the period covered by a previous information upon which he was acquitted, in order to sustain a plea of *autrefois acquit* he must show that the offence for which he was convicted & that for which he was acquitted were identical.—*Ex p. FLANAGAN* (1899), 34 N. B. R. 577.—*CAN.*

**m.** —[The burden of establishing the plea of *autrefois acquit* is upon accused.—*R. v. CARVER*, [1917] 2 W. W. R. 1170.—*CAN.*

**n. Available in extradition proceedings.]**—Pltf. having been imprisoned under the warrant of a police magistrate as a fugitive criminal who had been convicted of an extradition crime in the Philippine Islands, was discharged on a writ of *habeas corpus*. Subsequently, at the instigation of defts., he was again arrested on the same charge under the warrant of another police magistrate:—*Held*: the principle underlying the plea of *autrefois acquit* is common to both indictable offences, & extradition proceedings.—*VICENTE SOTTO v. WELCH* (1913), 9 Hong Kong L. R. 1.—*HONG KONG.*

**Sect. 1.—Plea of *autrefois acquit* and *autrefois convict*: Sub-sects. 1, 2 & 3, A. & B.]**

on the indictment. On this evidence the jury found that the offences were the same, & it being referred for the opinion of the judges, whether there was any evidence to justify & support the verdict, & if not, whether such verdict was final, & operated as a bar to any further proceedings by the Crown upon the second indictment:—**Held**: the verdict of the jury was final, & prisoners must be discharged.—*R. v. LEA* (1837), 2 Mood. C. C. 9; *sub nom. R. v. PARRY*, 7 C. & P. 836, C. C. R.

**3559. Withdrawal of plea.**—(1) When, by reason of some defect in the record, prisoner has not been lawfully liable to suffer judgment for the offence charged, he has not been in jeopardy in the sense which entitles him to plead the former proceeding in bar to a subsequent indictment.

(2) The plea [of *autrefois acquit*] has not concluded with pleading over to the felony, which is the usual & proper form. In strictness, therefore, prisoners are left without defence, & the judgment might be final; but upon the whole I think they should now be allowed to withdraw the plea, & plead not guilty, which course may be better than to allow them to amend by adding the usual conclusion in bar, as that may lead to a second demurrer (*per Cur.*).—*R. v. DRURY* (1849), 18 L. J. M. C. 189; 3 Cox, C. C. 544; *previous proceedings, sub nom. DRURY v. R.*, 3 Cox, C. C. 252.

**Annotations.**—As to (2) *Refd. R. v. Barron*, [1914] 2 K. B. 570; *R. v. Simpson*, [1914] 1 K. B. 66.

**SUB-SECT. 2.—PREVIOUS TRIAL OUTSIDE**

**3560. Bar to trial within jurisdiction for same offence—Provided foreign court had competent jurisdiction.**—*R. v. HUTCHINSON* (1677), 3 Heb. 785; 84 E. R. 1011; *sub nom. HUTCHINSON'S CASE*, cited in 1 Show. at p. 6; *sub nom. ANON.*, cited in Mos. at p. 2.

**Annotations.**—*Consd. Burrows v. Jemino* (1726), 2 Eq. Cas. Abr. 525, pl. 7. *Refd. R. v. Kimberley* (1729), 2 Stra. 848; *Gage v. Bulkeley* (1744), *Ridg. temp. H.* 263.

**3561.** — **Effect of difference in law of two countries.**—**Applt.**, a Belgian soldier, wounded another Belgian soldier by shooting him with a revolver in London. He was handed over to the Belgian military authorities & tried & acquitted by ct.-martial sitting at Calais. He was afterwards indicted at the Central Criminal Ct. on a charge of unlawful wounding:—**Held**: by virtue of a convention entered into between the English

& Belgian govts., the ct.-martial was a ct. of competent jurisdiction, & applt. was entitled to rely upon a plea of *autrefois acquit*.—*R. v. AUGHER* (1918), 118 L. T. 658; 82 J. P. 174; 34 T. L. R. 302; 26 Cox, C. C. 232; 13 Cr. App. Rep. 101, C. C. A.

*See, generally, CONFLICT OF LAWS*, Vol. XI., pp. 444 *et seq.*

**SUB-SECT. 3.—WHEN PLEA ADMITTED.**

**A. In General.**

**3562. Validity of first indictment—Second indictment on same charge.**—*ANON.* (1367), *Jenk.* 45; 145 E. R. 34.

**3563.** — **—**—*R. v. HOLME* (1584), 1 Hale, P. C. 491.

**Annotation.**—*Refd. R. v. Dudley & Stephens* (1884), 14 Q. B. D. 273.

**3564. Conviction on former indictment—Sufficiency of evidence at first trial.**—If a prisoner could have been legally convicted on the first indictment, upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment, & it is immaterial whether the proper evidence was adduced at the trial of the first indictment or not.—*R. v. SHEEN* (1827), 2 C. & P. 634.

**Annotations.**—*Refd. R. v. Plant* (1836), 7 C. & P. 575; *R. v. Duffy* (1849), 7 State Tr. N. S. 795. *Mentd. R. v. Evans* (1839), 8 C. & P. 765.

**3565.** — **—**—Where a prisoner, indicted singly for receiving stolen goods, pleaded *autrefois acquit* under an indictment against him & four others, on which one was convicted & prisoner & the three others were acquitted:—**Held**: it was good. The plea of *autrefois acquit* is founded upon an ancient maxim of the common law of England, that no one ought to be brought into jeopardy of his life twice for the same offence. The question is whether prisoner could have been convicted on the former indictment, for if he could, he must be acquitted on the second (GASELEE, J.).—*R. v. DANN* (1835), 1 Mood. C. C. 424, C. C. R.

**3566.** — **—**—**Applt.** was acquitted on a charge of sodomy. He was then indicted for committing an act of gross indecency with the same male person, to which he pleaded *autrefois acquit*:—**Held**: as the verdict of acquittal on the charge of sodomy did not involve an acquittal on the charge of gross indecency, because neither the act of penetration which is an essential element of the charge of sodomy, nor the intention to penetrate,

**PART VIII. SECT. 1, SUB-SECT. 2.**

**o. Whether bar to trial within jurisdiction for same offence—Effect of difference in law of two countries.**—A person was convicted in England of obtaining goods by false pretences, & was allowed to plead guilty to a further offence of the same nature for which a warrant was out for his arrest in Scotland, but in which no complaint had yet been served upon him. The English ct., in passing sentence, declared they had taken into consideration the offence committed by accused in Scotland. Subsequently he was charged in Scotland with the further offence above mentioned & the relevancy of the complaint was objected to on the ground that he had already tholed an assize:—**Held**: the proceedings in England could not be regarded as a trial of accused for the offence charged in the complaint; he had consequently not tholed an assize.—*HILSON v. EASSON* (1914), 51 Sc. L. R. 392.—**SCOT.**

**PART VIII. SECT. 1, SUB-SECT. 3.—A.**

**p. Test of admissibility of plea.**—The exact test is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first.—*R. v. FOGG* (1864), 3 N. S. W. S. C. R. 215.—**AUS.**

**q. —**—The test to be applied when the plea of *autrefois convict* is raised is to consider whether the evidence that was necessary to support the second charge would have been sufficient to procure a legal conviction on the first charge.—*Ex p. SPENCER* (1905), 2 C. L. R. 250.—**AUS.**

**r. —**—The true test whether a plea of *autrefois acquit* is a sufficient bar in any particular case, is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first.—*R. v. LEVI*, [1906] E. D. C. 272.—**S. AF.**

**3564 i. Conviction on former indictment—Sufficiency of evidence at first trial.**—Where a person has been convicted of an offence, & that conviction has been quashed upon the ground of the wrongful admission of evidence, the Crown cannot put him upon his trial again for the same offence.—*R. v. O'KEEFE* (1894), 15 N. S. W. L. R. 1.—**AUS.**

**3564 ii. —**—Accused was convicted of perjury, but the conviction was quashed on the ground of the insufficiency of the evidence. The accused was retried & convicted for the same perjury, notwithstanding a plea of *autrefois acquit*:—**Held**: the quashing of the conviction on the ground of the insufficiency of the evidence amounted to an acquittal, & as the evidence necessary to support a conviction on the second charge would have been sufficient to procure a legal conviction on the first, the plea of *autrefois acquit* was good.—*R. v. NOMADADER*, [1918] E. D. L. 270.—**S. AF.**

which is an essential element of an attempt to commit that offence, is an essential element of the offence of gross indecency, & as it was conceded that applt. could not in law have been convicted of gross indecency on the more serious charge, the plea of *autrefois acquit* was not proved.—*R. v. BARRON*, [1914] 2 K. B. 570; 83 L. J. K. B. 786; 78 J. P. 311; 30 T. L. R. 422; 58 Sol. Jo. 557; 10 Cr. App. Rep. 81, C. C. A.; *previous proceedings* (1913), 24 Cox, C. C. 83, C. C. A.

*Annotations*.—*Refd.* Haynes v. Davis, [1915] 1 K. B. 332; Bannister v. Clarke, [1920] 3 K. B. 598.

**3567. Conviction for different offences—Based on same facts.**—*WENTWORTH v. MATHIEU*, [1900] A. C. 212; 69 L. J. P. C. 11; 82 L. T. 161; 16 T. L. R. 223, P. C.

**3568.** —]—*R. v. BARRON*, No. 3566, *ante*.

**3569. Act charged coincident with but not incidental to act previously charged.**—The plea of *autrefois acquit* is bad when the criminal act alleged later, though coincident with that of which there has been an acquittal, is in no way incidental to the latter.—*R. v. NORTON* (1910), 5 Cr. App. Rep. 197, C. C. A.

*Annotation*.—*Refd.* *R. v. Tonks* (1915), 114 L. T. 81.

**3570. Previous conviction for misdemeanour—Cannot be pleaded to indictment for felony.**—*R. v. RUSSELL*, No. 4671, *post*.

#### B. Offences against the Person.

**3571. General rule—Murder or manslaughter.**—

—If a man commits murder & is indicted & convicted on acquitted of manslaughter, he shall never answer to any indictment of the same death.—*R. v. HOLCROFT* (1578), 4 Co. Rep. 46 b; 2 Hale, P. C. 33; 3 Co. Inst. 214; 76 E. R. 996.

*Annotations*.—*Consd.* *R. v. Tancock* (1876), 34 L. T. 455. *Mentd.* *R. v. Taylor* (1824), 3 L. J. O. S. K. B. 68; *O'Connell v. R.* (1844), 11 Cl. & Fin. 155.

**3572.** —]—*R. v. HOLME* (1584), 1 P. C. 491.

*Annotation*.—*Refd.* *R. v. Dudley & Stephens* (1884), 14 Q. B. D. 273.

**3567i. Conviction for different offences—Based on same facts.**—*R. v. WEBSTER* (1858), 9 L. C. R. 196.—**CAN.**

**3567ii.** —]—Where there has been an acquittal de ft. may be again prosecuted on a charge setting up another legal aspect of the same facts—the principle is, that he must not be punished more than once for the same acts or omissions.—*R. v. WEISS & WILLIAMS* (1913), 25 W. L. R. 286.—**CAN.**

**3567iii.** —]—Where accused was tried under Penal Code, s. 408, for criminal breach of trust of three sums of money alleged to have been dishonestly misappropriated on three dates, & it was part of the prosecution case at the trial that he had made three false entries to conceal the acts of misappropriation, & he was acquitted but was subsequently charged on the same evidence under Penal Code, s. 447a, in respect of said three entries:—*Held*: he should not be tried again for what were virtually the same offences charged in a different form.—*R. v. JHABUR MULL LAKKAR* (1922), 1 L. R. 49 Calc. 924.—**IND.**

**a. Information for offence previously subject of indictment—Entry of nolle prosequi to indictment.**—Two indictments had been found against a traverser, on which A.-G. entered a *nolle prosequi*, & thereupon, filed *ex officio* informations. The traverser pleaded, to the first information, that the ct. ought not to take cognisance of the offences therein specified, because an indictment was found in this ct. for the same offences on which he was, at the request of A.-G., arraigned,

& A.-G. said he would not further prosecute J. M., that he was the person who was so indicted & arraigned, & that the offences in the indictment & information were the same, & that he ought to be exempt from being compelled to answer for the offences in the information before any justice in any court, except on an indictment found, or presentment made, on the oath of twelve lawful men of the body of the county; concluding with a verification & prayer of judgment if the court ought to take cognisance of the information, & that he (the traverser) might be discharged:—*Held*: this plea of an indictment pending was no bar to an information for the same matter, & if the plea of a former prosecution pending could be pleaded, the entry of a *nolle prosequi* would be an answer to it.—*R. v. MITCHELL* (1848), 12 L. L. R. 217; 1 Ir. Jur. 4.—**IR.**

**t. Effect of nolle prosequi.**—In a summons case, the Public Prosecutor withdrew from the prosecution before accused had been served & accused was acquitted under Criminal Procedure Code, s. 494:—*Held*: the rule of English law, requiring accused to have been tried as well as acquitted in order to bar further proceedings, which is embodied in the present Code, is inapplicable to the statutory enactments subsequently introduced into the Code which are intended to bar further proceedings whether accused can be said to have been tried or not.—*Re DUDEKULA LAL SAHIB* (1917), 40 Mad. 976.—**IND.**

**a. Two pleas of "guilty" for the same offence under misapprehension—**

**3573. Indictment for murder—Previous acquittal of same murder—Second indictment in different form.**—Prisoner pleaded that he had been acquitted on an indictment for murdering a child, by administering a certain deadly poison, to wit, oil of vitriol, & by forcing the child to take, drink, & swallow down, a large quantity of the oil, knowing it to be a deadly poison, whereby the child became sick & distempered in his body, & by that sickness languished & died:—*Held*: a good bar to an indictment the first count of which was for murdering the same child by administering a large quantity of oil of vitriol, & forcing the child to take into his mouth & throat a large quantity of the oil, knowing that the oil would occasion the death of the child, whereby he became disordered in his mouth & throat, & by the disorder, choking, suffocating, & strangling, occasioned thereby, languished & died, & of which the second count was for murdering the child by administering a certain acid called oil of vitriol, & forcing the child to take a large quantity of the acid into his mouth & throat, by means whereof he became disordered in his mouth & throat, & incapable of swallowing his food, & died of the inflammation, injury, & disorder, occasioned thereby.—*R. v. CLARK* (1820), 1 Brod. & Bing. 473; 129 E. R. 804.

*Annotation*.—*Consd.* *R. v. Tonks*, [1916] 1 K. B. 443.

**3574. — Previous conviction of manslaughter.**—(1) *Autrefois convict* of manslaughter, & clergy thereupon allowed, is a good bar in an appeal of murder.

(2) Where the indictment upon which the party was convicted, but upon which no judgment had been given, was insufficient:—*Held*: the party may be indicted & arraigned again, or appealed of the same offence.—*WROTE v. WIGGES* (1591), 4 Co. Rep. 45 b; 76 E. R. 994.

*Annotations*.—*Generally*, *Refd.* *Penryn v. Corbet* (1595), Cro. Eliz. 464; *R. v. Drury* (1849), 18 L. J. M. C. 189. *Mentd.* *Case of Marshalsea* (1613), 10 Co. Rep. 68 b; *Hudson v. Parker* (1844), 1 Rob. Eccl. 14; *Conway & Lynch v. R.* (1845), 5 L. T. O. S. 458.

*Jurisdiction of court to amend by entering plea of "autrefois convict."*—Two prisoners, under the misapprehension that they were merely repeating the confession they made when they pleaded guilty before the magistrate, pleaded guilty in the Supreme Ct. to a count in an indictment charging them with the same offence to which they had previously pleaded. This was discovered prior to sentence:—*Held*: the ct. had jurisdiction, as sentence had not been pronounced, to amend by entering pleas of "*autrefois convict*," & to record judgment on those pleas for accused.—*R. v. SMITH, R. v. KING* (1911), 31 N. Z. L. R. 352.—**N.Z.**

#### PART VIII. SECT. 1, SUB-SECT. 3.—B.

**b. Indictment for murder—Previous acquittal for grievous hurt.**—K., P. M., N., & O., applts., were convicted by the ct. of session of attempt at murder. They had previously been tried by a deputy magistrate on a charge of voluntarily causing grievous hurt founded on same facts, & K., P., & M. were then acquitted, while N. & O. were convicted. N. & O. appealed to the ct. of session, & that ct., considering that the evidence showed that they had been guilty of an attempt at murder, forwarded the record to the High Ct. when the conviction was quashed & a new trial ordered. The order referred expressly only to N. & O., but proceedings were commenced *de novo* against all the five persons, & they were committed to the ct. of session for trial on a charge of attempt at murder, & convicted, as stated

—*Plea of autrefois acquit and autrefois convict: Sub-sect. 3, B.*

**3575.** — — —.]—Prisoner was tried for the manslaughter of A., & found guilty & sentenced. Shortly after his trial the coroner's jury returned an inquisition for wilful murder upon the same facts. At the next assizes prisoner was arraigned upon such inquisition, when he pleaded *autrefois convict*. The facts of identity of prisoner & deceased having been given in evidence, & the judge having read the depositions which, as he thought, disclosed a case of manslaughter:—*Held*: the plea was proved.—*R. v. Tancock* (1876), 34 L. T. 455; 13 Cox, C. C. 217.

**3576.** — — —.]—*Of another person by the same act.*—Prisoner was convicted of manslaughter, in Feb., & had his clergy. In Apr. following he was indicted for the murder of another person, but again found guilty of manslaughter. The stroke in both cases was on the same day & at the same time:—*Held*: the former allowance of clergy protected him against any punishment on the second verdict.—*R. v. Jennings* (1819), Russ. & Ry. 388, C. C. R.

*Annotation*:—*Refd. R. v. Brettell* (1842), Car. & M. 609.

**3577.** — — —.]—*Previous acquittal of wounding with intent to murder—Previous conviction of wounding with intent to do grievous bodily harm.*—*R. v. Salvi* (1857), 10 Cox, C. C. 481, n.

*Annotation*:—*Refd. R. v. Morris* (1867), L. R. 1 C. C. R. 90.

**3578. Indictment for manslaughter—Previous conviction of assault.**—A conviction for assault by justices in petty sessions, at the instance of the person assaulted, & imprisonment consequent thereon, is not, either at common law, or under Offences against the Person Act, 1861 (c. 100), s. 45, a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault.—*R. v. Morris* (1867), L. R. 1 C. C. R. 90; 36 L. J. M. C. 84; 16 L. T. 636; 31 J. P. 516; 15 W. R. 999; 10 Cox, C. C. 480, C. C. R.

*Annotations*:—*Consd. R. v. Friel* (1890), 17 Cox, C. C. 325. *Refd. Wemyss v. Hopkins* (1875), L. R. 10 Q. B. 378; *R. v. Miles* (1890), 24 Q. B. D. 423; *R. v. Dyson* (1908), 77 L. J. K. B. 813; *R. v. Tonks*, [1916] 1 K. B. 443.

above, by that et. The pleas of *autrefois convict* & *autrefois acquit* could not be urged as an answer to the charge, on which appts. were convicted, by any of them.—*R. v. Panna* (1875), 7 N. W. 371.—**IND.**

*Previous acquittal for assault.*—A panel who had been acquitted in a police ct. on a charge of assault, having, in consequence of the death of the injured party been afterwards indicted for murder, the plea of *res judicata* founded on the former trial repelled.—*H.M. Advocate v. Cobb* (or *Fairweather*) (1836), 1 Swin. 354.—**SCOT.**

**d.** — — —.]—A panel was tried in police ct. for assault. The person assaulted thereafter died; he was charged with murder. Plea of *res judicata* repelled.—*H.M. Advocate v. Stewart* (1866), 5 Ir. 310.—**SCOT.**

**e.** — — —.]—A person convicted of assault may subsequently be tried for murder on the supervening death of the person injured by the assault.—*H.M. Advocate v. O'Connor* (1882), 10 R. (Ct. of Sess.) 40.—**SCOT.**

**1. Indictment for manslaughter—Previous conviction for malicious wounding.**—Where prisoner was indicted for manslaughter & it appeared that before the death she had been convicted of malicious wounding in respect of same act which afterwards resulted in the death:—*Held*: that a plea of *autrefois convict* could not be supported.—*R. v. Woodman* (1873), 2 C. A. 255.—**N.Z.**

**g. Indictment for shooting with intent to murder—Previous acquittal for murder.**—When to an indictment for firing at A. with intent to murder him, prisoner insisted, by a plea of *autrefois acquit*, that he had been indicted for the murder of B., & that the murder of B. & the firing at A. were perpetrated at one & the same time & place, upon one & the same occasion, & with one & the same felonious purpose & object, & by one & the same person, & thereby became & constituted one entire transaction & felonious crime:—*Held*: this plea was bad.—*R. v. Gray* (1843), 5 I. L. R. 524.—**IR.**

**h. Indictment for assault with intent to commit murder—Previous summary conviction for assault inflicting bodily injury.**—In an indictment for a felonious assault with intent to commit murder, a former conviction, before two justices of the peace, for an assault so as to inflict bodily injury upon prosecutrix, may be pleaded in bar.—*R. v. Curran* (1867), 9 Ir. Jur. 235.—**IR.**

**k. Indictment for inflicting grievous bodily harm—Previous acquittal for manslaughter.**—Def. was charged with the manslaughter of S. & acquitted. It was contended that he could not be subsequently tried on a charge of unlawfully inflicting grievous bodily harm upon S.:—*Held*: def. could not, on the original charge, have been convicted of the lesser offence, & the acquittal was not a bar to a prosecution

**3579.** — — —.]—Where there has been a summary conviction under Summary Jurisdiction Act, 1879 (c. 49), for assault, & the person assaulted subsequently dies of injuries caused by the acts constituting the assault, a plea of *autrefois convict* is not a good answer by the person so summarily convicted to an indictment for the manslaughter of the person assaulted.—*R. v. Friel* (1890), 17 Cox, C. C. 325.

*Annotation*:—*Refd. R. v. Tonks*, [1916] 1 K. B. 443.

**3580.** — — —.]—*Previous acquittal of assault.*—*R. v. Hilton* (1895), 59 J. P. Jo. 778.

**3581.** — — —.]—*Previous conviction of wilful neglect under Children Act, 1908 (c. 67), s. 12.*—*R. v. Tonks*, No. 3555, *ante*.

**3582. Indictment for administering poison with intent to murder—Previous acquittal for murder—Of person poisoned at same time.**—Where a man had been tried & acquitted of the murder of his son by poison, & he was afterwards arraigned on a charge of attempting to poison his wife, & it

*Held*: the two offences were separate & distinct & though acquitted of the murder of the son, prisoner might be tried for the attempt of the life of the wife.—*R. v. Dagnes* (1839), 3 J. P. 293.

**3583.** — — —.]—Upon an indictment under 7 Will. 4, & 1 Vict. c. 85, ss. 3 & 5, for administering poison with intent to murder, a previous acquittal on an indictment for murder founded on the same facts cannot be pleaded in bar.—*R. v. Connell* (1853), 6 Cox, C. C. 178.

*Annotation*:—*Refd. R. v. White*, [1910] 2 K. B. 124.

**3584. Indictment for assault with intent to do grievous bodily harm—Previous acquittal for murder.**—*R. v. Bird*, No. 2398, *ante*.

**3585. Indictment for inflicting grievous bodily harm & unlawful wounding—Previous conviction of common assault.**—Prisoner was indicted at quarter sessions on counts charging him with unlawfully inflicting grievous bodily harm, unlawfully wounding, unlawfully assaulting, occasioning actual bodily harm, & common assault. The jury found him guilty of common assault, & were unable to agree as to the other counts. The

for the lesser offence.—*R. v. Shea* (1909), 14 Can. Crim. Cas. 319.—**CAN.**

**1. Indictment for causing hurt—Previous acquittal for assault.**—A person who is tried & discharged for the offence of assault under Penal Code, s. 312, cannot again, upon the same complaint, be tried for "causing hurt."—*Kahtan v. Smith* (1871), 7 B. L. R. App. 25; 16 W. R. 3.—**IND.**

**m. Indictment for assault & robbery—Previous conviction of unlawful wounding.**—Two persons were indicted for assaulting & putting prosecutor in bodily fear, & stealing money from his person, & immediately afterwards feloniously wounding him. One prisoner pleaded *autrefois convict*, & evidence was given that he had been summarily convicted of stealing a dice-box, which it appeared was stolen from prosecutor on the same night & in the same room when & where prosecutor was assaulted & had money taken from his person:—*Held*: there was no evidence of the identity of the offences to go to the jury on the plea.—*R. v. Williams & Ferguson* (1877), 3 C. A. 370; 2 J. R. N. S. 42.—**N.Z.**

**n. Indictment for unlawful assembly—Previous conviction for being armed with a bludgeon at night.**—Prisoner was charged & convicted for being armed with a bludgeon at night. He was then charged for taking part in an unlawful assembly. Counsel asked leave to plead *autrefois convict*:—*Held*: the plea was of no validity as

recorder then discharged the jury & sent prisoner for trial at the assizes:—*Held*: judgment must be entered for prisoner on the plea of *autrefois convict*.—*R. v. GRIMWOOD* (1896), 60 J. P. 809; 13 T. L. R. 70.

**3586. Indictment for burglary with violence—Previous acquittal for murder.**—If a party charged with the crime of murder committed in the perpetration of a burglary, be generally acquitted on that indictment, he cannot afterwards be convicted of the burglary with violence, as the general acquittal in the charge of murder would be an answer to that part of the indictment containing the allegation of violence.—*R. v. GOULD* (1840), 9 C. & P. 364.

**3587. Indictment for assault—Previous acquittal of wounding with intent to do grievous bodily harm.**—An acquittal on an indictment for a rape could not be successfully pleaded to a subsequent indictment for an assault with intent to commit a rape, nor could an acquittal on the indictment for feloniously stabbing with intent to do grievous bodily harm be successfully pleaded to an indictment for an assault, although, in each case, the transaction was the same, & accused might have been convicted of an assault, under 7 Will. 4, & 1 Vict. c. 85, s. 11.—*R. v. GISSON* (1847), 2 Car. & Kir. 781.

**3588. ———**—Where a person is acquitted on a charge of feloniously stabbing, with intent to do grievous bodily harm, such person may be subsequently indicted & convicted for an assault.—*R. v. GOADBY* (1817), 2 Car. & Kir. 782, n.

**3589. — Previous conviction under Highway Act, 1835 (c. 50), s. 78.**—Appl. was convicted upon an information under sect. 78 of the above Act for striking a horse ridden by H., & causing damage to H., then being upon the highway. Subsequently, H. laid an information under Offences against the Person Act, 1861 (c. 104), s. 42, for an assault, in respect of the same matter:—*Held*: applt. could not be convicted under the last summons.—*WEMYSS v. HOPKINS* (1875), L. R. 10 Q. B. 378; 44 L. J. M. C. 101; 33 L. T. 9; 39 J. P. 549; 23 W. R. 691.

*Annotations*:—*Apprvd.* *R. v. Miles* (1890), 24 Q. B. D. 423. *Apld.* *Welton v. Taneborne* (1908), 99 L. T. 668. *Mentd.* *It. v. South Shields Licensing JJ.*, [1911] 2 K. B. 1.

**3590. — Previous summary acquittal of assault on same day.**—Where an assault charged in an indictment, & that referred to in a certificate of dismissal by a magistrate, under 24 & 25 Vict. c. 100, s. 44, appear to have been on the same day, it is *prima facie* evidence that they are one & the same assault, & if the prosecutor alleges the contrary, it is incumbent on him to show that there was a second assault on the same day. *Deft.*

the offences were not identical.—*It. v. CAMPBELL* (1913), 33 N. Z. L. R. 804.—*N.Z.*

**o. Indictment for seduction—Previous acquittal for abduction.**—Prisoner was convicted under R. S. C., c. 162, s. 44, relating to "offences against the person," for unlawfully taking an unmarried girl under the age of sixteen years out of the possession & against the will of her father. On same day prisoner was again tried & convicted under R. S. C., c. 157, s. 3, relating to "offences against public morals," for the seduction of the girl, being previously of chaste character, & between the ages of twelve & sixteen years of age:—*Held*: the offences were several & distinct, & a conviction on the first indictment did not preclude a conviction on the second one.—*It. v. SMITH* (1890), 19 O. R. 714.—*CAN.*

**p. Indictment for indecent assault**

—*Previous acquittal of attempt to have carnal knowledge of female idiot.*—Prisoner, who has been acquitted of an attempt to have unlawful carnal knowledge of a female idiot, cannot plead that acquittal as a bar to a further prosecution for indecent assault.—*It. v. BURKE* (1912), 47 I. L. T. 111.—*IR.*

**q. — Previous acquittal for assaulting & carnally knowing a girl under 10.**—A person had been tried & acquitted on an indictment in one count for assaulting & carnally knowing a girl under ten, & was subsequently put on his trial for same offence upon an indictment for an indecent assault:—*Held*: the plea of *autrefois acquit* was a good plea.—*It. v. LEMEN* (1888), 6 N. Z. L. R. 329.—*N.Z.*

**r. Indictment for gross indecency—Previous acquittal of indecent assault.**—A male person who had been ac-

having appeared before the magistrate, the recital in the certificate of the fact of a complaint having been made, & of a summons having been issued, is sufficient evidence of those facts.—*R. v. WESTLEY* (1868), 32 J. P. 487; 11 Cox, C. C. 139.

**3591. Indictment for felonious wounding—Previous summary conviction for assault.**—A plea of *autrefois convict* of an assault before justices under 9 Geo. 4, c. 31, is a bar to an indictment for felonious stabbing, etc., in the same transaction.—*R. v. WALKER* (1843), 2 Mood. & R. 446; 7 J. P. 212.

*Annotations*:—*Apld.* *It. v. Eltrington* (1861), 1 B. & S. 688. *Consd.* *It. v. Miles* (1890), 24 Q. B. D. 423. *Refd.* *R. v. Reid* (1851), 5 Cox, C. C. 104; *Wemyss v. Hopkins* (1875), L. R. 10 Q. B. 378. *Mentd.* *Hancock v. Somes* (1859), 33 L. T. O. S. 105; *Re Thompson* (1860), 30 L. J. M. C. 19.

**3592. ———**—*Semble*: a conviction for an assault under 9 Geo. 4, c. 31, followed by payment of the fine or endurance of the imprisonment, may be pleaded in bar of an indictment for felony in respect of the same assault, charging an assault, & wounding with intent to murder, etc.—*R. v. STANTON* (1851), 17 L. T. O. S. 280; 5 Cox, C. C. 324.

*Annotations*:—*Consd.* *R. v. Eltrington* (1861), 1 B. & S. 688; *R. v. Miles* (1890), 24 Q. B. D. 423. *Refd.* *Wemyss v. Hopkins* (1875), L. R. 10 Q. B. 378.

**3593. — Previous summary acquittal for assault.**—Where, under 9 Geo. 4, c. 31, ss. 27–29, a complaint of assault or battery has been made to two justices of the peace, who dismiss the complaint & give the party a certificate accordingly, the certificate may be pleaded in bar to an indictment, founded on the same facts, charging assault & battery, accompanied by malicious cutting & wounding so as to cause grievous or actual bodily harm.—*R. v. ELINGTON* (1861), 1 B. & S. 688; 31 L. J. M. C. 14; 5 L. T. 284; 8 Jur. N. S. 97; 10 W. R. 13; 9 Cox, C. C. 86; 121 E. R. 870; *sub nom.* *It. v. ELINGTON*, 26 J. P. 117.

*Annotations*:—*Apprvd.* *R. v. Miles* (1890), 24 Q. B. D. 423; *R. v. Grimwood* (1896), 60 J. P. 809. *Refd.* *Wilkinson v. Dutton* (1863), 3 B. & S. 821; *Wemyss v. Hopkins* (1875), L. R. 10 Q. B. 378.

**2594. Indictment for felonious wounding & unlawful wounding—Previous summary conviction for assault.**—A person who has been convicted of an assault by a ct. of summary jurisdiction, but has been discharged, without any sentence of fine or imprisonment, on giving security for good behaviour, cannot afterwards be convicted for the same assault, on an indictment charging him with felonious wounding, & unlawful wounding.—*R. v. MILES* (1890), 24 Q. B. D. 423; 59 L. J. M. C. 56; 62 L. T. 572; 54 J. P. 549; 38 W. R. 334; 6 T. L. R. 186; 17 Cox, C. C. 9, C. C. R.

*Annotations*:—*Apld.* *Ryley v. Brown* (1890), 62 L. T. 458. *Refd.* *R. v. Friel* (1890), 17 Cox, C. C. 325; *Reed v. Nutt* (1890), 59 L. J. Q. B. 311. *Mentd.* *Haynes v. Davis*, [1915] 1 K. B. 332.

quitted on a charge of indecent assault on other male persons was thereafter charged on the same facts with being a party to gross indecency with other male persons:—*Held*: he was not entitled to plead *autrefois acquit*, as he could not when charged with indecent assault have been convicted of gross indecency, nor could he as charged under that section be convicted of indecent assault.—*It. v. PETERSEN*, [1910] T. P. D. 859.—*S. AF.*

**s. Indictment for rape—Previous acquittal for murder.**—An acquittal on a charge of murder is no bar to a subsequent trial for rape, even though the evidence on both charges would to a large extent be the same.—*It. v. KERR* [1907] E. D. C. 324.—*S. AF.*

**t. Indictment for assault—Previous acquittal of wounding with intent to murder.**—An acquittal on a charge of feloniously wounding with intent



**Sect. 1.—Plea of *autrefois acquit* and *autrefois convict*: Sub-sect. 3, B. & C.]**

**3595. Indictment for assault with intent to commit rape—Previous acquittal of rape.]—R. v. GISSON, No. 3587, *ante*.**

**3596. Indictment for assault—Previous acquittal of rape—Not by acquittal of assault with intent to commit rape.]—After an acquittal upon an indictment for rape, & assault with intent to commit a rape, prisoner may be indicted for a common assault.—R. v. DUNGEY (1864), 4 F. & F. 99.**  
*Annotation:—Reid. R. v. Ollis, [1900] 2 Q. B. 758.*

**3597. Indictment for gross indecency—Previous**

### C. Offences against Property.

**3598. Larceny—Previous acquittal of larceny of different goods—At the same time.]—Where prisoner had been before tried for the same stealing, though of different goods:—Held: he could not be again put upon his trial, the larceny being the same.—R. v. PYNE (1842), 6 J. P. 508.**

**3599. ———.]—When a person stole two pigs belonging to the same person at the same time, & after being convicted & punished for stealing one of the pigs, was again indicted at a subsequent assize for stealing the other:—Held: this might legally be done. *Semble*: in such a case the second prosecution ought not to be proceeded with.—R. v. BRETTET (1842), Car. & M. 609.**

**3600. ——— Where act of taking is the same.]—I do not think it necessary in a plea of *autrefois convict* to allege the identity of the specific chattel charged to be taken. Suppose the first charge to be taking a coat; *autrefois convict* pleaded; parol evidence showing that the pocket-book was in the pocket of the coat. I think that would support the plea, because it would show a previous conviction for the same act of taking (ERLE, J.).—R. v. BOND (1850), 1 Den. 517; T. & M. 242; 4 New Mag. Cas. 133; 4 New Sess. Cas. 143; 19 L. J. M. C. 138; 14 J. P. 288; 14 Jur. 399; 4 Cox, C. C. 231, C. C. R.**  
*Annotations:—Mentd. R. v. Faderman (1850), 4 Cox, C. C. 359; R. v. Thomas (1850), 14 J. P. 513.*

**3601. ——— From the same person at subsequent date.]—Prisoner was tried on Apr. 6, 1863, upon an indictment which charged him with having, on Jan. 22, 1863, stolen 25 lbs. of copper, the property of A., & was acquitted. He was again tried on June 29, 1863, upon an indictment**

which charged him, in the first count, with having, on Sept. 20, 1862, stolen a riddle, the property of A., & in the second count with having, on Jan. 16, 1863, stolen five shovels, also the property of A.:—Held: prisoner was not entitled to be acquitted upon the second trial on the ground that the charge of stealing the riddle & shovels ought to have been included in the first indictment, & on these facts a verdict was rightly found against him upon a plea of *autrefois acquit*.—R. v. KNIGHT (1864), Le. & Ca. 378; 9 L. T. 808; 28 J. P. 149; 9 Cox, C. C. 437, C. C. R.

**3602. ——— Previous acquittal of stealing where**

Prisoner was indicted the property of A. & acquitted. She was then indicted again for stealing the same boots laid as the property of B. & pleaded *autrefois acquit*. It appeared that A. was a boy 14 years of age living with & assisting B., who was his father, & that the boots were the property of B., but that, at the time they were stolen by prisoner, A. had temporarily in his father's absence the charge of the stall from which they were stolen:—Held: A. was not a bailee, & the ownership of the boots could not properly be laid in him, & the plea of *autrefois acquit* could not be sustained notwithstanding the power of amendment given by Criminal Procedure Act, 1851 (c. 100).—R. v. GREEN (1856), Dears. & B. 113; 26 L. J. M. C. 17; 28 L. T. O. S. 108; 20 J. P. 742; 2 Jur. N. S. 1146; 5 W. R. 52; 7 Cox, C. C. 186, C. C. R.

**3603. ——— Previous conviction for obtaining credit by false pretences.]—A debt, who has been convicted upon an indictment charging him with obtaining credit for goods by false pretences cannot be afterwards convicted upon a further indictment charging him with larceny of the same goods.—R. v. KING, [1897] 1 Q. B. 214; 66 L. J. Q. B. 87; 75 L. T. 392; 61 J. P. 329; 13 T. L. R. 27; 41 Sol. Jo. 49; 18 Cox, C. C. 447, C. C. R.**  
*Annotation:—Expld. R. v. Barron, [1914] 2 K. B. 570.*

**3604. ——— Previous conviction of uttering counterfeit coin given in payment for the stolen goods.]—On the trial of an indictment for larceny it appeared that prisoner having given prosecutor an order for certain goods, they were sent by a servant with directions not to part with them without the money. On the way the servant was met by prisoner, who said the goods were for him, & took them, giving two counterfeit half-crowns in payment:—Held: he was properly indicted for**

to murder is not a bar to an information for a common assault & battery.—R. v. DOUGLASS (1865), 4 N. S. W. S. C. R. 157.—AUS.

**a. ——— Previous acquittal for murder.]—On an indictment for murder in the statutory form, not charging an assault, prisoner, under 32 & 33 Vict. c. 29, s. 51 (1), cannot be convicted of an assault; & acquittal of the felony is therefore no bar to a subsequent indictment for the assault.—R. v. SMITH (1874), 34 U. C. R. 552.—CAN.**

**b. ——— Previous summary acquittal for same offence.]—Where a charge under Criminal Code, 1892, s. 262, of assault causing actual bodily harm is brought under Part 55 by the election of debt, to be tried summarily, a conviction releases from further criminal proceedings.—NEVILLS v. BULLARD (1897), 28 O. R. 588.—CAN.**

### PART VIII. SECT. 1, SUB-SECT. 3.—C.

**c. Larceny—Previous conviction for interference with goods.]—Upon trial for larceny, prisoner pleaded *autrefois convict* & proved that he had pre-**

viously been convicted under Commonwealth Customs Act, 1901-1914, s. 23, upon a charge of interfering with the goods which were the subject-matter of the charge of larceny. The evidence given upon both occasions so far as it related to prisoner's acts in connection with the goods was the same:—Held: as prisoner, when charged with the interference, was not in peril of being convicted of larceny the plea was bad.—R. v. McNICOL [1916] V. L. R. 350.—AUS.

**d. ——— Theft of package of post letters—Conviction before justices for theft of cheque contained in one letter.]—Deft., a railway mail clerk, stole a package containing 4 registered letters. He was arrested & committed by a magistrate for trial upon a charge of stealing 4 post letters. Before being arraigned at the assizes on this charge, he was brought before the same magistrate & another justice & charged with & convicted by the two justices of stealing a cheque for \$10, the property of a private individual, which was one of the documents contained in one of the letters making up the package, & he was sentenced to three months'**

imprisonment with hard labour. When debt was brought before the ct. for trial on his previous commitment, a charge containing eight counts was laid against him. He pleaded "*autrefois convict*," & gave evidence of his conviction by the two justices. There was no question about the identity of accused or about the fact that the \$10 cheque was contained in the package. The trial judge decided against accused on his plea of "*autrefois convict*," in respect of the first seven counts, & in his favour on the eighth count, which was for stealing the sum of \$1,345, the aggregate amount of three sums of money contained in the letters. Debt then pleaded "guilty" on the first six counts & "not guilty" on the seventh. No trial took place on the seventh count; & a case was reserved as to the correctness of the judge's decision against debt, on a plea of "*autrefois convict*." The six counts on which debt pleaded guilty were for stealing three separate post letters, the property of the Postmaster-General, containing each a specified sum of money, & for stealing the same three sums of money without reference to the letters



larceny, & he might be convicted of the larceny notwithstanding he had been previously arraigned on & pleaded guilty to a charge of knowingly uttering the two counterfeit half-crowns.—*R. v. WEBB* (1850), 14 J. P. 689; 5 Cox, C. C. 154.

**3605. Larceny of fixtures—Previous acquittal of simple larceny.**—In one indictment prisoners were charged with larceny at common law & for feloniously receiving "the goods aforesaid." They were acquitted on the ground that the alleged goods were a fixture in a building. They were then charged upon a second indictment under Larceny Act, 1861 (c. 96), s. 31, for stealing the fixture, to which charge they pleaded *autrefois acquit*. The presiding chairman at sessions held that plea not to be proved, & prisoners then pleaded not guilty, but were convicted:—*Held*: the ruling of the chairman was right, & prisoners had not been in peril on the count for receiving in the first indictment.—*R. v. O'BRIEN* (1882), 46 L. T. 177; 15 Cox, C. C. 29, C. C. R.

**3606. Receiving stolen goods—Previous acquittal of receiving where different thief alleged.**—In an indictment for receiving stolen goods knowing them to have been stolen by a person named, the stealing by that person must be proved, or the receiver must be acquitted.—*R. v. WOOLFORD & LEWIS* (1834), 1 Mood. & R. 384.

*Annotation*:—*Mentd.* *R. v. Craddock* (1850), 2 Den. 31.

**3607. — Previous joint indictment with others for the same offence.**—*R. v. DANN*, No. 3565, ante.

**3608. Obtaining by false pretences—Previous acquittal of larceny.**—An acquittal of an offence charged as a larceny cannot be pleaded in bar to an indictment for the same offence charged as a false pretence.—*R. v. HENDERSON* (1841), Car. & M. 328; 2 Mood. C. C. 192; 5 J. P. 195.

*Annotation*:—*Mentd.* *R. v. Bowen* (1849), 13 Q. B. 790.

containing them, the property being again laid in the Postmaster-General:—*Held*: the conviction of debt. by the justices was not a bar to his subsequent conviction upon the six counts in respect of which he first pleaded "*autrefois convict*" then "guilty."—*R. v. POPE* (1914), 26 W. L. R. 659.—**CAN.**

**e. Unlawful possession—Previous acquittal for theft.**—Accused was charged under Act 48 of 1882, s. 58, before the special ct., Kimberley, with the theft of diamonds, but, the evidence showing that he was not a servant in terms of the sect., he was discharged. Thereafter he was charged with contravening sect. 2 of the Act by having in his possession certain rough & uncut diamonds without being able to give a satisfactory account of, or to prove his right to, such possession. He pleaded *autrefois convict*, but was found guilty & sentenced:—*Held*: he had been properly convicted, as the second charge had been for a different offence, requiring evidence distinct from the first.—*R. v. SMITH* (1898), 15 S. C. 361.—**S. AF.**

**f. Receiving stolen goods—Previous summary acquittal of being in possession of same goods reasonably suspected of being stolen.**—Prisoner was charged before justices with having goods in his possession suspected to have been stolen, & acquitted. He was subsequently indicted for receiving same goods knowing them to have been stolen, & he pleaded acquittal by the justices:—*Held*: the plea was no answer to the indictment.—*R. v. WRIGLEY* (1897), 18 N. S. W. L. R. 160; 13 N. S. W. L. N. 227.—**AUS.**

**g. —**—The offence of having possession of property suspected of being stolen or unlawfully obtained & not giving a satisfactory account of

how it was come by, is not substantially the same offence as that of receiving stolen property knowing it to be stolen:—*Held*: an acquittal on a charge of the former offence is no bar to a conviction of the latter offence.—*R. v. CLEARY*, [1914] V. L. R. 571.—**AUS.**

**h. — Nolle prosequi entered on previous indictment for larceny & receiving.**—Prisoner was convicted of receiving stolen goods, on an indictment containing two counts, one for stealing the goods & the other for receiving them, knowing them to have been stolen. Prisoner had, on a former day, in the same circuit, been indicted for stealing the same goods as those which he was charged with stealing by the first count of the present indictment. A jury was impanelled & the trial of prisoner begun, but in consequence of it appearing from the testimony that prisoner could not be convicted for larceny, the clerk of the Crown, who was conducting the prosecution by direction of the Attorney-General, entered a *nolle prosequi*, & then sent another bill before the grand jury, containing a count for receiving, the indictment on which the conviction took place, & on the trial he consented, that prisoner should be acquitted of the charge accordingly:—*Held*: a *nolle prosequi* being entered, prisoner could be again indicted for same offence.—*R. v. THORNTON* (1878), 2 P. & B. 140.—**CAN.**

**k. Killing a cow—Previous acquittal for stealing & receiving the cow.**—Prisoner was indicted for feloniously & maliciously killing a cow. He pleaded *autrefois acquit*, & proved that he had been acquitted of stealing & also of receiving the same animal:—*Held*: evidence did not support plea.—*R. v. FOGG* (1864), 3 N. S. W. S. C. R.

**3609. Indictment under Prevention of Crime Act, 1871 (c. 112), s. 7—Previous acquittal of larceny from the person.**—There is no objection in law to trying a prisoner who has been acquitted of larceny, on an indictment, supported by exactly the same evidence of fact, under sect. 7 of the above Act.—*R. v. MILES* (1909), 3 Cr. App. Rep. 13; 73 J. P. Jo. 516, C. C. A.

**3610. Illegal pawning—Previous conviction for larceny.**—The conviction of a person for larceny of a chattel is no bar to his subsequent prosecution, under Pawnbrokers Act, 1872 (c. 93), s. 33, for illegally pawning the chattel which he had stolen.—*PICKFORD v. CORSI*, [1901] 2 K. B. 212; 70 L. J. K. B. 710; 84 L. T. 627; 65 J. P. 628; 49 W. R. 537; 45 Sol. Jo. 540; 19 Cox, C. C. 712, D. C.

**3611. Burglary & felony—Previous acquittal of burglary with intent to commit felony.**—A plea of *autrefois acquit* of a burglary where the felony is laid as actually committed, cannot be pleaded to an indictment for the same burglary laid with intent to commit the felony, for they are two distinct & different offences.—*R. v. VANDERCOMB & ABBOTT* (1796), 2 Leach, 708; 2 East, P. C. 519, Ex. Ch.

*Annotations*:—*Consd.* *R. v. Birchenough* (1836), 1 Mood. C. C. 477. *Mentd.* *R. v. Reid* (1851), 2 Den. 88.

**3612. Housebreaking—Previous acquittal for burglary.**—*Qu.*: whether an acquittal for burglary is sufficient to bar an indictment for housebreaking on the same facts.—*R. v. SEGAR & POTTER* (1696), Comb. 401; 90 E. R. 554.

*Annotation*:—*Refd.* *Re Newton* (1849), 13 Q. B. 716.

**3613. Bankruptcy offence—Omitting goods from schedule—Previous charge of omitting other goods from the same schedule.**—An insolvent debtor acquitted on a former indictment for omitting goods out of his schedule, may be again indicted for

215.—**AUS.**

**l. Robbery & conspiracy to rob—Previous conviction for receiving.**—Prisoner, having been convicted of unlawfully receiving stolen money knowing it to have been stolen, was subsequently found guilty of conspiracy to rob & robbery. Money received by him in respect of which he was first convicted was part of the fruits of the robbery, which he was afterwards found guilty of conspiring to commit & committing:—*Held*: his conviction for receiving was not a bar to his conviction of robbing & of conspiracy to rob. The test was not whether the facts before the ct. at the first trial were the same as at the second, but whether prisoner could have been properly convicted on the first of the offences of conspiracy & robbery. At the first trial he was not in peril in respect of either of these offences.—*R. v. HORNING* (1922), 69 D. L. R. 530; 51 O. L. R. 504.—**CAN.**

**m. Arson—Previous acquittal of arson with intent to injure.**—To an information charging him with fire to a stack of grain, the property of A. B., prisoner pleaded to a previous acquittal on a charge of having set fire to a barn, the property of A. B. with intent to injure A. B. It was admitted that the setting fire in both cases was the same act:—*Held*: the evidence did not support the plea.—*R. v. BINGHAM* (1881), 2 N. S. W. L. R. 90.—**AUS.**

**n. Attempting to cheat—Previous conviction for cheating.**—As long as a conviction for actual cheating remains in force, a plea of *autrefois convict* is a complete defence to a charge of attempting to cheat.—*R. v. WEISS & WILLIAMS* (1913), 25 W. L. R. 351.—**CAN.**

**o. Procuring forgery—Previous con-**

**Sect. 1.—Plea of *autrefois acquit* and *autrefois convict*: Sub-sect. 3, C. & D.]**

omitting other goods not specified in the former indictment, but such a course ought not to be taken except under very peculiar circumstances.—*R. v. CHAMPNEYS* (1837), 2 Mood. & R. 26.

**3614. Malicious damage endangering safety of persons—Acquittal on charge of felony—Subsequent indictment for misdemeanour—Malicious Damage Act, 1861 (c. 97), s. 36, & Offences against the Person Act, 1861 (c. 100), s. 34.]**—An acquittal upon an indictment charging prisoner with a felony under Malicious Damage Act, 1861, s. 35, & Offences against the Person Act, 1861, s. 32, is no bar to a subsequent indictment being preferred upon the same facts for a misdemeanour under Malicious Damage Act, 1861, s. 36, & Offences against the Person Act, 1861, s. 34.—*R. v. GILMORE* (1882), 15 Cox, C. C. 85.

**3615. Uttering counterfeit coin—Previous conviction for felony—Subsequent indictment for misdemeanour—Coinage Offences Act, 1861 (c. 99).]**—Applt. was indicted, together with two other prisoners, for three utterings of counterfeit coin on July 30, which is a misdemeanour under sect. 10 of the above Act. Then applt. was tried singly on a second indictment for one of the same three utterings of counterfeit florins at C. on July 30, after having been convicted of uttering counterfeit coins at N. in Feb. 1909, which was a felony by sect. 12, because there was a second offence of uttering. The whole of the second indictment was read out to prisoner, who pleaded not guilty. Not quite the same evidence was given as in the previous trial, because he was being tried alone. Evidence was then at once called as to a previous conviction at N. in Feb. 1909, without waiting for the verdict of the jury on the subsequent offence:—*Held*: an irregularity had been committed in contravention of the words in sect. 37 of the Act, which say that on an indictment for felony under that sect. prisoner must in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence, & then afterwards the previous conviction may be inquired into.

A prisoner cannot plead *autrefois convict* to a felony indictment by pleading that he has just been convicted for the misdemeanour.—*R. v. RUSSELL* (1910), 6 Cr. App. Rep. 78, C. C. A.

**violation for false pretences.]**—H. was indicted for fraudulently procuring in Queensland the commission in N. S. W. of the offence of forging a document. He pleaded that he had been already convicted & punished for the acts charged against him on a former indictment for obtaining money by false pretences:—*Held*: the offences charged in the indictments respectively were distinct & the offence of procuring a forgery had been completed before the offence of obtaining money by false pretences, & therefore punishment for the former offence was not barred by the punishment for the latter offence.—*R. v. HALL* (No. 2), [1902] S. R. Q. 53.

**a. Separate charges of embezzlement.]**—Deft. was brought to trial charged with having between certain dates, while acting as cashier in the office of the H. Ry., received various sums of money for which he was bound to account, & pay over, but which he fraudulently converted to his own use. Objection was taken on the part of deft., that each taking constituted a separate offence, & the prosecuting counsel thereupon, by leave of the judge, amended by substituting separate charges covering the amount

specified in the original charge. Deft. pleaded not guilty to each of said charges, & was tried upon the first charge & found guilty of fraudulently not accounting, but acquitted as to so much of the charge as related to failure to pay. Prisoner was sentenced on the first charge, & the hearing of the remaining charges were adjourned until Nov. 27, when the judge directed prisoner to be tried at the same time upon charges 16, 29, & 38:—*Held*: as the charges numbered 16, 29, & 38, showed on their face that they were in no respect identical with the first charge upon which prisoner was tried & convicted, but were for the theft of a different sum at a different date, the pleas of *autrefois acquit* & *autrefois convict*, which were disallowed by the judge, could not have in any way prevailed prisoner.—*R. v. CROSS* (1909), 43 N. S. R. 320; 6 E. L. R. 414; 14 Can. Crim. Cas. 171.—**CAN.**

**PART VIII. SECT. 1, SUB-SECT. 3.—D.**

**q. Sedition—Previous conviction for inciting persons to resist police—Arising out of same subject-matter.]**—Prisoner during a strike made a speech for which he was convicted by the

**D. Other Cases.**

**3616. Conspiracy to raise rebellion—Conviction as to harbouring rebels.]**—A conviction by the privy council for refusing to take an oath as to harbouring rebels cannot be pleaded as *res judicata* on an indictment for conspiracy to raise the same rebellion.—*R. v. BAILLIE* (1684), 10 State Tr. 617, P. C.

**3617. Accessory before fact to felony—Previous acquittal as principal.]**—A person who is tried for felony as a principal, & acquitted, cannot plead that acquittal, in bar of another indictment which charges him with being an accessory before the fact to the same felony.—*R. v. PLANT* (1836), 7 C. & P. 575; *sub nom.* *R. v. BIRCHENOUGH*, 1 Mood. C. C. 477, C. C. R.

*Annotation*:—*Refd.* *R. v. Ollis*, [1900] 2 Q. B. 758.

**3618. Aiding & abetting—Previous acquittal of conspiracy to commit same offence.]**—The fact that a person has been acquitted of conspiracy to commit a crime does not entitle him to plead *autrefois acquit* on a charge of aiding & abetting the commission of the crime.—*R. v. KUPFERBERG* (1918), 34 T. L. R. 587; 13 Cr. App. Rep. 166, C. C. A.

**3619. Perjury—Previous acquittal of same perjury differently laid.]**—Deft. was indicted in Middlesex for perjury committed in an affidavit, which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a *proul patet* by the affidavit affiled in the Ct. of K. B. at Westminster, etc., & on this he was acquitted: after which he was indicted again in Middlesex for the same perjury, with this difference only, that the second indictment set out the *jurat* of the affidavit, in which it was stated to have been sworn in London, which was traversed, by an averment that in fact deft. was so sworn in Middlesex & not in London:—*Held*: he was entitled to plead *autrefois acquit*, for the *jurat* was not conclusive as to the place of swearing, & the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment, & therefore deft. had been once before put in jeopardy for the same offence.—*R. v. EMDEN* (1808), 9 East, 437; 103 E. R. 640.

*Annotations*:—*Mentd.* *R. v. Silkstone* (1842), 2 Gal. & Dav. 396; *R. v. Ratcliffe Culey* (1846), 9 Q. B. 18; *R. v. Crondall* (1847), 10 Q. B. 812; *Re Wenham* (1848), 10 L. T. O. S. 444; *Curtis v. Stovin* (1889), 22 Q. B. D. 513.

stipendiary magistrate at Wellington on a charge under Police Offences Act, 1908, s. 6, of inciting persons to resist the police. The magistrate in hearing the case admittedly heard evidence of the whole speech, though only certain words, not appearing in the present indictment for sedition, were stressed before him. Prisoner pleaded "*autrefois convict*" to the charge of sedition:—*Held*: the plea was no answer; the one speech being two distinct offences.—*R. v. YOUNG* (1914), 33 N. Z. L. R. 1191.—**N.Z.**

**3617 i. Accessory before fact to felony—Previous acquittal as principal.]**—An acquittal of a man upon an indictment against him as principal in a felony, is a bar to an indictment against him as accessory to same felony before the fact.—*R. v. FOY* (1788), Vern. & Scr. 540.—**IR.**

**r. Previous acquittal for conspiring to commit the offence.]**—It is immaterial to a charge under Commonwealth Maternity Allowance Act, 1912 (No. 8), s. 10, that accused had been tried & acquitted on an indictment for having conspired with others to do acts unlawful by the statute & the facts, or some of the facts, relied on in support of such charge were given

**3620. Continuing offences not again chargeable**

—**Neglect to have child vaccinated.**—Where a parent has once been convicted under 16 & 17 Vict. c. 100, ss. 2 & 9, for neglecting to have his child vaccinated within three months of its birth, he cannot, although he still neglects to get the child vaccinated, be a second time convicted.—*PILCHER v. STAFFORD* (1864), 4 B. & S. 775; 3 New Rep. 463; 33 L. J. M. C. 113; 28 J. P. 88; 10 Jur. N. S. 651; 12 W. R. 407; 122 E. R. 651; *sub nom.* *STAFFORD v. PILCHER*, 9 L. T. 759.  
*Annotations*:—*Distd.* *Allen v. Worthy* (1870), L. R. 5 Q. B. 163. *Refd.* *Milnes v. Bale*, *Milnes v. Lea* (1875), L. R. 10 C. P. 591; *R. v. Portsmouth JJ.*, [1892] 1 Q. B. 491.

**3621. — Effect of Vaccination Act, 1867 (c. 84), s. 31.**—On Mar. 30, 1869, A. was convicted for disobeying an order of a justice to cause his child to be vaccinated within seven days from the date of such order. Subsequently the registrar of births & deaths gave him notice to procure the vaccination of the child, which he failed to do; & on Apr. 29, another information came on to be heard against him, when he was ordered to have the child vaccinated within seven days from the date of such order. At the hearing he produced a certificate in the form given in schedule B. to the above Act, & signed by a medical practitioner, certifying that the child was not in a fit state to be vaccinated, & postponing the vaccination until June 20. He did not obey the order made upon him, & on May 13, 1869, another information under above Act, s. 31, came on to be heard against him for disobedience of such order. He again produced the certificate above mentioned, but he was convicted:—*Held*: (1) the justices were not deprived of the jurisdiction to convict him, by reason of the former conviction; (2) the certificate was not a bar to the proceeding but the justices had jurisdiction to consider whether it was given *bonâ fide* or not, & if they thought it was not, they might consider that A. had shown no reasonable ground for his omission to carry the order into effect.—*ALLEN v. WORTHY* (1870), L. R. 5 Q. B. 163; 39 L. J. M. C. 36; 21 L. T. 665; 34 J. P. 263.

*Annotations*:—*As to* (1) *Consd. Knight v. Halliwell* (1874), L. R. 9 Q. B. 412; *Kennard v. Simmons* (1884), 15 Cox, C. C. 397. *Refd.* *Tebb v. Jones* (1877), 37 L. T. 576; *R.*

*v. Brocklehurst* (1891), 61 L. J. M. C. 48; *R. v. Portsmouth JJ.*, [1892] 1 Q. B. 491. *As to* (2) *Refd.* *Hinds v. Elsam* (1903), 88 L. T. 867.

**3622. — Neglect to keep dog under control.**—Applt. was charged with non-compliance, on Aug. 21, 1889, & ten days thereafter, with an order made by justices under Dogs Act, 1871 (c. 56), s. 2, requiring him to keep a dangerous dog under proper control. No evidence was given to support the charge except as to Aug. 21, & the charge was dismissed on the ground that the offence had not been made out. Subsequently applt. was charged with not keeping the dog under proper control on Aug. 21, simply. This charge was proved & applt. was convicted:—*Held*: as applt. was put in peril & might have been convicted on the first hearing, the matter was *res judicata* on the second hearing, & the maxim *nemo bis vexari debet* applied.—*RYLEY v. BROWN* (1890), 62 L. T. 458; 54 J. P. 486; 17 Cox, C. C. 79, C. C. R.

**3623. — Leaving children chargeable.**—On Oct. 1, 1898, the three children of prisoner became chargeable to the parish of P., & had ever since remained chargeable. On Nov. 13, 1900, prisoner was convicted under Vagrancy Act, 1824 (c. 83), s. 4, for running away & leaving the children chargeable, & was sentenced to imprisonment. On Jan. 22 a warrant was issued for his arrest in respect of a like offence, & on Dec. 14, 1903, he was arrested thereunder:—*Held*: on the ground that there had been a continuous chargeability of the children, there could be but one offence, & for that prisoner had already suffered punishment.—*PADDINGTON GUARDIANS v. SULLIVAN* (1903), 68 J. P. 23.

**3624. Information for driving car at speed exceeding twenty miles—Previous conviction for dangerous driving—Motor Car Act, 1903 (c. 36), ss. 1, 9.**—The driver of a motor-car was convicted under above Act, s. 1, of driving his motor-car in a manner which was dangerous to the public.

Evidence was given as to speed, & the question of speed, besides other circumstances, was taken into consideration on such conviction. He was then charged on a second information with driving his car at a speed exceeding twenty miles an hour, contrary to sect. 9 of the Act:—*Held*: (*JELF, J. diss.*), as the question of speed had been taken

in proof of conspiracy.—*R. v. ERSON*, [1914] V. L. R. 144.—*AUS.*

**s. Conspiracy to commit an offence—Previous trial for offence.**—The plea of *autrefois acquit* is not available in respect of a charge of conspiracy; the offence of conspiring to commit an indictable offence is quite distinct from the offence itself.—*R. v. WEISS & WILLIAMS* (1913), 25 W. L. R. 351.—*CAN.*

—*Where a person has been tried for a specific offence & acquitted, & he is subsequently charged with conspiracy of which that offence is alleged to form a part:—Held*: an acquittal is conclusive; & it would be a very dangerous principle to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates.—*R. v. LALIT MOHAN CHUCKERBUTTY* (1911), 1 L. R. 38 Cal. 559.—*IND.*

**a. Assault on police constable—Previous acquittal for resisting another constable in execution of his duty.**—The dismissal of a charge of resisting constable A. in the execution of his duty is no bar to a charge of assaulting constable B. in the execution of his duty even though the two charges arise out of the same set of facts, & the evidence on both is substantially the same.—*McLINEY v. MINSTER*, [1911] V. L. R. 347.—*AUS.*

**b. — Previous conviction of**

*being drunk & disorderly.*—A person convicted of being “drunk & disorderly” was upon same evidence convicted subsequently of assaults upon the police:—*Held*: the first conviction was a bar to the second on the ground that no person shall be convicted twice for the same offence.—*R. (FLYNN) v. COUNTY CORK JJ.* (1909), 43 I. L. T. 154.—*IR.*

**c. Assisting in keeping a gaming house—Previous conviction for betting there.**—Applt. was charged under Games, Wagers & Betting Houses Act, 1902 (No. 18), s. 19 (2), with being found in a betting house & convicted, the evidence showing that he was not only there but was assisting the keeper thereof.

He was then charged with assisting the keeper, & the deposition in the former case being put in by consent as the evidence in the case, was convicted:—*Held*: as he had not been convicted a second time upon the same facts within the meaning of the maxim *nemo debet bis puniri pro uno delicto* since though the same evidence was given in each case the facts necessary & material to the proof of each charge were distinct.—*Ex p. SPENCER* (1905), 5 S. R. N. S. W. 250.—*AUS.*

**d. Election offences.**—Prisoner was indicted for having applied for & voted on a ballot in another person's name at a Dominion election, on which

charge he was acquitted. He was subsequently indicted & convicted for perjury in having on same occasion taken the oath of identity:—*Held*: the offences were distinct; the personation being complete under Dominion Election Act, 1900, s. 114, when he applied for the ballot; while the perjury, which was an offence under Criminal Code, was not committed until, on being challenged, he took the false oath; & therefore, a plea of *autrefois acquit* could not be set up as an answer to the subsequent indictment.—*R. v. QUINN* (1905), 11 O. L. R. 242; 6 O. W. R. 1011.—*CAN.*

**e. Prosecution as British subject—Previous acquittal as foreign citizen.**—Prisoner being charged as a citizen of the U.S., was acquitted on proving himself to be a British subject. He was then indicted as a subject of Her Majesty, & pleaded *autrefois acquit*:—*Held*: the plea was not proved, for that the offence in the case of a foreigner & a subject is substantially different, the evidence, irrespective of national status, which would convict a foreigner, being insufficient as against a subject; & prisoner, therefore, was not in legal peril on the first indictment.—*R. v. MAGRATH* (1867), 26 U. C. R. 385.—*CAN.*

**f. Recognisance to keep peace.**—To *act. fa.* on a recognisance to keep the peace towards H.M., charging an

**Sect. 1.—Plea of *autrefois acquit* and *autrefois convict*: Sub-sect. 3, D.; sub-sect. 4.]**

into consideration on the conviction under sect. 1, the conviction was a bar to a conviction under sect. 9 for driving at a speed exceeding twenty miles an hour.—**WELTON v. TANEBORNE** (1908), 99 L. T. 668; 72 J. P. 419; 24 T. L. R. 873; 21 Cox, C. C. 702; 6 L. G. R. 891, D. C.

See, further, **STREET & AERIAL TRAFFIC**.

#### SUB-SECT. 4.—MATTERS NOT GIVING GROUNDS FOR PLEA.

**3625. Discharge of jury on previous trial—Discharge during trial.]—R. v. WHITEHEAD** (1679), 7 State Tr. 311.

**Annotations:—****Consd. R. v. Charlesworth** (1861), 1 B. & S. 460. **Refd. R. v. Kinloch** (1746), *Fost.* 16, 28; **Winsor v. R.** (1866), 6 B. & S. 143.

**3626. ———.]—R. v. KINLOCH**, No. 3222, *ante*.

**3627. ———.]—R. v. GOULD** (1763), 18 State Tr. 415, n.

**Annotation:—****Refd. R. v. Charlesworth** (1861), 1 B. & S. 460.

**3628. ———.]—**Where, in a case of *misdeemeanour*, the jury are improperly, & against the will of *deft.*, discharged by the judge from giving a verdict after the trial has begun, this is not equivalent to an acquittal, nor does it entitle *deft.* to judgment *quod eat sine die*. At the trial, a material & necessary witness for the Crown refused to give evidence, & was committed for contempt, whereupon, at the application of counsel for the Crown, *deft.* objecting, the judge discharged the jury from giving any verdict. The *ct.* in that case refused to allow *deft.* to add a plea *puis darrein continuance*, stating the above facts on the ground that this would be to allow double pleading, & also, as the facts would be set out on the record, *deft.* could take advantage of them.—**R. v. CHARLESWORTH** (1861), 1 B. & S. 460; 31 L. J. M. C. 25; 5 L. T. 150; 25 J. P. 820; 8 Jur. N. S. 1091; 9 W. R. 842; 9 Cox, C. C. 44; 121 E. R. 786.

**Annotations:—****Folld. R. v. Lewis** (1909), 78 L. J. K. B. 722. **Refd. R. v. Heytesbury** (1863), 8 L. T. 315; **Winsor v. R.** (1866), L. R. 1 Q. B. 390; **R. v. Richardson** (1913), 108 L. T. 384.

**3629. ——— Discharge on failure to agree.]—**Prisoner was indicted for an indecent assault. Upon his trial at the Middlesex sessions the jury, not being able to agree upon their verdict, were, after being locked up five hours, discharged from

assault & breach of the peace, *deft.* pleaded that he had been summarily convicted before a magistrate for the assault & paid the fine imposed:—**Held**: no defence.—**R. v. HARMER** (1854), 17 U. C. R. 555.—**CAN.**

#### PART VIII. SECT. 1, SUB-SECT. 4.

**3625 i. Discharge of jury on previous trial—Discharge during trial.]—**At a trial for forgery a material witness, while under examination, had an apoplectic fit, & a medical practitioner gave evidence that it would be dangerous to his health to continue the examination same day or next day, whereupon the judge discharged the jury. At a later day in same sittings, the witness being sufficiently recovered to be examined, prisoner was again arraigned on same indictment, pleaded "not guilty," & was convicted & sentenced:—**Held**: there was a sufficient necessity to justify the judge in discharging the jury, in the exercise of his discretion, & the second trial & conviction were regular, even if the

judge had erroneously exercised his discretion as a plea of *autrefois convict* or *autrefois acquit* could not have been supported.—**R. v. HENNESSEY** (1873), 2 C. A. 243.—**N.Z.**

**3629 i. ——— Discharge on failure to agree.]—**Where prisoner is unanimously acquitted of some charges, & the jury are divided as to the rest & discharged, & he is "retried" under Criminal Procedure Code, s. 308, before a different jury, he is not being "tried again" within the meaning of sect. 403, but his retrial is on the original indictment & plea, & the *ct.* continues the trial before another jury, & the process may continue till a verdict is passed on all the counts.—**R. v. NIRMAL KANTA ROY** (1914), 1 L. R. 41 Calc. 1072.—**IND.**

**g. ——— Intimation of withdrawal of proceedings by Crown.]—**Accused was arraigned on an accusation of murder. The jury disagreed. The judge's note of what occurred read as follows: "After an absence of two hours & ten minutes the jury returned

giving a verdict. Upon his second trial at the Central Criminal Ct. it was objected, upon his arraignment, that prisoner could not be tried again, the judge having discharged the jury from giving their verdict of his own caprice, & not from any illness of the jurors, or any real necessity having arisen for their discharge:—**Held**: the judge presiding at the trial was sole judge as to whether a necessity for such a proceeding as discharging the jury had arisen, & a discretionary power was vested in him. He must exercise that discretion & the discharge of jury was no bar to a second trial.—**R. v. DAVISON** (1860), 2 F. & F. 250; 8 Cox, C. C. 360.

**Annotations:—****Refd. R. v. Charlesworth** (1861), 1 B. & S. 460; **Winsor v. R.** (1866), L. R. 1 Q. B. 390; **R. v. Lewis** (1909), 78 L. J. K. B. 722; **R. v. Richardson** (1913), 108 L. T. 384.

**3630. ———.]—**Where a trial has proved abortive, & no verdict has been given, there is no rule of law to prevent prisoner being again put on a second trial, the maxim that a man is not to be put in peril twice for the same offence applying only to cases where verdicts have been given.—**WINSOR v. R.** (1866), L. R. 1 Q. B. 390; 7 B. & S. 490; 35 L. J. M. C. 161; 30 J. P. 374; 12 Jur. N. S. 561; 14 W. R. 695; *sub nom. R. v. WINSOR*, 10 Cox, C. C. 327, Ex. Ch.

**Annotations:—****Refd. R. v. Murphy** (1869), L. R. 2 P. C. 535; **A.-G. for New South Wales v. Murphy** (1870), 21 L. T. 598; **R. v. Payne** (1872), 41 L. J. M. C. 65; **R. v. Bradlaugh** (1883), 15 Cox, C. C. 217; **R. v. Lewis** (1909), 78 L. J. K. B. 722; **R. v. Richardson** (1913), 8 Cr. App. Rep. 159; **Crane v. Public Prosecutor**, [1921] 2 A. C. 299. **Mentd. Droege v. Suart**, *The Karnak* (1869), L. R. 2 P. C. 505; **R. v. Littlechild**, **R. v. Heslop** (1871), 40 L. J. M. C. 137.

**3631. Acquittal on ground of defective indictment.]—****ANON.** (1484), *Jenk.* 162; 145 E. R. 104.

**3632. ———.]—**The plea of *autrefois acquit* is a good plea only when the acquittal is upon an indictment sufficient in law.—**R. v. VAUX** (1591), 4 Co. Rep. 44 a; 2 Hale, P. C. 251; 76 E. R. 992.

**Annotations:—****Refd. Wrote v. Wiggles** (1591), 4 Co. Rep. 45 b; **Gardiner v. Spurdant** (1617), *Cro. Jac.* 438; **Willmott v. Tiler** (1701), 12 Mod. Rep. 448; **R. v. Rhodes & Cole** (1703), 2 Ld. Raym. 886; **Jones v. Givins** (1713), *Gilb.* 185; **R. v. Aylett** (1785), 1 Term Rep. 63; **Gray v. R.** (1844), 6 State Tr. N. S. 117; **Conway & Lynch v. R.** (1845), 5 L. T. O. S. 458; **R. v. Drury** (1848), 3 Car. & Kir. 190, 193; **R. v. Drury** (1849), 18 L. J. M. C. 189.

**3633. ———.]—****WROTE v. WIGGES**, No. 3574, *ante*.

**3634. ———.]—R. v. CARTER** (1704), 6 Mod. Rep. 167; *Holt*, K. B. 347; 87 E. R. 924.

**3635. ———.]—**When an indictment is preferred, there may be, & frequently are, three cases, wherein there can be no acquittal which can be pleaded

into *ct.* & on being asked by the Registrar if they are agreed on a verdict the foreman replied, "We are not agreed, & there is no likelihood of our agreeing if we retire for a week." The judge thereupon dismissed the jury. The Solr.-General intimates that he does not intend to proceed with the case against prisoner, & withdraws the indictment; prisoner is thereupon discharged.

Subsequently the A.-G. again indicted accused on a charge of murder. Before pleading to the merits accused pleaded a previous acquittal:—**Held**: in the absence of any verdict either acquitting or convicting accused of the charge of murder, the plea of previous acquittal could not be sustained.—**R. v. KERR**, [1907] E. D. C. 324; 25 S. C. 91; 18 C. T. R. 32.—**S. AF.**

**h. ———.]—**In a trial for murder the jury disagreed & accused was remanded under custody. The A.-G. thereupon ordered prisoner to be liberated & he was discharged from custody. Two years later he was

in bar, viz., if the bill be returned ignoramus, if it be *coram non Judice*, there not being a complete authority, & if the indictment be insufficient.—JONES v. GIVIN (1713), Gilb. 185; 10 Mod. Rep. 214; 93 E. R. 300.

*Annotations*.—*Refd.* Chambers v. Robinson (1726), 2 Stra. 691; Smith v. Hickson (1734), 2 Barn. K. B. 465; Chapman v. Pickersgill (1762), 2 Wils. 145; Sutton v. Johnstone (1786), 1 Term Rep. 493; Wicks v. Fentham (1791), 4 Term Rep. 247; Dawkins v. Paulet (1869), 18 W. R. 336.

**3636.** — Unless second indictment contains same defect.]—Prisoner acquitted of forgery, on a variance between the instrument produced in evidence & that recited in the indictment, cannot plead *autrefois acquit* to another indictment for the same offence except the instrument be again misrecited in the same manner.—R. v. COOGAN (1787), 1 Leach, 448; 2 East, P. C. 948.

*Annotations*.—*Refd.* R. v. Ritson (1869), 39 L. J. M. C. 10; R. v. Riley, [1896] 1 Q. B. 309; R. v. Cade, [1914] 2 K. B. 209.

**3637.** —.]—This blunder which makes the indictment absurd & repayment is, in the opinion of all the Judges of England, a sufficient reason for arresting judgment. But as the opinion is founded, not on any proof of the prisoner's innocence, but merely on the informality of the record, he may be again indicted for the offence (*per cur.*).—R. v. READING (1793), 2 Leach, 590.

*Annotations*.—*Refd.* R. v. Edsall (1798), 2 Leach, 662, n.; R. v. Faderman (1850), 4 Cox, C. C. 359.

**3638.** —.]—The consequence is that the indictment is repugnant & defective, & prisoner must be discharged from it. But as the objection goes only to the form of the indictment & not to the merits of the case, he must be remanded to prison until the end of the session, to afford prosecutor an opportunity, if he thinks fit, of preparing another & better indictment against him (*per cur.*).—R. v. GILCHRIST (1795), 2 Leach, 657.

R. v. Reeves (1798), 2 Leach, 808; R. v. Faderman (1850), *Annotations*.—*Refd.* R. v. Edsall (1798), 2 Leach, 662, n. 4 Cox, C. C. 361.

**3639.** —.]—R. v. TAYLOR, No. 3556, *ante*.

**3640.** —.]—The first count of an indictment charged prisoners with having in their possession a mould intended to impress the stamp of the reverse side of a shilling, the second stated, that the mould was intended to impress the obverse side; the third stated that it was intended to impress part or parts of the reverse side, & the fourth stated the same as to the obverse side. A general verdict of guilty having been recorded, a motion was made in arrest of judgment on the

ground that the two last counts were bad for uncertainty, whereupon the judge directed another indictment to be preferred. The second indictment contained the two first counts of the previous one, a third & fourth stated, that the mould was intended to impress parts of the obverse & parts of the reverse sides, & a fifth & sixth used the word "part" instead of parts. Prisoner pleaded *autrefois convict*.—*Held*: the plea was bad & the second conviction must be confirmed.—R. v. PHILLIPS & BRUNSDEN (1837), 1 Jur. 427, Ex. Ch.

**3641.** —.]—A judgment for a prisoner on demurrer in a case of felony, on the ground that the indictment does not sufficiently charge the felony, is no bar to a subsequent good indictment for the same felony.—R. v. RICHMOND (1843), 1 Car. & Kir. 240; 2 L. T. O. S. 230; 1 Cox, C. C. 9.

**3642.** — Except in case of immaterial misnomer.]—Prisoner was indicted for stealing the goods of William Carr. It appeared in evidence that the proper name of the owner was John Wilson, & an acquittal was directed. Prisoner was again indicted for stealing the goods of "John Wilson, otherwise called William Carr." Prisoner pleaded *autrefois acquit*, with an averment that "the said William Carr was known as well by the name of William Carr as John Wilson":—*Held*: the plea was good.—R. v. AUSTIN (1846), 7 L. T. O. S. 432; 2 Cox, C. C. 59.

**3643.** Acquittal on ground of error in time of arraignment.]—ANON. (1420), Jenk. 72.

**3644.** Acquittal through defect in record.]—R. v. DRURY, No. 3559, *ante*.

**3645.** Defect in proceedings before grand jury—Witness not sworn.]—R. v. BITTON, No. 2441, *ante*.

**3646.** —.]—A person who has pleaded to an indictment which was invalid, on account of its having been found upon the testimony of witnesses not duly sworn to give evidence, may be required to plead to another indictment for the same offence, without the first indictment being quashed by the ct.—ANON. (1833), 6 C. & P. 95.

**3647.** —.]—R. v. BRESLAUER (1904), 68 J. P. Jo. 341.

**3648.** Acquittal on summary charge of assault alleged—Where trial not on the merits.]—Prisoner was charged with common assault before a stipendiary magistrate, & the charge was dismissed, but the magistrate declined to grant a

re-arrested on same charge & brought to trial. A plea of *autrefois acquit* was raised:—*Held*: prisoner was not liable to be retried.—R. v. KELIJANA (1909), 30 N. L. R. 437.—S. AF.

**k. Conviction quashed on ground of defective indictment.**—M. was charged with buying a rough diamond, not being duly licensed or authorised, but the indictment did not allege where the sale had taken place. He was convicted before the Special Ct. of K., but on appeal the indictment was quashed, the record being as follows: "Indictment & conviction quashed." M. was subsequently charged again with the same offence on a proper indictment, & pleaded "*autrefois acquit*":—*Held*: the ct. could take cognisance of the grounds upon which the former indictment had been quashed, & could therefore go behind the record, & the plea of *autrefois acquit* was bad, as prisoner had never been in jeopardy.—R. v. MYERS (1882), 2 S. C. 219.—S. AF.

**l.** —.]—The conviction of prisoner found guilty of the theft of horses, the property of some persons unknown, was set aside on the ground

that at the trial the owners of the horses appeared to give evidence & no amendment of the charge had taken place. Prisoner was subsequently tried again for stealing same horses, the property of certain persons set out in the charge. He pleaded *autrefois acquit*:—*Held*: the plea of *autrefois acquit* was bad.—R. v. TWALATUNGA (1903), 20 S. C. 425.—S. AF.

**3644 i. Acquittal through defect in record.**—Prisoner had been charged with maliciously wounding with intent to do grievous bodily harm. The jury found a verdict of guilty of "unlawfully wounding." On a Crown case reserved the ct. decided that this did not amount to a verdict of maliciously wounding with intent, but was in reality no verdict at all; the conviction was quashed on the ground of error on the record:—*Held*: prisoner was properly tried afterwards & convicted on a charge of assault, occasioning actual bodily harm, arising out of the same facts.—R. v. LEE (1895), 16 N. S. W. L. R. 6.—AUS.

**m. Acquittal on technical grounds.**—The quashing of a conviction on

technical grounds will not support a plea of *autrefois acquit*.—R. v. CARVER, [1917] 2 W. W. R. 1170.—CAN.

**n. Acquittal of some in joint charge.**—An acquittal of some of the accused on charges of rioting armed with deadly weapons, grievous hurt & murder is no bar to the trial of others concerned in same offences.—KOKAI SARDAR v. MEHER KHAN (1910), 1 L. R. 37 Calc. 680.—IND.

**o. Discharge at preliminary hearing before magistrates.**—Accused was charged with theft before two justices, & they, after preliminary inquiry directed by sect. 577, discharged him, being "of opinion that no sufficient case was made out to put accused on his trial." Subsequently another information on same charge was laid against him, & after a preliminary inquiry he was committed for trial. It was objected that there is no jurisdiction in any magistrate to hear such a charge twice, & as the same magistrates dismissed it, & in any event the indictment should be quashed because depositions laid before grand jury & on which indictment was founded

*Sect. 1.—Plea of autrefois acquit and autrefois convict: Sub-sect. 4. Sects. 2 & 3. Parts IX. & X. Sects. 1 & 2: Sub-sect. 1.]*

certificate of dismissal. Prisoner was subsequently indicted for the assault along with three alleged acts of intimidation. At the trial, it was objected that the charge of assault had already been dealt with:—*Held*: the charge had not been heard on the merits, & the objection was overruled.—*R. v. EDMONDES* (1895), 59 J. P. 776.

**3649. Informality in proceedings—Betting House Act, 1853 (c. 119)—Licensing Act, 1872 (c. 94)—Dismissal on technical grounds.]**—*W.* appeared before a ct. of summary jurisdiction in answer to a summons which was being treated as being, & intended to be, a summons under Betting Houses Act, 1853 (c. 119). On a technical ground this summons was dismissed, but another summons was immediately granted under Licensing Act, 1872 (c. 94), & upon this summons *deft.* was convicted. On appeal to quarter sessions:—*Held*: the conviction on this second summons was bad, as, on the first summons, as drawn, *deft.* might have been convicted of the offence of which he was convicted on the second summons.—*WOOD v. NAIRN* (1897), 61 J. P. 184.

**3650. ——— Licensing (Consolidation) Act, 1910 (c. 24), s. 79—Erroneous committal for trial.]**—By s. 79 of the Licensing Act, 1910, it is an offence punishable on summary conviction by a fine not exceeding £20 for the holder of a justices' licence to suffer his premises to be used in contravention of the Betting Act, 1853.

By ss. 1 & 3 of the Betting Act, 1853, it is an offence punishable by fine or imprisonment not exceeding six months for the occupier of premises to use them for the purpose of betting with persons resorting thereto.

By s. 17 of the Summary Jurisdiction Act, 1879 (c. 49), a person charged before a ct. of summary jurisdiction with an offence punishable with imprisonment exceeding three months may claim to be tried by a jury.

*Applt.* was the licensee of the Gate Inn at Matlock. On Apr. 30, 1919, six informations were laid against him. Five of them charged that he, being the licensee of the Gate Inn, had on Apr. 21, 1919, & other dates respectively, suffered the premises to be used by certain persons for the purpose of betting with persons resorting thereto in contravention of the Betting House Act, 1853 (c. 49), contrary to the form of the statute in such case made & provided. The sixth information charged that *applt.* on Apr. 21, 1919, he then being the occupier of the Gate Inn, unlawfully did use the same for the purpose of betting with persons resorting thereto. The six informations were heard together by justices sitting as a ct. of summary jurisdiction. *Applt.* claimed to be

tried by a jury, & he was committed for trial on all the informations. At quarter sessions he was indicted & tried for the offence under the Betting Act, 1853, alleged to have been committed at the Gate Inn on Apr. 21, & was acquitted. The justices subsequently heard the first five informations, & convicted *applt.* on each of them. *Applt.* appealed to quarter sessions. The appeal as to the offence alleged on Apr. 21 was allowed, & the other appeals were dismissed:—*Held*: (1) the offence under the Betting Act, 1853, is not the same offence as that created by s. 79 of the Licensing (Consolidation) Act, 1910, & *applt.* had not been twice placed in jeopardy for the same offence; (2) as a person charged with an offence under s. 79 has no right to claim to be tried by a jury, the act of the justices in purporting to commit *applt.* for trial on the five informations which alleged offences under s. 79 was a mere nullity & did not deprive the justices of jurisdiction to hear those informations summarily at a subsequent date.—*BANNISTER v. CLARKE*, [1920] 3 K. B. 598; 90 L. J. K. B. 256; 124 L. T. 28; 85 J. P. 12; 36 T. L. R. 778; 26 Cox. C. C. 641, D. C.

**3651. ——— Omission to inform accused of right to be tried by jury.]**—Upon the hearing of an information preferred by *resp.* against *applt.* under the above Act, it was discovered, when the third of *resp.*'s witnesses was being examined, that *applt.* had not, through inadvertence, been informed before the charge was proceeded with, as required by Summary Jurisdiction Act, 1879 (c. 49), s. 17, of his right to be tried by a jury, & thereupon the *solt.* for *resp.* withdrew the summons with the consent of the justices, although the *solt.* for *applt.* contended that there was no power to withdraw it. A further information was subsequently preferred by the *resp.* under the same Act against the *applt.* The evidence given on the hearing of both informations was substantially the same:—*Held*: the withdrawal of the first summons in consequence of the technical informality was not equivalent to a dismissal which could be pleaded in bar of the subsequent proceedings.—*DAVIS v. MORTON*, [1913] 2 K. B. 479; 82 L. J. K. B. 665; 108 L. T. 677; 77 J. P. 223; 29 T. L. R. 466; 23 Cox, C. C. 359.

*Annotation*:—*Mentd.* *Hopkins v. Hopkins*, [1914] P. 282.

**3652. ——— Evidence unsworn.]**—*Appet.* convicted by a metropolitan magistrate of assaulting a police constable in the execution of his duty, but by some inadvertence the constable who was assaulted gave his evidence at the hearing of the charge without being sworn. Upon the attention of the magistrate being called to the irregularity, he, later in the same day, reheard the case, all the evidence being then given upon oath. The magistrate again convicted *applt.* A rule having been obtained to quash the second conviction upon the ground that it was bad in that *appet.* at the

only included those taken at first hearing, not second:—*Held*: preliminary inquiry is not final in its nature, & at common law a dismissal by magistrates is not tantamount to an acquittal upon indictment. All proceedings have been regular, & there is no ground for quashing this indictment.—*R. v. HANNAY* (1905), 2 W. L. R. 543.—*CAN.*

**p. Withdrawal of summons.]**—An order of justices permitting a summons for an offence punishable on summary conviction to be withdrawn does not amount to an acquittal, & a fresh summons may subsequently be issued for same offence.—*R. (McDONNELL) v. TYRONE JJ.*, [1912] 2 I. R. 44.—*IR.*

**q. Dismissal without prejudice.]**—A "dismissal without prejudice" of a previous summons for an alleged violation of secrecy under Ballot Act is not a bar to a subsequent conviction for same offence.—*R. v. UNKLES* (1874), 1 I. R. 8 C. L. 50.—*IR.*

**r. ———**—*Resp.* was charged before justices at Petty Sessions with larceny of property not exceeding in value five shillings & conceded to the justices hearing the case. The justices made an order dismissing the charge "without prejudice," & gave *resp.* a certificate under their hands of such dismissal:—*Held*: the dismissal, although expressed to be without prejudice, was a bar to a subsequent prosecution for same offence.—*GREAT*

*SOUTHERN & WESTERN IRY. CO. v. GOODING*, [1908] 2 I. R. 429.—*IR.*

**s. Informality in proceedings—Justices having no jurisdiction.]**—The withdrawal of a charge before justices in the case of an indictable offence where the justices have no summary jurisdiction & before prisoner has pleaded, is not a bar to a subsequent presentment for the same alleged offence.—*R. v. WOODHOUSE*, [1919] V. L. R. 736.—*AUS.*

**t. ——— Conviction quashed.]**—Where a conviction by justices is quashed on the ground that it is bad on its face by reason of the sentence pronounced being one which the justices had no jurisdiction to award,



time of the conviction had previously been put in peril in respect of the same offence:—*Held*: the rule must be discharged inasmuch as appt. had not been legally convicted on the first hearing & had therefore not been in peril at the time of the second hearing, & the second conviction was therefore good.—*R. v. MARSHAM, Ex p. PETHICK LAWRENCE*, [1912] 2 K. B. 362; 81 L. J. K. B. 957; 107 L. T. 89; 76 J. P. 284; 28 T. L. R. 391; 23 Cox, C. C. 77, D. C.

*Annotations*:—*Distd.* *Davis v. Morton*, [1913] 2 K. B. 479. *Apld.* *Bannister v. Clarke*, [1920] 3 K. B. 598.

**3653. — Sale of Food & Drugs Act, 1899 (c. 51) — Omission to serve certificate of analysis.**—An information was preferred against applt. for having sold milk which was deficient in natural fat & also contained a certain percentage of added water. When the case came on for hearing the magistrate was informed that no certificate of analysis had been served with the summons in accordance with sect. 19 (2) of the above Act, whereupon he dismissed the summons. No

evidence as to the facts was given. A second summons was then taken out in respect of the same alleged offence, & with it was served a copy of the analyst's certificate:—*Held*: applt. had been in peril of being convicted on the first summons & therefore was entitled to plead *autrefois acquit* to the second summons.—*HAYNES v. DAVIS*, [1915] 1 K. B. 332; 84 L. J. K. B. 441; 112 L. T. 417; 79 J. P. 187; 24 Cox, C. C. 533; 13 L. G. R. 497, D. C.

#### SECT. 2.—PLEA TO THE JURISDICTION.

See COURTS, Vol. XVI., p. 125, Nos. 233–240.

#### SECT. 3.—PLEA OF PARDON.

See CONSTITUTIONAL LAW, Vol. XI., pp. 516 *et seq.*

## Part IX.—The Jury.

Grand jury.]—See Part VI., Sect. 5, *ante*.

Petty jury.]—See JURIES.

## Part X.—Informations.

#### SECT. 1.—IN GENERAL.

**3654. Former practice.**—Informations at common law were filed by the coroner, who did it upon any application, as a matter of course, 4 & 5 Will. & Mar., c. 18, was therefore made to limit it, & other grounds there are by which the ct. has limited itself (LORD MANSFIELD, C.J.).—*R. v. ROBINSON* (1765), 1 Wm. Bl. 541; 96 E. R. 313. *Annotation*:—*Refd.* *R. v. Casey* (1876), 13 Cox, C. C. 310.

**3655. By private person & by attorney-general.**—There are two kinds of “information” applicable to perjury, & one being a proceeding by the Q. B. Div. on the relation of a person who thinks he is entitled to set the extraordinary power of the ct. in motion, the other being the well-known proceeding by the Crown through the A.-G. (DENMAN, J.).—*R. v. SLATOR* (1881), 8 Q. B. D. 267; 51 L. J. Q. B. 246; 46 J. P. 694; 30 W. R. 410, D. C.

**Quo warranto.**—See CROWN PRACTICE, Vol. XVI., pp. 353 *et seq.*

**Revenue proceedings.**—See CROWN PRACTICE, Vol. XVI., pp. 214 *et seq.*

#### SECT. 2.—INFORMATIONS FILED BY THE ATTORNEY-GENERAL.

##### SUB-SECT. 1.—IN GENERAL.

**n.—A suggestion upon record on behalf of the King.**—*WILKES v. R.* (1770), 4

the case is to be treated as if the conviction had not been made. Accused may be put on trial again on same charge, & he cannot successfully avail himself of the objection of *autrefois convict* or *autrefois acquit*, either of which must have for its basis an adjudication in fact within jurisdiction.—*CONLIN v. PATTERSON*, [1915] 2 I. R. 169.—*IR.*

a. —.—.—.]—Accused was charged with selling liquor without a licence

to A., & convicted. The conviction was quashed, on the ground that the evidence disclosed a sale not to A., but to B. through the agency of A. Accused was then charged on same facts with selling to B., & pleaded *autrefois acquit*, but was convicted:—*Held*: the plea of *autrefois acquit* was bad.—*R. v. LEVI*, [1906] E. D. C. 272.—*S. AF.*

b. *Verdict of coroner's jury.*—The fact that the coroner's jury brought in

*Bro. Parl. Cas.* 360; 2 E. R. 244; *sub nom.* *R. v. WILKES*, 4 Burr. 2527; 19 State Tr. 1075, H. L.

*Annotations*:—*Refd.* *Moody v. Stracey* (1812), 4 Taunt. 588. *Mentd.* *Entick v. Carrington* (1765), 2 Wils. 275; *Steel v. Sowerby* (1795), 6 Term Rep. 171; *Thellusson v. Woodford* (1798), 4 Ves. 227; *Wood v. Plant* (1807), 1 Taunt. 44; *Beauchamp v. Tomkins* (1810), 3 Taunt. 141; *Butt v. Conant* (1820), 1 Brod. & Bing. 548; *Stockdale v. Hansard* (1839), 2 Per. & Dav. 1; *Gray v. R.* (1844), 11 Cl. & Fin. 427; *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *R. v. O'Connell* (1844), 3 L. T. O. S. 376; *Douglas v. R.* (1848), 12 Jur. 974; *Wray v. Toke* (1848), 17 L. J. M. C. 183; *Eastern Archipelago Co. v. R.* (1853), 2 E. & B. 856; *Ex p. Newton* (1855), 4 E. & B. 869; *R. v. Charlesworth* (1861), 1 B. & S. 460; *R. v. Cutbush* (1867), L. R. 2 Q. B. 379; *R. v. Paine* (1867), 16 L. T. 282; *Bradlaugh v. R.* (1878), 3 Q. B. D. 607; *Castro v. R.* (1881), 6 App. Cas. 229; *R. v. Martin*, [1911] 2 K. B. 450; *Hines v. Hines & Burdett*, [1918] P. 364; *Gibbs v. Gibbs & Heathcote* (1920), 123 L. T. 206.

**3657. Who may file information—Solicitor-general during vacancy of attorney-general's office.**—*WILKES v. R.*, No. 3656, *ante*.

**3658. — Not Attorney-General for Duchy of Lancaster.**—It is not competent to the A.-G. of the Duchy of Lancaster to exhibit an information in the High Ct. of Justice, & the ct. will order an information exhibited by him to be taken off the file on the application of deft. even after answer put in by deft.—*A.-G. OF DUCHY OF LANCASTER v. DEVONSHIRE (DUKE)* (1884), 14 Q. B. D. 195; 54 L. J. Q. B. 271; 33 W. R. 367; 1 T. L. R. 185, D. C.

*Annotations*:—*Mentd.* *A.-G. of Duchy of Lancaster v. L. & N. W. Ry.*, [1892] 3 Ch. 274.

a verdict of accidental death in the case of a person accused of homicide, does not justify the pleading of *d'autrefois acquit*.—*R. v. LABELLE* (1892), Q. R. 2 Q. B. 289.—*CAN.*

#### PART X. SECT. 2, SUB-SECT. 1.

c. *Who may file information—Crown prosecutor for Attorney-General.*—A prosecutor for the Queen has power to file in the name of the A.-G. a presentment against any person for



**Sect. 2.—Informations filed by the Attorney-General:**  
*Sub-sects. 1 & 2. Sect. 3: Sub-sects. 1 & 2.]*

**3659. For what offences—Misdemeanour.]—R. v. WILKES, ante. 3656, ante.**

**3660. — Of a serious nature.]—HORNE v. R. (1778), 4 Bro. Parl. Cas. 368; *sub nom.* R. v. HORNE, 2 Cowp. 672; 20 State Tr. 651; 98 E. R. 1300, H. L.**

*Annotations:—*Refd. R. v. Philipps (1805), 6 East, 464; Bradlaugh v. R. (1878), 3 Q. B. D. 607. *Mentd.* R. v. Griffin (1733), Kel. W. 292; R. v. Topham (1791), 4 Term Rep. 126; Hawkes v. Hawke (1807), 8 East, 427; R. v. Marsden (1815), 4 M. & S. 164; Churchill v. Hunt (1819), 1 Chit. 480; R. v. Burdett (1821), 4 B. & Ald. 314; May v. Brown (1824), 3 B. & C. 113; R. v. Morley (1827), 1 Y. & J. 221; Adams v. Meredew (1828), 2 Y. & J. 417; Goldstein v. Foss (1828), 2 Y. & J. 146; Tuam Archbp. v. Robeson (1828), 5 Bing. 17; Harvey v. French (1832), 1 Cr. & M. 11; Gompertz v. Levy (1838), 9 Ad. & El. 282; R. v. Virrier (1840), 12 Ad. & El. 317; R. v. Bidwell (1847), 17 L. J. M. C. 99; R. v. Duffy (1849), 4 Cox, C. C. 294; White v. R. (1876), 13 Cox, C. C. 318; Davies v. Lloyd (1901), 17 T. L. R. 678; Clack v. Clack, [1906] 1 K. B. 483; Jones v. Hulton, [1909] 2 K. B. 444.

**3661. — ]—R. v. CATE & TARRY (1887), Archbold's Criminal Pleading, 26th ed. p. 127.**

**3662. Cannot be quashed.]—Information filed by A.-G. not quashed.—R. v. GREGORY (1697), 1 Salk. 372; 91 E. R. 323.**

*Annotation:—*Refd. R. v. Joakam (1733), Sess. Cas. K. B. 70.

**3663. — ]—An information by A.-G. cannot be quashed; but if an information can be quashed, it must be for something that appears on the record, & not for a matter extrinsic (*per cur.*).—R. v. JOAKAM (1733), Sess. Cas. K. B. 70; 2 Barn. K. B. 323; 93 E. R. 71; *sub nom.* WHITEHAM v. JOKEHAM, Kel. W. 143.**

**3664. — Proceedings may be stopped by nolle prosequi.]—The ct. will not quash an *ex officio* information at the instance of the prosecutor, for the A.-G. if he sees fit, may enter a *nolle prosequi* without the interference of the ct.—R. v. STRATTON (1779), 1 Doug. K. B. 239; 21 State Tr. 1045; 99 E. R. 156.**

*Annotations:—*Refd. R. v. Mitchel (1848), 6 State Tr. N. S. 545. *Mentd.* R. v. Duffy (1848), 4 Cox, C. C. 123; R. v. Dudley & Stephens (1884), 14 Q. B. D. 273.

**3665. — ]—Another case is that of a criminal information at the suit of the A.-G., a practice which has, I am sorry to say, fallen into disuse. The issue, if such an information is entirely in the discretion of the A.-G., & no one can set such an information aside (A. L. SMITH, L.J.).—R. v. COMPTROLLER-GENERAL OF PATENTS, [1899] 1 Q. B. 909; 17 W. R. 567; R. v. COMPTROLLER-GENERAL OF PATENTS, *Ex p.* TOMLINSON, 68 L. J. Q. B. 568; 80 L. T. 777; 15 T. L. R. 310; 16 R. P. C. 233, C. A.**

*Annotations:—*Mentd. *Re* A. & B.'s Appln. for a Patent (1810), 28 R. P. C. 454; R. v. Patents Comptroller-General, *Ex p.* Muntz (1922), 38 T. L. R. 652.

**3666. Effect of death of Attorney-General.]—WALLER v. HANGER (1614), 2 Bulst. 261; 80 E. R. 1107.**

**3667. Delay in filing—Privilege of Crown.]—ANON. (1564), Moore, K. B. 58; 72 E. R. 439.**

**3668. — ]—In an information at the suit of the Crown, in which notice of trial was given in Trinity term, 1838, & afterwards countermanded, the ct. discharged a rule obtained by defts., in Easter term, 1842, for setting down the cause for trial, at the sittings after that term.—R. v. RAY (1842), 9 M. & W. 760; 2 Dowl. N. S. 232; 11 L. J. Ex. 317; 152 E. R. 322.**

an indictable offence even though there has been no preliminary investigation with the matter.—R. v. CAME- & CRACKNELL (1896), 22 V. L. R. —AUS.

**SUB-SECT. 2.—PARTICULAR CASES.**

**NOTE.—Prosecutions by information being seldom resorted to the names of cases are given for reference to former practice.**

**3669. Conspiracy to impair King's revenue.]—R. v. STARLING (1663), 1 Sid. 174; 1 Keb. 675, 682; 1 Lev. 125; 82 E. R. 1039; *sub nom.* A.-G. v. STARLING, 1 Keb. 650.**

*Annotations:—*Consd. R. v. Daniell (1704), 6 Mod. Rep. 99; Mogul S.S. Co. v. McGregor, Gow (1889), 58 L. J. Q. B. 465. *Refd.* R. v. Eccles (1783), 1 Leach, 274.

**3670. Conspiracy to issue false balance sheets.]—The directors of a joint stock bank, knowing it to be in a state of insolvency, issued a balance sheet showing a profit & thereupon declared a dividend of 6 per cent. They also issued advertisements inviting the public to take shares upon the faith of their representations that the bank was in a flourishing condition. On an *ex officio* information filed by the A.-G., they were found guilty of a conspiracy to defraud.—R. v. BROWN (1858), 7 Cox, C. C. 442.**

*Annotation:—*Refd. R. v. Charlesworth (1861), 1 B. & S. 460.

**3671. Riot.]—R. v. STROUDE (1681), 2 Show. 149; R. v. BERCHET (1690), 1 Show. 106; PRYNN'S CASE (1690), 5 Mod. Rep. 459; R. v. HUNT (1754), 1 Keny. 108; A.-G. v. THANET (EARL) (1799), 27 State Tr. 821.**

**3672. Subverting government.]—R. v. STRATTON, No. 333, ante.**

**3673. Disobedience to order in council.]—R. v. HARRIS (1791), 2 Leach, 549; 4 Term Rep. 202; 100 E. R. 973.**

*Annotations:—*Consd. R. v. Hall, [1891] 1 Q. B. 747. *Refd.* R. v. Crawshaw (1860), 30 L. J. M. C. 58. *Mentd.* Boynton v. Anchoine Drainage & Navigation Comrs., [1921] 2 K. B. 213.

**3674. Receipt of bribes by official in India.]—R. v. STEVENS & AGNEW (1804), 5 East, 244; DOUGLAS v. R. (1848), 13 Q. B. 74.**

**3675. Bribery of electors.]—R. v. LEATHAM (1861), 25 J. P. 468; R. v. BOYES (1861), 1 B. & S. 311; R. v. CHARLESWORTH (1861), 1 B. & S. 460.**

**3676. Misconduct by public officers.]—SAVAGE'S CASE (1558), 2 Dyer, 151 b; R. v. PURNELL (1748), 1 Wils. 239; R. v. LEDIARD (1755), Say. 242; R. v. PINNEY (1832), 3 State Tr. N. S. 11.**

**3677. Perjury.]—AGAR'S CASE (1601), Moore, K. B. 627; 72 E. R. 801.**

**3678. Blasphemous libel.]—R. v. EATON (1812), 31 State Tr. 927; R. v. CARLISLE (1819), 1 Chit. 451; R. v. WADDINGTON (1822), 1 State Tr. N. S. 1339.**

**3679. Obscene libel.]—R. v. CURLI (1727), 17 State Tr. 153; R. v. WILKES (1770), 19 State Tr. 1075.**

**3680. Seditious libel.]—SEVEN BISHOPS' CASE (1688), 3 Mod. Rep. 212; R. v. TUTCHIN (1704), 14 State Tr. 1095; R. v. SMITH (1713), Gilb. 57; R. v. CLERK (1728), 1 Barn. K. B. 304; R. v. FRANKLIN (1731), 17 State Tr. 625; R. v. OWEN (1752), 18 State Tr. 1203; R. v. WILKES (1770), 19 State Tr. 1075; HORNE v. R. (1778), 4 Bro. Parl. Cas. 368; R. v. GORDON (1787), 22 State Tr. 175; R. v. REEVES (1796), Peake, Add. Cas. 84; R. v. WAKEFIELD (1799), 27 State Tr. 679; R. v. COBBETT (1804), 29 State Tr. 1; R. v. WHITE (1808), 1 Camp. 359, n.; R. v. LAMBERT & PERRY (1810), 31 State Tr. 335; R. v. HUNT (1811), 31 State Tr. 367; R. v. SUTTON (1816), 4 M. & S.**

**PART X. SECT. 2, SUB-SECT. 2.**

**d. Smuggling of goods.]—On an information filed by the A.-G. for the**

Queen for goods smuggled, costs will not be allowed to deft. against the Crown.—R. v. MAINWARING (1837), 5 O. S. 670.—CAN.

532; *R. v. BURDETT* (1820), 3 B. & Ald. 717; *R. v. HARVEY* (1823), 2 B. & C. 257.

**3681. Libels on foreign sovereigns & ambassadors.]—***R. v. D'EON* (1764), 1 Wm. Bl. 510; *R. v. GORDON* (1787), 22 State Tr. 175; *R. v. VINT* (1799), 27 State Tr. 627; *R. v. PELTIER* (1803), 28 State Tr. 529.

### SECT. 3.—INFORMATION AT INSTANCE OF PRIVATE PERSON.

#### SUB-SECT. 1.—IN GENERAL.

**3682. Jurisdiction.]—***R. v. PAXTON* (1731), 2 Barn. K. B. 62, 66; 94 E. R. 357, 360; *sub nom. R. v. BAXTER*, 2 Stra. 918.

**3683. —.]—**Information for a battery in Newfoundland denied, being a local offence.—*R. v. HOOPER* (1734), Kel. W. 190; Sess. Cas. K. B. 246; 25 E. R. 562; *sub nom. R. v. HOOKER*, Ridg. temp. H. 31; 7 Mod. Rep. 193.

**3684. An extraordinary remedy—Issue discretionary—Alternative remedy sufficient.]—***Ex p. GREER* (1855), 4 W. R. 50; 19 J. P. Jo. 755.

**3685. —.]—***R. v. BELL* (1862), 26 J. P. Jo. 308.

**3686. —.]—***Ex p. BAXTER* (1864), 28 J. P. Jo. 326.

**3687. —.]—**The ct. declined to grant a rule for a criminal information against a superintendent of police, being of opinion that the affidavits did not establish any personal connection of the superintendent with assaults alleged to have been committed by police officers under his control, & that as there was nothing to show that ordinary proceedings for assault would be an insufficient remedy, there was no *prima facie* case made out for the granting of a criminal information.—*Ex p. BOWEN* (1911), 27 T. L. R. 179, D. C.

**3688. —.]—**Matters of aggravation.]—*Ex p. LITTLE* (1865), 29 J. P. Jo. 742.

**3689. —.]—***Ex p. GREENWELL* (1870), 34 J. P. Jo. 406.

**3690. —.]—***Ex p. CUTHBERT* (1875), 39 J. P. Jo. 356, D. C.

**3691. —.]—**Libel of person in public office or position.]—A criminal information does not lie against a party who has accused by letter a post-mistress of opening letters, & tampering with them. There must be some special circumstances to entitle the applicant to that extraordinary remedy. The proper remedy is by indictment.—*Ex p. LITTLETON (POSTMISTRESS)* (1888), 52 J. P. 264, D. C.

**3692. —.]—**A criminal information for libel can only be granted at the suit of persons who are in some public office of position, & not at the

suit of private persons.—*R. v. LABOUCHERE* (1884), 12 Q. B. D. 320; 53 L. J. Q. B. 362; 50 L. T. 177; 48 J. P. 165; 32 W. R. 861; 15 Cox, C. C. 415, D. C.

*Annotations:—**Reid. R. v. Yates* (1884), 1 T. L. R. 193; *Re Appln. for an Attachment for Contempt of Court* (1886), 2 T. L. R. 351; *R. v. Ensor* (1887), 3 T. L. R. 366; *Wood v. Cox* (1888), 4 T. L. R. 652; *R. v. Masters* (1889), 6 T. L. R. 44; *R. v. Russell, Ex p. Morris* (1905), 21 T. L. R. 749; *Ex p. Freeman-Mitford* (1914), 30 T. L. R. 693. *Mentd. Weid-Blundell v. Stephens*, [1919] 1 K. B. 520.

**3693. —.]—***R. v. MASTERS* (1889), 6 T. L. R. 44, D. C.

**3694. —.]—**The remedy of criminal information for a libel is not confined to cases of libel upon persons acting in a judicial capacity while discharging judicial duties, but the ct. can in its discretion grant a criminal information for the protection of persons who are discharging public duties imposed upon them by statute, in respect of a libel published of them in the exercise of those duties.—*R. v. RUSSELL, Ex p. MORRIS* (1905), 93 L. T. 407; 69 J. P. 450; 21 T. L. R. 749; 49 Sol. Jo. 735, D. C.

**3695. —.]—**The ct. will not grant a rule *nisi* for a criminal information for libel on the application of a private person who does not hold a public office or position.—*Ex p. FREEMAN-MITFORD* (1914), 30 T. L. R. 693, D. C.

*See, further, LIBEL.*

**3696. —.]—**Not available to poor person.]—In the case of a very poor person proceeding by information is not the proper manner.—*ANON.* (1773), Loft, 155; 98 E. R. 584.

#### SUB-SECT. 2.—GROUNDS FOR REFUSAL.

**3697. Remedy by indictment more appropriate—Breach of public statute.]—**This ct. will not grant a criminal information for breach of a public statute creating a state offence on the application of a private person, but only on the information of the law officers of the Crown. If a private person desires to punish an infraction of such a statute he must do so by the ordinary machinery for the administration of justice, the preferring of an indictment.—*Ex p. CRAWSHAY v. LANGLEY* (1860), 3 L. T. 320; 24 J. P. 805; 8 Cox, C. C. 356.

**3698. —.]—**Publishing obscene divorce reports.]—*Re EVENING NEWS* (1886), 3 T. L. R. 255, D. C.

**3699. Remedy by indictment more appropriate.]—***R. v. DUMMER* (1699), 1 Salk. 374; *R. v. PROBY & TAYLOR* (1756), 1 Keny. 250; *R. v. JENNINGS* (1845), 2 Dow. & L. 741; *R. v. PEPPER CORN* (1855), 26 L. T. O. S. 74; *R. v. HODGSON* (1856), 26 L. T. O. S. 239;

**3700. Civil remedy open to applicant.]—***R. v. WESTON* (1728), 1 Barn. K. B. 56; *ANON.* (1732),

#### PART X. SECT. 3, SUB-SECT. 1.

**3682 i. Jurisdiction.]—**In applications for a criminal information, the ct. has a more extensive jurisdiction than a grand jury, inasmuch as it can take into account the conduct & character of prosecutor, & the circumstances of the act complained of.—*R. v. BLAND* (1849), 1 Legge, 534.—**AUS.**

**3684 i. An extraordinary remedy—Issue discretionary.]—**The grant of a criminal information is not a matter of course, but in the discretion of the ct., & although a *prima facie* case may have been made, on showing cause both sides must be heard, & if satisfied of the innocence of accused, the ct. is bound to discharge the rule *nisi*.—*R. v. M'INNIS* (1846), 1 Legge, 351.—**AUS.**

**3684 ii. —.]—**If it appears to the ct. that an information is applied for from malice, it will be refused, though, otherwise, the fact would warrant the granting it.—*R. v. GOING, WHITE & MAGRATH* (1801), Rowe, 563.—**IR.**

**e. —.]—**Motive of prosecutor immaterial.]—A case being such as in the circumstances, to call for the issue of a criminal information, the particular object or motive of prosecutor is immaterial.—*R. v. ABBOTT* (1848), 1 Legge, 467.—**AUS.**

**f. —.]—**Libel of person in public office or position.]—A criminal information will not be granted except in case of a libel on a person in authority, in respect of the duties pertaining to his office.—*R. v. BIGGS* (1884), 2 Man. L. R. 18.—**CAN.**

#### PART X. SECT. 3, SUB-SECT. 2.

**g. Accused committed for trial by magistrate—Refusal by Attorney-General to prosecute.]—**Where a person has been committed for trial by a magistrate & the A.-G. has afterwards refused to prosecute, the full ct. will not act as a Ct. of Appeal from his decision by directing a criminal information to be filed, unless very special circumstances are shown.—*R. v. MCKAYE* (1885), 6 N. S. W. L. R. 123; 1 N. S. W. W. N. 58.—**AUS.**

**h. Party seeking information must be free from blame.]—**A party seeking a criminal information against another must himself be free from blame.—*R. v. WHELAN* (1863), 1 P. E. I. 223.—**CAN.**

**k. —.]—**Plea of justification in libel not proved.]—Appct. for a criminal

*Sect. 3.—Information at instance of private person: Sub-sects. 2 & 3, A., B., C. & D.]*

2 Barn. K. B. 198; *R. v. COTTEN* (1733), 1 Kcl. W. 125; *ANON.* (1733), 2 Barn. K. B. 279; *R. v. GROSVENOR* (1743), 1 Wils. 18; *ANON.* (1773), Lofft, 184; *R. v. WATSON* (1788), 2 Term Rep. 199; *R. v. FRIAR* (1819), 1 Chit. 702.

**3701. Summary remedy provided by statute.]—***R. v. HILL* (1729), 1 Barn. K. B. 296; 94 E. R. 202.

**3702. Charge denied by defendant.]—***R. v. HAMPDEN* (1844), 2 L. T. O. S. 367; *R. v. MARTIN & SWAYNE* (1853), 21 L. T. O. S. 102; *R. v. BARNWELL* (1857), 29 L. T. O. S. 107; *R. v. BELL* (1862), 26 J. P. Jo. 308.

**3703. Where applicant has sought other means of redress—Explanation of libel asked for.]—***Ex p. HAVILAND* (1877), 41 J. P. Jo. 789.

**3704. —Apology asked & action threatened.]**—Where a magistrate has been libelled in the discharge of his duties as a magistrate & has demanded an apology & threatened an action for damages, he cannot afterwards apply for a criminal information for libel.—*Ex p. POLLARD* (1901), 17 T. L. R. 773, D. C.

**3705. When applicant has sought other means of redress.]—***ANON.* (1723), 8 Mod. Rep. 187; *Ex p.* (1836), 4 Ad. & El. 576, n.; *R. v. DOHERTY* (1840), Arn. & H. 16; *R. v. GWILT* (1840), 11 Ad. & El. 587; *R. v. LAWSON* (1841), 1 Q. B. 486; *R. v. NOTTINGHAM JOURNAL (PROPRIETORS)* (1841), 9 Dowl. 1042; *Ex p. BEAUCLEER* (1843), 7 Jur. 373; *Re ALDRED, Ex p. YARMOUTH CORPN.* (1844), 8 J. P. Jo. 757; *R. v. UPTON ST LEONARD'S INHABITANTS* (1847), 10 Q. B. 827; *Ex p. ROE* (1852), 20 L. T. O. S. 115; *R. v. MARSHALL* (1855), 4 E. & B. 475; *Ex p. HARRY* (1856), 28 L. T. O. S. 84.

**3706. When civil action is pending.]—***R. v. COSINS* (1728), 1 Barn. K. B. 140; *R. v. PHILLIPS* (1736), Lee temp. Hard. 241; *R. v. FIELDING* (1758), 2 Keny. 386; *R. v. SPARROW* (1788), 2 Term Rep. 198; *R. v. MAHON* (1836), 4 Ad. & El. 575.

**3707. Where applicant is at fault.]—***R. v. PORTER* (1728), 1 Barn. K. B. 52; *R. v. SYMONDS* (1736), Lee temp. Hard. 240; *R. v. HANKEY* (1757), 1 Burr. 316; *R. v. PEACH* (1758), 1 Burr. 548; *R. v. JACKSON* (1773), Lofft, 147; *R. v. LARRIEU* (1837), 7 Ad. & El. 277; *R. v. GREGORY* (1838), 8 Ad. & El. 907; *R. v. HALL* (1846), 7 L. T. O. S. 136.

information must rely wholly upon the ct. for redress, & must come there entirely free from blame. Where there is a foundation for a libel, though it fall far short of justification, an information will not be granted.—*R. v. BIGGS* (1884), 2 Man. L. R. 18.—**CAN.**

**1. —Prosecutor having given provocation.]—**An application for a criminal information refused, prosecutor having given previous provocation. The misconduct of the party making the application has always been held a sufficient reason for allowing the cause shown on behalf of the principal as well as the second.—*R. v. EDGEWORTH* (1827), 1 Ir. L. Rec. 1st ser. 8.—**IR.**

**m. —.**—[On an application for a criminal information, the conduct of appt. in the transaction is open to the scrutiny of the ct., & it will inquire into the provocation he may have given.—*BUTT v. JACKSON* (1846), 10 L. L. R. 120.—**IR.**

**n. —Misconduct of bailiff.]—**Upon an application for an information against a person for resisting the execution of a warrant issued by a

judge to bind him over to keep the peace, it is sufficient cause shown against its going, that the bailiff behaved outrageously, insulted persons in the house, had gone at an unreasonable hour, had stated he was searching for stolen goods, & had refused to show his warrant.—*R. v. SOUTHWELL* (1749), Rowe, 727.—**IR.**

**o. —Prosecutor chosen another remedy —Not renounced it before applying for information.]—**When prosecutor has chosen another remedy, which he has not expressly renounced, he cannot obtain leave to file a criminal information.—*Ex p. O'FARRELL* (1887), 13 Q. L. R. 270.—**CAN.**

**PART X. SECT. 3, SUB-SECT. 3.—A. p. Undue influence at a parliamentary election.]—***R. v. DUGGAN* (1873), 1 R. 7 C. L. 94.—**IR.**

**PART X. SECT. 3, SUB-SECT. 3.—B. q. Preventing proper inquiry by coroner.]—**Deft., not being a duly qualified medical practitioner, dissected & removed parts of the body of deceased, with the intent, according to

**3708. When applied for by the Crown not through Attorney-General.]—***R. v. PHILLIPS, LUCAS & GIBSON* (1764), 3 Burr. 1564; 97 E. R. 983.

**3709. When a previous rule has been discharged on merits.]—***R. v. SMITHSON* (1833), 4 B. & Ad. 861; 1 Nev. & M. K. B. 775; 110 E. R. 679.

**3710. When application is unduly delayed.]—***R. v. SCHOOL* (1728), 1 Wils. 19, n.; *R. v. ROBINSON* (1765), 1 Wm. Bl. 541; *PRIDEAUX v. ARTHUR* (1774), Lofft, 393; *R. v. TAYLOR* (1793), Nolan, 204; *R. v. SMITH* (1796), 7 Term Rep. 80; *R. v. HARRIES* (1811), 13 East, 270; *R. v. MARSHALL & GRANTHAM* (1811), 13 East, 322; *R. v. BISHOP* (1822), 5 B. & Ad. 612; *R. v. BARRY O'MEARA* (1823), 2 L. J. O. S. K. B. 34; *R. v. JOLLIE* (1833), 4 B. & Ad. 867; *R. v. HEXT* (1840), 4 J. P. 283; *R. v. HARRIS* (1844), 13 L. J. M. C. 162; *R. v. ANDREWS* (1847), 9 L. T. O. S. 75; *R. v. WAKLEY (MIDDLESEX CORONER)* (1847), 11 J. P. Jo. 405; *Ex p. HOPPER* (1854), 23 L. T. O. S. 164; *R. v. CALTHORPE* (1863), 27 J. P. 581.

**SUB-SECT. 3.—FOR WHAT OFFENCES GRANTED.**

**A. Bribery and Corruption.**

**3711. Bribery.]—***R. v. TIVERTON CORPN.* (1724), 8 Mod. Rep. 186; *R. v. PLYMPTON* (1725), 2 Ld. Raym. 1377; *ANON.* (1731), 2 Barn. K. B. 47; *R. v. ISHERWOOD* (1758), 2 Keny. 202; *R. v. PITT & MEAD* (1762), 3 Burr. 1335; *R. v. ROBINSON* (1765), 1 Wm. Bl. 541; *R. v. VAUGHAN* (1769), 4 Burr. 2494; *R. v. JOLLIFFE* (1791), cited in 1 East, at p. 154; *R. v. YOUNG* (1801), cited in 2 East, at p. 14; *R. v. CASSANO* (1805), 5 Esp. 231; *R. v. STEWARD* (1831), 2 B. & Ad. 12.

**B. Offences against Administration of Justice.**

**3712. Embracery.]—***R. v. OPIE* (1670), 1 Wms. Saund. 301.

**3713. Interfering with witness.]—***R. v. CHAMBERLAYN* (1728), 1 Barn. K. B. 112; *R. v. LAWLEY* (1731), 2 Stra. 904; *R. v. PHILLIPS* (1736), Lee temp. Hard. 241.

**3714. Abusing judge or magistrate.]—***R. v. COTTON* (1733), 2 Barn. K. B. 313; *Ex p. CHAPMAN* (1836), 4 Ad. & El. 773; *Ex p. MARLBOROUGH (DUKE)* (1844), 5 Q. B. 955; *R. v. ROBERTS* (1857), 29 L. T. O. S. 197; *Ex p. HOSKYNs* (1869), 33 J. P. Jo. 68.

**3715. Prejudicing criminal trial.]—***R. v. WILLIAMS* (1823), 2 L. J. O. S. K. B. 30; *R. v. GRAY*

the information, of preventing due inquiry into the cause of death. This act is a criminal misdemeanour, as tending to defeat the objects of the coroner's inquest, & being *contra bonos mores*.—*R. v. RUSSELL* (1839), 1 Legge, 110.—**AUS.**

**r. Advising resistance to execution of writ.]—***R. v. MORRISON & PAGNUELO* (1872), 3 R. L. O. S. 525.—**CAN.**

**s. False return to writ of certiorari.]—***R. v. ARNOLD* (1888), 8 C. L. T. Occ. N. 271.—**CAN.**

**t. Soliciting grand jury to throw out indictments.]—**An information granted against one soliciting a grand jury to throw out bills of indictment, which they accordingly did.—*ANON.* (Undated), Rowe, 644.—**IR.**

**a. —.**—[Information granted because two grand juries had thrown out two bills of indictment against defts., under the influence of defts.—*ANON.* (Undated), Rowe, 727.—**IR.**

**b. Dropping proceedings to obtain pardon.]—**An information will be granted for offering to drop proceedings on a *certiorari*, if a pardon was granted

(1865), 10 Cox, C. C. 184; *Ex p. SMITH* (1869), 21 L. T. 294.

**3716. Pretence of reading Riot Act.]—R. v. SPRIGGINS** (1746), Wm. Bl. 2.

**3717. Misappropriation by member of corporation.]—R. v. WATSON** (1788), 2 Term Rep. 199.

**3718. Printing report of House of Commons.]—R. v. WRIGHT** (1799), 8 Term Rep. 293.

**3719. Publishing evidence before coroner's jury with comments.]—R. v. FLEET** (1818), 1 B. & Ald. 379.

**3720. Abusing public officer.]—R. v. SMITH** (1822), 1 L. J. O. S. K. B. 31.

**3721. Personating juror.]—R. v. MAY** (1857), 29 L. T. O. S. 196.

#### *C. Misconduct by Judicial Officers.*

**3722. Magistrate.]—R. v. NEWTON** (1720), 1 Stra. 413; *R. v. HEBER* (1731), 2 Barn. K. B. 77; *R. v. AUSTIN* (1732), 2 Barn. K. B. 203; *R. v. MATHER* (1733), 2 Barn. K. B. 249; *R. v. EYRES* (1733), 2 Barn. K. B. 250; *R. v. SHREWSBURY JJ.* (1733), 2 Barn. K. B. 272; *R. v. DE VEIL* (1733), 2 Barn. K. B. 379; *R. v. WYKES* (1738), Andr. 238; *R. v. SOANE* (1738), Andr. 272; *R. v. JONES* (1742), 1 Wils. 7; *R. v. RYE CORPN. JJ.* (1752), Say. 25; *R. v. NOTTINGHAM JJ.* (1755), Say. 216; *R. v. CORBETT & COULSON* (1756), Say. 267; *R. v. PHELPS* (1757), 2 Keny. 570; *R. v. FIELDING* (1758), 2 Keny. 386; *R. v. YOUNG* (1758), 1 Burr. 556; *R. v. ATHAY* (1758), 2 Burr. 653; *R. v. PALMER* (1761), 2 Burr. 1162; *R. v. WILLIAMS, R. v. DAVIS* (1762), 3 Burr. 1317; *R. v. BAYLIS* (1762), 3 Burr. 1318; *R. v. SEAFORD JJ.* (1763), 1 Wm. Bl. 432; *R. v. HANN* (1765), 3 Burr. 1716; *R. v. WALLIS* (1772), Lofft, 38; *R. v. COZENS* (1780), 2 Doug. K. B. 426; *R. v. DAVIE* (1781), 2 Doug. K. B. 588; *R. v. JACKSON*

(1787), 1 Term Rep. 653; *R. v. HOLLAND & FORSTER* (1787), 1 Term Rep. 692; *R. v. BROOKE* (1788), 2 Term Rep. 190; *R. v. WEBSTER* (1789), 3 Term Rep. 389; *R. v. BARKER* (1801), 1 East, 186; *R. v. HOSEASON* (1811), 14 East, 605; *R. v. STAFFORDSHIRE JJ.* (1819), 1 Chit. 217; *R. v. BORRON* (1820), 3 B. & Ald. 432; *R. v. SOMERSETSHIRE JJ.* (1822), 1 Dow. & Ry. K. B. 443; *R. v. LANCASHIRE JJ.* (1822), 1 Dow. & Ry. K. B. 485; *R. v. WHATELY* (1829), 4 Man. & Ry. K. B. 431; *Ex p. FENTIMAN* (1834), 2 Ad. & El. 127; *R. v. PYRKE* (1843), 1 L. T. O. S. 150; *R. v. BADGER* (1843), 4 Q. B. 468; *Re GRIFFITHS* (1847), 9 L. T. O. S. 75; *R. v. SAUNDERS* (1847), 2 Cox, C. C. 249; *Ex p. SMERDON* (1850), 15 L. T. O. S. 141; *R. v. HOLE* (1850), 14 J. P. Jo. 352; *R. v. BARTON* (1850), 4 Cox, C. C. 353.

**3723. Mayor.]—R. v. HALFORD** (1734), 7 Mod. Rep. 193; *R. v. NOTTINGHAM CORPN.* (1773), Lofft, 185; *Ex p. CARTER v. HARWICH CORPN.* (1851), 16 J. P. 23.

**3724. County Court Judge.]—Re ANON.**, No. 7148, *post*.

**3725. Vice-Chancellor of Oxford.]—R. v. HOLMES** (1734), 1 Cunn. 129.

**3726. Sheriffs.]—ANON.** (1733), 2 Barn. K. B. 227.

**3727. Attorney.]—R. v. NORMAN** (1743), 1 Wils. 7.

*See PUBLIC AUTHORITIES & PUBLIC OFFICERS.*

#### *D. Misconduct by Ministerial Officers.*

**3728. Churchwardens.]—ANON.** (1730), 1 Barn. K. B. 327; *ANON.* (1732), 2 Barn. K. B. 166.

**3729. Sheriff.]—R. v. SHACKLINGTON** (1735), Andr. 201, n.; *R. v. GROSVENOR* (1743), 1 Wils. 18; *R. v. WOODROW* (1788), 2 Term Rep. 731.

to two men convicted of treasonable practices.—*R. v. GOING, WHITE & MAGRATH* (1801), Rowe, 563.—*IR.*

**c. Preventing prisoners standing their trial.]—An information will be granted for withdrawing prisoners, out on bail, from abiding their trial.—R. v. GOING, WHITE & MAGRATH** (1801), Rowe, 563.—*IR.*

**d. Disputing counsel's right to be heard.]—Conditional order granted for an information against the magistrates of a corporate city, who had disputed the right of counsel to be heard for or against a party at petty sessions.—ANON.** (1829), 3 Ir. L. Rec. 1st ser. 44.—*IR.*

**e. Conspiracy by attorneys.]—R. (AT THE PROSECUTION OF ELLIOT) v. MAHER** (1845), 6 L. T. O. S. 132.—*IR.*

**f. Threatening letter to mayor & corporation.]—R. wrote a notice to L., Mayor of B., & certain members of the town council, saying that in a certain event he would use the letter to charge them with the felony of manslaughter, " & take further notice that as regards those whom with the mayor, I intend to have returned for trial at the next assizes for the conspiracy alleged to have been carried out on Dec. 13, last, I will if they again conspire illegally to exclude the said burgesses, etc., use this notice to charge the said persons accused as conspirators with the felony of murder." It, being convicted in a criminal information moved in arrest of judgment:—*Held*: this letter disclosed a good ground for a criminal information.—*R. v. REA* (1865), 17 L. C. L. R. 584.—*IR.***

#### **PART X. SECT. 3, SUB-SECT. 3.—C.**

**3722 i. Magistrate.]—If the conduct of prosecutor has been blamable the ct. will not grant a criminal information against a magistrate at his instance;**

**J.—VOL. XIV.**

but if the conduct of the magistrate is not justifiable, the rule will be discharged without costs.—*R. v. MUNRO* (1831), (1825–1897), N. B. Dig. 226.—*CAN.*

**3722 ii. —.]—A magistrate is entitled to six days' notice of a motion for a criminal information against him for a violation of his duty.—R. v. HEUSTIS** (1853), James, 101.—*CAN.*

**3722 iii. —.]—On an application for an attachment or criminal information against a justice of the peace for misconduct in the exercise, or under the authority of, his office, it must be shown that six clear days' previous notice in writing had been given to such magistrate.—R. v. RAE** (1874), 1 L. R. 8 C. L. 524.—*IR.*

**3722 iv. —.]—Re McMICKEN** (1912), 8 D. L. R. 550.—*CAN.*

**3722 v. —.]—The ct. refused to grant an information against a magistrate for an offence which amounted to a felony, would grant it for extortion; but would not grant it in any case where the Crown prosecuted.—R. v. MAGEE** (Undated), Rowe, 416.—*IR.*

**3722 vi. —.]—An information granted against a magistrate for destroying a house, on not finding the men he was in search of.—ANON.** (Undated), Rowe, 645.—*IR.*

**3722 vii. —.]—The ct. granted an information against a magistrate who, in the exercise of his office, abused prosecutor.—R. v. MANLY** (Undated), Rowe, 646.—*IR.*

**3722 viii. —.]—The Ct. of King's Bench refused to grant an attachment against a magistrate for maliciously convicting one for offending against the game laws, & fining him & levying the fine; but granted a criminal information.—R. v. MARTIN** (Undated), Rowe, 726.—*IR.*

**g. Judge — Recorder's Court.]—Ap- plication for leave to file an information against a judge of a recorder's ct. upon the grounds that he had falsified the records of the ct. & maliciously condemned appet. as guilty of a felony upon the verdict of his peers, when, as alleged, no verdict whatever was found by the jury. The facts were that the jury came into ct. & the foreman pronounced a verdict of guilty. Counsel of accused then questioned, not through the ct., some of the jury as to the grounds of their verdict, when one stated that he did not concur in it. The attention of the ct. was not drawn to this dissent, nor did it appear the ct. was aware of it. A verdict of guilty was recorded by the presiding judge; & when formally read to the jury by the clerk, no objection was made. The ct. refused the information.—R. v. FORD** (1853), 3 C. P. 209.—*CAN.*

**h. — Division Court.]—On ap- plication for leave to file a criminal information against a division ct. judge for his conduct in imposing a fine for contempt upon a barrister employed to conduct a case before him:—*Held*: such leave should never be granted unless the ct. see plainly that dishonest, oppressive, vindictive, or corrupt motives influenced the mind, & prompted the act complained of, which in this case was clearly not shown.—*Re TORONTO DIVISION COURT RECORDER & JUDGE* (1864), 23 U. C. R. 376.—*CAN.***

#### **PART X. SECT. 3, SUB-SECT. 3.—D.**

**3729 i. Sheriff.]—Where a sheriff, duly appointed, refuses to act or take the oath of office, the appropriate remedy is by information *ex officio* or indictment, & a *mandamus* will not be granted.—R. v. HUTCHINSON, R. v. GERRARD** (1893), 32 L. R. Ir. 142.—*IR.*

*Sect. 3.—Information at instance of private person : Sub-sect. 3, D., E., F. (a), (b), (c), (d) & (e), G. to P.; sub-sect. 4.]*

**3730. Clerk of Market.**—ANON. (1733), 2 Barn. K. B. 310.

**3731. Overseers.**—R. v. WATSON (1743), 1 Wils. 41; R. v. HERBERT (1759), 2 Keny. 460; R. v. TARRANT (1767), 4 Burr. 2106; R. v. COX & CASYTOR (1837), 1 Jur. 52.

**3732. Parish officer.**—R. v. BARRAT (1780), 2 Doug. K. B. 465; R. v. COMPTON (1783), Cald. Mag. Cas. 246.

**3733. Commissioners.**—R. v. ROGERS (1758), 2 Keny. 373.

**3734. Road surveyor.**—R. v. FRIAR (1819), 1 Chit. 702.

**3735. Guardian.**—R. v. BRIGHTMAN (1848), 11 L. T. O. S. 126.

**3736. Sheriff's officer.**—ANON. (1730), 1 Barn. K. B. 381.

See PUBLIC AUTHORITIES & PUBLIC OFFICERS.

### E. Libel.

See LIBEL & SLANDER.

### F. Breach of the Peace.

#### (a) Assault.

**3737. Assault.**—R. v. WINGFIELD (1632), Cro. Car. 251; R. v. HOLLOWAY (1724), 8 Mod. Rep. 283; JENNINGS v. MOTT (1727), 1 Barn. K. B. 16; R. v. MOUSELEY & SYMS (1728), 1 Barn. K. B. 123; ANON. (1731), 2 Barn. K. B. 27; ANON. (1731), 2 Barn. K. B. 87.

#### (b) Provocation to Breach of the Peace.

**3738. Writing abusive letter.**—*Ex p.* PARKER v. WATTE (1838), 2 J. P. 57.

**3739. Conduct & language.**—R. v. HINCKLEY, *Ex p.* HALL (1847), 11 J. P. Jo. 37.

### PART X. SECT. 3, SUB-SECT. 3.—F. (b).

**k. Threatening letter.**—*To member of Legislative Council.*—*It is nisi* for a criminal information which had been obtained for sending a letter to prosecutor with intent to provoke a breach of the peace, etc. R., a member of Legislative Council, applied to ct. to file criminal information against defts., one for sending & the other for bringing to him a threatening letter with intent, first, to intimidate R. in the performance of his duties as member of Legislative Council, & secondly, to provoke & stir him up to fight a duel:—*Held*: rule would be discharged without costs as regards both defts. as intimidation could not be inferred from the letter.—*R. v. MACDERMOTT & MACFARLANE* (1844), Res. & Eq. Jud. 14.—**AUS.**

**3738 i. Abusive letter.**—It is not sufficient cause against an application for an information for writing an abusive letter to the proprietor of a newspaper, that prosecutor was the proprietor of a paper in which reflections were inserted against deft.; & on deft.'s application to him, that he refused to interfere, referring him to the printer.—*R. v. GOLD* (Undated), Howe, 580.—**IR.**

**3738 ii.**—[An order for a criminal information for writing to the prosecutor a letter, tending to provoke him to commit a breach of the peace, made absolute, although it was not sworn by prosecutor, or conveyed by the words in his affidavit, that deft. intended to provoke him to commit a breach of the peace.—*MALONE v. PIERS* (1831), 4 Ir. L. Rec. 1st ser. 102.—**IR.**

**3739 i. Conduct & language.**—R. v. O'CONNELL (Undated), Rowe, 610.—**IR.**

**3739 ii.**—[A conditional order for liberty to file a criminal information granted, although prosecutor did not swear that he believed deft.'s language was used with an intention to provoke him to fight a duel; a third party, who was present on the occasion out of which the prosecution arose, having made an affidavit to that effect.—*R. v. MAUNSELL* (1839), 1 I. L. R. 257.—**IR.**

**1. Threat to horsewhip.**—Conditional order granted for a criminal information against deft., for shaking a horsewhip over prosecutor, & desiring him to consider himself horsewhipped.—*R. v. ARMSTRONG* (1827), 1 Ir. L. Rec. 1st ser. 7.—**IR.**

### PART X. SECT. 3, SUB-SECT. 3.—F. (c).

**m. Challenge to duel.**—*Applicant must be blameless.*—The ct. will not grant the extraordinary remedy of a criminal information for a challenge to a duel, unless appet. be himself wholly blameless.—*THORN v. FAITHFUL* (1856), 2 Legge, 966.—**AUS.**

**n.**—[Conditional order for a criminal information granted against deft., for attempting to provoke prosecutor to fight a duel.—*R. v. STAUNTON* (1827), 1 Ir. L. Rec. 1st ser. 7.—**IR.**

—[*R. v. HOLMES* (circa 1800–1803), Rowe, at pp. 267, 268, 283, 284.—**IR.**

**p.**—[*R. v. JACKSON* (1846), 7 L. T. (O. S.) 237, 323.—**IR.**

**q.**—[Where a conditional

### (c) Challenge to Fight.

**3740. Challenge.**—R. v. HANKEY (1757), 1 Burr. 316; R. v. CHAPPEL (1757), 1 Burr. 402; PRIDEAUX v. ARTHUR (1774), Loftt, 393; R. v. WILLETT (1795), 8 Term Rep. 294; R. v. YOUNGHUSBAND (1835), 4 Nev. & M. K. B. 850; R. v. LARRIEU (1837), 7 Ad. & El. 277; *Ex p.* ELGIE (1847), 9 L. T. O. S. 39; *Ex p.* LANGDON (1850), 14 J. P. Jo. 301.

### (d) Going Armed.

**3741. Bearing arms.**—R. v. KNIGHT (1686), 3 Mod. Rep. 117.

### (e) Riot and Incitement to Riot.

**3742. Rioting.**—R. v. BEAMOND (1732), 2 Barn. K. B. 138; R. v. SMITH (1831), cited in Grady & Scotland's Crown Practice, at p. 8; R. v. MUNTZ, PARE, PEARCE & TROW (1837), 1 J. P. 386; *Ex p.* LICENSED VICTUALLERS' SOCIETY (1872), 36 J. P. 359.

### G. Blasphemy.

**3743. Libelling Christianity.**—R. v. WOOLSTON (1729), Fitz-G. 64.

### H. Immorality.

**3744. Apprenticing girl to prostitute.**—R. v. DELAVAL (1763), 3 Burr. 1434.

### I. Abduction.

**3745. Inveigling word.**—*SKELES' CASE* (1639), Cro. Car. 557; R. v. BLACKET & ROBINSON (1702), 7 Mod. Rep. 39; R. v. LYNN (1733), 2 Barn. K. B. 242; R. v. PIERSON (1739), Andr. 310; R. v. GREEN (1781), 3 Doug. K. B. 36.

### J. Rescue.

**3746. Rescue.**—*JOURDAN'S CASE* (1698), 12 Mod. Rep. 256.

order for liberty to file a criminal information for sending a letter provoking to fight a duel has been granted, although it might be good cause against making such order absolute, that prosecutor, who had spoken injuriously of deft. in addressing a jury had so spoken maliciously, & not *bona fide* in the discharge of his duty as counsel; yet, where the ct. is not satisfied that such injurious expressions of prosecutor were irrelevant, malicious, & not *bona fide*, they will make absolute the order.—*R. (ON THE PROSECUTION OF ARMSTRONG) v. KIERNAN* (1855), 7 Cox, C. C. 6.—**IR.**

**r. Affidavits showing prosecutor had fought duel.**—*Attorney-General ordered to prosecute information against him.*—[If on an application for an information, it appears on the face of the affidavits of deft., that prosecutor has fought a duel; the ct. will grant an information against him, & will order the A.-G. to prosecute it.—*R. v. O'CONNELL* (Undated), Rowe, 610.—**IR.**

### PART X. SECT. 3, SUB-SECT. 3.—F. (e).

**s. Obstructing justice of peace in execution of duty.**—*Riot.*—[Information for speaking opprobrious, malicious, & contemptuous words of a justice of the peace, in the execution of his office in dispersing rioters, for questioning & denying his authority, & for obstructing & hindering him from dispersing them & preserving the peace.—*Held*: to be too general, the obstruction being imperfectly set forth.—*R. v. GRIFFITH* (1788), Vern. & Scr. 612.—**IR.**

*K. Impressment of Seamen.*

**3747. Impressment.]—***R. v. WEBB* (1747), 1 Wm. Bl. 19.

*L. Demanding Money with Menaces.*

**3748. Threats.]—***R. v. HALLINGBY* (1734), Cunn. 93.

*M. Attempting to obtain Execution of Will.*

**3749. Undue influence.]—***R. v. WRIGHT* (1760), 2 Burr. 1099.

*N. Cheating.*

**3750. Using untrue dice.]—**ANON. (1702), 7 Mod. Rep. 40.

*O. Conspiracy.*

**3751. Trade combination to fix price.]—***R. v. NORRIS* (1758), 2 Keny. 300.

*P. Giving Credit to Wife with a view to charge Husband.*

**3752. Invelgling wife to obtain credit—With view to charge husband.]—**POCOCK *v. THORNICROFT* (1701), 12 Mod. Rep. 454.

## SUB-SECT. 4.—PROCEDURE.

See Crown Office Rules, 1906, rr. 36, 37.

**3753. Motion must be made by counsel.]—**The motion for a criminal information must be made by the law officers of the Crown or by a barrister, & not by a private individual.—*R. v. LANCASTER J.J.* (1819), 1 Chit. 602.

—**Attachment.]—**See CONTEMPT OF COURT, ATTACHMENT & COMMITTAL, Vol. XVI., p. 61, Nos. 690, 691.

**3754. Joinder of defendants.]—**ANON. (1731), 1 Barn. K. B. 450; 94 E. R. 302.

**3755. —.]—**A joint information against several

on distinct rules will not be granted.—*R. v. HEYDON* (1762), 3 Burr. 1270; 97 E. R. 826; *subsequent proceedings*, 3 Burr. 1359.

**3756. — Default of one not to prejudice others.]—**In a criminal information against several the default of one shall not prejudice the others.—*R. v. WINGFIELD* (1632), Cro. Car. 251; 79 E. R. 819.

*Annotation:—*Refd. *R. v. Prynne* (1689), 5 Mod. Rep. 459.

**3757. Motion must be made on affidavit—Contents of affidavit.]—**An affidavit by A., stating that B. had brought him a challenge from C. & that B. had refused to make an affidavit that C. sent him with it, is not evidence on which this ct. will grant a rule *nisi* for a criminal information against C. for sending the challenge.—*R. v. WILLETT* (1795), 6 Term Rep. 294; 101 E. R. 560.

*Annotation:—*Consd. *R. v. Stanger* (1871), L. R. 6 Q. B. 352.

**3758. — —.]—**Where only circumstances of strong suspicion are stated in affidavits, on which a rule for a criminal information is moved, it is not sufficient unless the deponents also add their belief that the party against whom the application is made acted from corrupt motives.—*R. v. WILLIAMSON* (1820), 3 B. & Ald. 582; 106 E. R. 774.

*Annotation:—*Refd. *Ex p. Munster* (1869), 20 L. T. 612.

**3759. — —.]—**In moving for a criminal information for libel, a prosecutor need not adopt the statutory mode of proof (see 38 G. 3, c. 78; 6 & 7 W. 4, c. 76); but it is not sufficient to produce an affidavit, stating merely that deft., printed & published a libel in a newspaper, called, etc., a copy of which libel is hereunto annexed, & to annex such copy.

The prosecutor cannot use a statement in deft.'s affidavits to supply a defect in his own, where the latter are so imperfect that the ct., if aware of their defectiveness, would not have granted a rule *nisi*.—*R. v. BALDWIN* (1838),

all the circumstances connected with the transaction out of which the complaint has arisen, as the suppression of any of them will be ground of cause against making the rule *nisi* absolute.—*KNOX v. ANDERSON* (1840), 2 L. L. R. 262.—**IR.**

**3757 iv. — —.]—**The affidavit to ground a criminal information, for procuring a party to commit a breach of the peace by fighting a duel, should, in all cases, state that such was the intention of the party.—*R. v. KELLY* (1847), 11 L. L. R. 217.—**IR.**

**3757 v. — —.]—**An application for an order to have informations returned in order to ground a motion for admitting prisoners to bail is not a motion of course, some ground must be stated in the affidavit.—*R. v. CORBETT* (1840), 2 L. L. R. 265.—**IR.**

**e. — Particulars of abusive language—Omission cured by defendant's plea.]—**Informations for using profane or abusive language are defective if they do not set out the language used; but where no objection is raised it may be said to have been cured by deft.'s appearance & plea.—*R. v. BALLANTINE* (1914), 14 F. L. R. 278; 22 Can. Crim. Cas. 385.—**CAN.**

**f. — Whether supplemental affidavits may be filed.]—**Supplemental affidavits may be filed by prosecutor in a criminal information, in reply to those of deft., if such refer exclusively to new matter introduced in deft.'s affidavit.—*R. v. BIRCH* (1844), 7 L. L. R. 386.—**IR.**

**g. — —.]—**On showing cause against a rule for a criminal information, supplemental affidavits, even

## PART X. SECT. 3, SUB-SECT. 3.—N.

**t. Playing with loaded dice—Prisoner defrauded—Demanding return of money unfairly won.]—**Prisoner was tried on an information charging him with having sent a letter to M. demanding money of him with menaces & without reasonable or probable cause. It appeared from the letter that prisoner & M. had been playing at some game with dice, & that prisoner having afterwards ascertained, as he alleged, that the dice used was loaded, demanded back the money which he had lost, threatening a prosecution for fraud if the demand was not complied with:—*Held: prisoner* on his trial for the offence of sending the letter was entitled to show that the demand itself was made in good faith, & for that purpose to prove that he had been so defrauded or that at least he had probable grounds for so believing.—*R. v. NICHOLSON* (1868), 7 N. S. W. S. C. R. 155.—**AUS.**

## PART X. SECT. 3, SUB-SECT. 3.—O.

**a. To hinder removal of potatoes from one county to another.]—**An information granted against a person for combining with several others to hinder the removal of potatoes from one part of the country to another.—*R. v. MASSEY* (Undated), Rowe, 731.—**IR.**

## PART X. SECT. 3, SUB-SECT. 4.

**3753 i. Motion must be made by counsel.]—**An application for a criminal information cannot be made by the party in person, but must be made by counsel.—ANON. (1829), 2 Ir. L. Rec.

1st ser. 479.—**IR.**

**b. Applicant must apply at earliest opportunity.]—**When a party means to apply for a criminal information he must do so at the earliest opportunity. If he allows a term to elapse he is to late, & the ct. will not afterwards grant the application.—*R. O'REILLY* (1841), 2 Leg. Rep. 110.—**IR.**

**c. —.]—**It is a settled rule of the ct. that a party applying for the special interposition of the ct. must make his application promptly, & without unnecessary delay.—*R. v. CONWAY* (1850), 2 Ir. Jur. 124.—**IR.**

**d. Who may sign information—Master of Crown Office.]—**A criminal information must be signed by the master of the Crown Office.—*R. v. CROOKS* (1837), 5 O. S. 733.—**CAN.**

**3757 i. Motion must be made on affidavit—Contents of affidavit.]—**An affidavit to ground a criminal information for applying abusive terms to prosecutor, must state prosecutor's belief that the words were used with an intention to provoke him to fight a duel, & must state the rank or situation in life of the parties.—*R. v. BYRNE* (1827), 1 Hud. & B. 16.—**IR.**

**3757 ii. — —.]—**The absence of a statement of the rank in life of the parties in the affidavits, to ground a motion for a criminal information, is a substantial defect, & may be taken advantage of upon showing cause against the conditional order.—*R. v. HARRISON* (1839), 1 Jebb & S. 422.—**IR.**

**3757 iii. — —.]—**In motions for leave to file criminal informations, the parties applying are bound to disclose

*Sect. 3.—Information at instance of private person:*  
*Sub-sect. 4. Part XI.]*

8 Ad. & El. 168; 3 Nev. & P. K. B. 342; 1 Will. Woll. & H. 158; 2 Jur. 856; 112 E. R. 801.

*Annotation:—Consd. R. v. Stanger (1871), L. R. 6 Q. B. 352.*

**3760.** ———.]—The affidavits in support of an application for a criminal information against a party for writing letters provoking a breach of the peace, stated the belief of the deponents that the letters were in the handwriting of the party, not from their own knowledge of his handwriting, but from the information of other persons. The ct. refused a rule to show cause, on the ground that such evidence would not warrant a grand jury in finding a true bill. The ct. also refused leave to renew the application upon affidavits supplying sufficient evidence of the handwriting.—*Ex p. WILLIAMS (1841), 5 Jur. 1133.*

*Annotation:—Refd. R. v. Stanger (1871), L. R. 6 Q. B. 352.*

**3761.** ———.]—A rule *nisi* for a criminal information for libel having been obtained against J. on affidavits which stated that a copy of a newspaper had been purchased from a salesman in the office of the newspaper, & that by a footnote to the newspaper J. was stated to be the printer & publisher of the newspaper, & that the deponent believed J. to be the printer & publisher, the ct. discharged the rule on the ground that the affidavits contained no legal evidence of publication, which was necessary in order to obtain leave to file a criminal information.—*R. v. STANGER (1871), L. R. 6 Q. B. 352; 40 L. J. Q. B. 96; 24 L. T. 266; 35 J. P. 580; 19 W. R. 640.*

**3762.** ———.]—*Misleading affidavits.*—*R. v. WROUGHTON (1765), 3 Burr. 1683; 97 E. R. 1045.*

**3763.** ———.]—*Imperfect affidavits.*—Affidavits sworn before commissioners must state in the *jurat* the place where sworn; & on showing cause against a rule for a criminal information, on its appearing that the affidavits in support of the rule were defective in that respect, the ct. refused time to amend, & discharged the rule.—*R. v. COCKSHAW (1833), 2 Nev. & M. K. B. 378; 3 L. J. M. C. 10.*

*Annotation:—Refd. R. v. Burn (1837), 7 Ad. & El. 190.*

**3764.** ———.]—A magistrate applying for a criminal information for slanderous words addressed to him in the execution of his duty, made an affidavit as to the subject of complaint, in which he stated deft. to be a litigious & shuffling person, & related a former dispute between him & his son, involving circumstances discreditable to deft. The latter statement was made, professedly, in explanation of some words used by deft. on the occasion when he spoke those more particularly complained of, but it did not bear upon the merits of the complaint:—*Held:* the above statements were impertinent & censurable, but the ct. did not, therefore, reject the affidavit.—*R. v. BURN (1837), 7 Ad. & El. 190; 6 Dowl.*

though merely in confirmation, ought not to be used, unless the leave of the ct. had been obtained for that purpose; but if the party showing cause observe upon such affidavits, he thereby opens it to the other side to read them.—*R. v. SHEEHAN (1829), 2 Hud. & B. 214.—IR.*

**h.** ———.]—*Misleading affidavits.*—An application for an information against deft. for grossly abusing prosecutor, a magistrate, in the discharge of his duty, calling him coward, etc., was refused, because it appeared that he had suppressed several material

facts in his affidavits grounding the application.—*R. v. KEARNEY (Undated), Rowe, 621.—IR.*

**k.** ———.]—*How entitled.*—To support a motion for leave to file a criminal information against a justice of the peace, the affidavits should not be entitled as in a suit pending.—*BUSTARD v. SCHOFIELD (1835), 4 O. S. 11.—CAN.*

**l.** *Affidavit in reply—Too general in its terms.*—The affidavit in denial on such an application must, as a rule, be full, clear, & as specific as possible; & all the circumstances must be laid before the ct. fully & candidly, in order

36; 2 Nev. & P. K. B. 152; 1 J. P. 310; 1 Jur. 657; 112 E. R. 443.

**3765.** ———.]—*Title of.*—The affidavits produced on showing cause against a rule for a criminal information need not be entitled.—*R. v. HARRISON (1794), 6 Term Rep. 60; 101 E. R. 435.*

*Annotation:—Refd. Whitehead v. Firth (1810), 12 East, 166.*

**3766.** ———.]—The affidavits on a motion for leave to file a criminal information ought not to be entitled, & if they are, they cannot be read; the affidavits produced on showing cause against the rule may or may not be entitled; all affidavits made after the rule is made absolute must be entitled.—*R. v. ROBINSON (1765), cited in 6 Term Rep. at p. 642; 2 Stra. 704, n.; 101 E. R. 748.*

*Annotations:—Apld. King v. Cole (1796), 6 Term Rep. 640. Consd. Yates v. R. (1885), 14 Q. B. D. 648.*

**3767.** ———.]—*KING v. COLE (1796), 6 Term Rep. 640; 101 E. R. 747.*

*Annotation:—Refd. Yates v. R. (1885), 14 Q. B. D. 648.*

**3768. When exculpatory affidavits necessary.]**

It is an invariable rule not to grant an information for a libel, without an exculpatory affidavit, unless where the party libelled is abroad at a great distance, or the subject matter of the charge is general imputation, or an accusation of criminal language held in Parliament.—*R. v. HASWELL, R. v. BATE (1780), 1 Doug. K. B. 387; 99 E. R. 249.*

*Annotations:—Refd. R. v. Webster (1789), 3 Term Rep. 388; R. v. Wright (1815), 2 Chit. 162; R. v. Aunger (1873), 28 L. T. 630.*

**3769.** ———.]—An affidavit to found a motion for a criminal information for a libel must distinctly negative the charge, unless the party libelled be abroad, or the charge be general.—*R. v. WRIGHT (1815), 2 Chit. 162.*

**3770.** ———.]—The ct. will not grant an information against a magistrate for having improperly convicted a person, unless the party complaining makes an exculpatory affidavit denying the fact.—*R. v. WEBSTER (1789), 3 Term Rep. 388; 100 E. R. 636.*

**3771.** ———.]—Where newspaper articles charged the relator with partiality from political motives, in the manner in which he discharged his duties as presiding officer at an election for members of a school board, & mentioned a specific instance where he had rejected the vote of a duly qualified female voter, who was politically opposed to him, though the relator in his affidavit denied generally the truth of all the charges, & also denied that he refused any voter on political or improper or illegal considerations, or prevented directly or indirectly any voter who was legally qualified to vote & who observed the prescribed regulations from voting, or put any obstacles in the way, or did anything, at any time, calculated improperly to affect the election of any particular candidate, the ct. discharged a rule *nisi* for a criminal information which had been obtained against the

that they may deal with the matter.—*R. v. WILKINSON (1877), 41 U. C. R. 1.—CAN.*

**m.** ———.]—*Insulting to prosecutor.*—Though the matters charged in the affidavit of prosecutor be answered so that the ct. would not grant an information thereon, yet if deft. will introduce other matters in his affidavit, reflecting on prosecutor, showing a manifest intention of insulting him thereby, the ct. will, on that ground, grant the information.—*R. v. ROWE (Undated), Rowe, 418.—IR.*

**n.** *Time limit between teste & return*



publisher, because the relator had not negatived specifically the charge made against him as to the rejection of the female voter's vote.—*R. v. AUNGER* (1873), 28 L. T. 630; 37 J. P. 645; 12 Cox, C. C. 407.

**3772. Information against judicial officer—Necessity for notice.**—A party who applies to the ct. for a criminal information against deft. for breach of duty as a magistrate as well as an individual must before motion give notice to deft. of his intended application.—*R. v. HEMING* (1833), 5 B. & Ad. 666; 2 Nev. & M. K. B. 477; 1 Nev. & M. M. C. 445; 3 L. J. M. C. 3; 110 E. R. 936.

**3773.** ———.]—Justices are entitled to six days' notice of motion for a criminal information against them.—*Ex p. FENTIMAN* (1834), 2 Ad. & El. 127; 4 Nev. & M. K. B. 126; 2 Nev. & M. M. C. 427; 111 E. R. 49.

*Annotation* :—*Refd. Re Pyrke* (1843), 1 L. T. O. S. 253.

**3774. Withdrawal of proceedings—Sanction of court necessary.**—The ct. was of opinion that applications for contempt of ct. being in the nature of criminal informations are incapable of settlement & must not be withdrawn without the sanction of the ct.—*R. v. NEWTON* (1903), 67 J. P. 453; 19 T. L. R. 627, D. C.

*Annotation* :—*Refd. R. v. Parke*, [1903] 2 K. B. 432.

**3775. Rule nisi need not be made absolute.**—When a person has obtained a rule *nisi*, for a criminal information, the ct. of K. B. will not compel him to make it absolute.—*R. v. SHERWOOD* (1824), 2 L. J. O. S. K. B. 78.

**3776. Rule may be discharged on payment of costs.**—On a rule for an information, though the ct. may think a ground is laid, yet, if, under the circumstances, the payment of the prosecutor's costs appears an adequate punishment, they will discharge the rule on deft.'s undertaking so to do.—*R. v. MORGAN* (1780), 1 Doug. K. B. 314; 99 E. R. 203.

**3777. When rule granted after first rule discharged.**—*R. v. WARBURTON* (1699), 12 Mod. Rep. 319; 88 E. R. 1349.

**3778.** ———.]—*R. v. SMITHSON*, No. 3709, *ante*.

**3779.** ———.]—D. obtained a rule *nisi* for a criminal information against the publishers of a libel, on his affidavit that the imputation in the libel was false. The ct. discharged the rule, on the sole affidavit of S., who deposed that the imputation was true. Afterwards S. made declarations, & depositions in an ecclesiastical suit, but not, apparently, material to such suit, contradicting his affidavit in all particulars. D. then indicted S. for perjury, & the bill was found, but S. left the country. In the term after S. had made the declarations & depositions, & after he had gone away, D. obtained another rule for a criminal information against the publishers, on affidavit of the above facts, & of his innocence as before.—*R. v. EVE* (1836), 5 Ad. & El. 780; 2 Har. & W. 450; 1 Nev. & P. K. B. 229; 111 E. R. 1361.

*Annotations* :—*Refd. Ex p. Munster* (1869), 20 L. T. 612. *Mentd. Taylor v. Slingo* (1836), 2 Har. & W. 327.

**3780.** ———.]—The ct. will not permit a second application to be made for a rule for a criminal information unless leave was reserved for the purpose on the first application from very special circumstances, such as being met by affidavits which afterwards turned out to be based on perjury.—*Ex p. MUNSTER* (1869), 20 L. T. 612.

**3781. When rule enlarged.**—Where a rule *nisi* for a criminal information, though served before, reached the hands of deft. only the day before it was to be argued :—*Held* : it must be enlarged.—*R. v. HEELY* (1846), 10 Jur. 1009.

**3782. When information quashed.**—*FOUNTAIN'S CASE* (1663), 1 Sid. 152; 82 E. R. 1027.

*Annotation* :—*Folld. Garland v. Burton* (1738), Andr. 174.

**3783.** ———.]—*GARLAND v. BURTON* (1738), Andr. 174; 2 Stra. 1103; 95 E. R. 350.

**3784.** ———.]—*R. v. NIXON* (1719), 1 Stra. 185; 93 E. R. 462.

*Annotation* :—*Refd. R. v. Wilkes* (1770), 4 Burr. 2527.

**3785.** ———.]—Information quashed by consent.—*R. v. GREEN, R. v. ROPER* (1737), 2 Stra. 1072; 93 E. R. 1039.

## Part XI.—Inquisitions.

See CORONERS, Vol. XIII., pp. 247–259.

*of subpoena—Venue laid in home district.*—It is not necessary that there should be fifteen days between the *teste* & return of a subpoena on a criminal information, where the venue is laid in the home district.—*R. v. CROOKS* (1840), (1823–1900), 1 Ont. Dig. 1583.—**CAN.**

**o. Imputation on third person's character.**—*In affidavit showing cause—Whether affidavit answering charges may be filed.*—In showing cause against an information, a third person, whose character is involved, has no right to answer the charges relative to himself, or to file an affidavit relative thereto; nor will the ct. give him leave to do so, unless some of the parties desire it.—*R. v. ROWE* (1804), Rowe, 275.—**IR.**

**p. Application for information—When made.**—A criminal informa-

tion must be applied for the term immediately succeeding the act complained of, or a very satisfactory account given why this has not been done.—*R. v. BELLINGHAM* (1828), 2 Ir. L. Rec. 1st ser. 32.—**IR.**

**q. ———.**—In special circumstances, the ct. will allow a motion for a criminal information to be made within the last four days of term, although the cause did not arise within the term.—*EVATT v. KELLY* (1838), 1 Jebb & S. 28.—**IR.**

**r. Amendment of—Time for.**—Application to amend an information refused, it being too late, owing to the operation of Stat. Limitations to file a new one.—*A.-G. v. MATHEWS* (1829), 2 Ir. L. Rec. 1st ser. 397.—**IR.**

**s. Failure to serve conditional order**

*on deft.*—A conditional order for a criminal information was granted against deft. when he was absent from Ireland, & it was served upon his wife at his residence in this country, but it did not appear that the order had ever reached his hands or that he attempted to conceal his place of residence abroad :—*Held* : the conditional order would not be made absolute.—*R. v. DICKENSON* (1875), 1 R. 10 C. L. 91.—**IR.**

**t. Plea of justification not set aside on motion.**—The ct. refused to set aside on motion a plea of justification pleaded to counts of a criminal information for words spoken of & to a person acting magisterially, leaving the party to demur if he thought fit.—*R. v. REA* (1863), 9 Cox, C. C. 401.—**IR.**

## Part XII.—Evidence and Proof.

### SECT. 1.—IN GENERAL.

**3786. Sufficiency of.]**—A mere *scintilla* of evidence, not sufficient to justify a verdict, ought not to be left to the jury.—*R. v. SMITH* (1865), 1 Le. & Ca. 607; 6 New Rep. 168; 34 L. J. M. C. 153; 12 L. T. 608; 29 J. P. 532; 11 Jur. N. S. 695; 13 W. R. 816; 10 Cox, C. C. 82, C. C. R.

*Annotation*.—*Mentd.* *R. v. Chattaway & Chattaway* (1922), 17 Cr. App. Rep. 7.

**3787. — To satisfy jury.]**—In a criminal case the jury, in order to convict, ought to be satisfied that by the evidence, affirmatively, as a conviction created in their minds beyond all reasonable doubt that the guilt of the prisoner is established, & if there is only an impression of probability, they ought to acquit him. So far as the case rests on direct testimony, they should, if there be any circumstances to impeach the credibility of the witnesses, look carefully to those circumstances as elements of doubt in the case.—*R. v. WHITE* (1865), 4 F. & F. 383.

*Annotation*.—*Refd.* *R. v. Beal* (1912), 8 Cr. App. Rep. 95.

**3788. — —.]**—You ought to have the highest degree of certainty which the practical business of life admits of (*POLLOCK, C.B.*).—*R. v. KOHL* (1865), 4 F. & F. 930, n.

**3789. — —.]**—Where *prima facie* evidence has been given for the Crown, which, if unanswered, would raise a presumption that might justify a jury in bringing in a verdict of guilty, & prisoner has called evidence to rebut that presumption, the proper direction for the jury is, that if the evidence in rebuttal raises in their minds a reasonable doubt as to prisoner's guilt, they should acquit him, as the *onus* of proof still lies upon the prosecution. If upon the whole evidence the jury are left in a real state of doubt the prosecution have failed to satisfy the *onus* of proof which lies upon them.—*R. v. STODDART* (1909), 73 J. P. 348; 25 T. L. R. 612; 53 Sol. Jo. 578; 2 Cr. App. Rep. 217, C. C. A.

*Annotations*.—*Refd.* *R. v. Norton*, [1910] 2 K. B. 496; *R. v. Ellsom* (1911), 76 J. P. 38; *R. v. Savidge* (1911), 76 J. P. 32; *Ibrahim v. R.*, [1914] A. C. 599; *R. v. Schama, R. v. Abramovitch* (1914), 112 L. T. 480. *Mentd.* *R. v. Bradshaw, Edwards & Jones* (1910), 4 Cr. App. Rep. 280; *R. v. Brownlow* (1910), 74 J. P. 240; *R. v. Pratley* (1910), 4 Cr. App. Rep. 159; *R. v. Hill* (1911), 76 J. P. 49; *R. v. Vassileva* (1911), 6 Cr. App. Rep. 228; *R. v. Horn* (1912), 76 J. P. 270; *R. v. Monk* (1912), 7 Cr. App. Rep. 119; *R. v. Finch* (1916), 85 L. J. K. B. 1575; *R. v. Immer, R. v. Davis* (1917), 118 L. T. 146; *R. v. Hill* (1918), 82 J. P. 194; *R. v. Sanders* (1919), 14 Cr. App. Rep. 11.

**3790. — Evidence consistent with innocence**

### PART XII. SECT. 1.

**3786 i. Sufficiency of.]**—Evidence of the behaviour of police dogs is inadmissible in a criminal case, & no presumption of guilt on the part of an accused person can be deduced by the behaviour of such dogs towards him.—*R. v. ADONIS*, [1918] T. P. D. 411.—S. AF.

**3786 ii. — —.]**—*R. v. KOTCHO, R. v. BARLEY*, [1918] E. D. L. 91.—S. AF.

**a. Circumstantial evidence—Must be inconsistent with anything but guilt of accused.]**—When circumstantial evidence is relied on to prove the guilt of any person accused of a criminal offence the circumstances & facts proved to the satisfaction of the jury must be not only such as are consistent with the guilt of that accused person but must be such as are inconsistent with any other reasonable conclusion except the guilt of that accused person.—*R. v. TURNBULL*

(1920), 20 S. R. N. S. W. 598; 37 N. S. W. W. N. 176.—AUS.

**b. — —.]**—Prisoner was tried before the judge of the county ct. for the crime of incest & was convicted. There was no direct proof of guilt but there were many circumstances from which an inference of guilt could be drawn, & which, if the case had been tried with a jury, could not properly have been withdrawn from them.—*Held*: the conviction must be affirmed.—*R. v. WARD* (1914), 48 N. S. R. 204; 24 Can. Crim. Cas. 75.—CAN.

**c. Evidence must relate to particular charge.]**—It is a well-established & well-known principle of the criminal law that each case ought to stand on its own merits & should be decided on the evidence given in relation to that particular charge.—*R. v. LAPOINTE* (1912), 22 O. W. R. 601; 3 O. W. N. 1469; 4 D. L. R. 210.—CAN.

or guilt.]—H. was the holder of a six-day licence. On a certain Sunday morning the police observed a number of persons being admitted to the licensed premises, & leaving after an interval of from three to twelve minutes. The only one of these persons who was called as a witness stated in evidence that when he entered the premises he called for intoxicating liquor, but that H. refused to serve him. The justices held that a *prima facie* case had been made out against H. of keeping open the premises for the sale of intoxicating liquors during part of the time at which the premises were directed to be closed, but H. refused to give or to call any evidence.—*Held*: the evidence was equally consistent with innocence as with guilt, & therefore a *prima facie* case had not been established against H., & the justices were not entitled to draw any inference of guilt from his refusal to give evidence.—*HARRIES v. THOMAS* (1917), 86 L. J. K. B. 812; 117 L. T. 123; 81 J. P. 172; 25 Cox, C. C. 753, D. C.

**3791. Circumstantial evidence — Exclusion of other causes.]**—Where a criminal charge depends on circumstantial evidence, it ought not only to be consistent with the prisoner's guilt but inconsistent with any other rational conclusion.—*HODGE'S CASE* (1838), 2 Lew. C. C. 227.

**3792. — —.]**—On an indictment for manslaughter by causing a fire, it is necessary in order to sustain the case by an exhaustive process of proof, to show that the fire could not have arisen from any other cause than that charged.—*R. v. GARDNER* (1859), 1 F. & F. 669.

### SECT. 2.—IDENTIFICATION OF ACCUSED.

**3793. Necessity for.]**—If two men are indicted, & one of them appear to be innocent & the other guilty, but the prosecutor cannot identify them respectively, both must be acquitted.—*R. v. RICHARDSON* (1785), 1 Leach, 387.

**3794. Procedure at identification—Witness must act independently.]**—Identification of a debt, by a witness must be absolutely independent.—*R. v. DICKMAN* (1910), 74 J. P. 449; 26 T. L. R. 640; 5 Cr. App. Rep. 135, C. C. A.

*Annotation*.—*Mentd.* *Crane v. Public Prosecutor*, [1921] 2 A. C. 299.

**3795. — —.]**—The identification of a suspected person must be carefully conducted; it is wrong to point out the suspected person & ask,

### PART XII. SECT. 2.

**d. General rule.]**—Evidence of belief as to a prisoner's identity is admissible although a belief on circumstantial grounds would be of little, & might be of no value.—*R. v. CORCORAN* (1865), 4 N. S. W. S. C. R. 83.—AUS.

**3794 i. Procedure at identification—Witness must act independently.]**—Police ought not either directly or indirectly to do anything which may prevent the identification of an accused person from being absolutely independent, & they should be most scrupulous in seeing that it is so.—*R. v. MURRAY & MAHONEY* (No. 2), [1917] 1 W. W. R. 404; 10 Alta. L. R. 275; 27 Can. Crim. Cas. 247; 33 D. L. R. 702.—CAN.

**e. Proof of identification—Evidence of peculiarities of accused—Loss of finger of left hand.]**—On the trial of a prisoner for murder evidence was given that he had lost one finger of

"Is that the man?"—*R. v. CHAPMAN* (1911), 28 T. L. R. 81; 7 Cr. App. Rep. 53, C. C. A.

**3796.** ———.]—Where the sole defence is an alibi identification by a single witness must be conducted with great care, & the summing up must deal carefully with the facts of the identification.—*R. v. MILLICAMP* (1921), 16 Cr. App. Rep. 83, C. C. A.

**3797.** ——— Suspected person should not be presented alone.]—It is improper, in order to identify prisoners, to invite proposed witnesses to see them apart from other persons.—*R. v. SMITH & EVANS* (1908), 1 Cr. App. Rep. 203, C. C. A.

**3798.** ———.]—For the purpose of identification the suspected person should not be presented alone.—*R. v. WILLIAMS* (1912), 8 Cr. App. Rep. 84, C. C. A.

**3799.** ——— Suspected person should not be in dock.]—It is improper to identify a deft. only when he is in the dock.

The Ct. of Cr. App. will not interfere with a sentence unless further facts are brought to its notice, but if further facts are brought to its notice which justify a reduction of sentence, will err on the side of mercy.—*R. v. CARTWRIGHT* (1914), 10 Cr. App. Rep. 219, C. C. A.

**3800.** ——— Preliminary description should not be given to witness.]—A., the driver of a cart, left his pony & cart outside a public-house. On leaving it he saw two men loitering near, S. & another man. On returning to the place the pony & van had disappeared. On the trial of B. for the theft, the evidence for the Crown consisted of the identification of B. by A. & S. Both A. & S. had picked B. out of a line of men at the police-station, A. as a man he had seen loitering at the place & S. as a man he had seen drive off with the pony & cart. A., in the course of his evidence, said: "I did not take particular notice of him; I just caught his eye at the minute I brought the van round." S. said he had only seen the back of the man who drove off with the van, but he identified the man at the police-station from his front. When asked how it was he was able to identify B., he said: "Because they said he very much resembled the man they had suspicion of"; & in answer to the foreman of the jury, he said that a detective officer had given him a description of the man. The vice in the evidence of S. was not pointed out to the jury by the judge in his summing up, although he pointed out to them that S. said he had not seen his face until he saw it at the police-station. B. was convicted:—*Held*: the conviction must be quashed on the ground that the evidence of identification was very unsatisfactory & the case had not been properly left to the jury.—*R. v. BUNDY* (1910), 75 J. P. 111; 5 Cr. App. Rep. 270, C. C. A.

*Annotation*:—*Apld. R. v. Finch* (1916), 85 L. J. K. B. 1575.

**3801.** ——— Photographs of suspected persons should not be shown previously.]—Photographs of persons about to be put up for identification ought not to be shown previously to those who are invited to identify such persons.—*R. v. GOSS* (1923), 17 Cr. App. Rep. 196, C. C. A.

his left hand, & on the application of counsel for the Crown Judge ordered him to hold up his left hand, & the jury saw it.—*Held*: the order was right.—*R. v. HARTLEY* (1871), 10 N. S. W. S. C. R. 306.—*AUS.*

**3807 i.** ——— *Finger-prints may be sufficient.*]—The resemblance between the finger-print of an accused person & the finger-print found on an article may be sufficient evidence to justify a jury in finding that the

finger-print found on the article was made by accused.—*R. v. PARKER*, [1912] V. L. R. 152.—*AUS.*

**3807 ii.** ———.]—During the absence of the occupants of a dwelling-house, the house was entered, & property stolen therefrom. Finger-prints were found on an article in the house. These finger-prints exactly corresponded to the prints of the right thumb of the person accused of breaking into the house:—*Held*: there

**3802. Question to witness.**]—In order to identify a person in ct. with one whom the witness has described, the attention of the witness may be directed to the person in ct., & he may be asked whether that is the person of whom he has spoken.—*R. v. WATSON* (1817), 2 Stark. 116; 32 State Tr. 1, N. P.

*Annotations*:—*Refd. A.-G. v. Briant* (1846), 15 M. & W. 169; *Mulcahy v. R.* (1867), 15 W. R. 446; *R. v. McCafferty* (1867), 15 W. R. 1022; *Marks v. Beyfus* (1890), 63 L. T. 733. *Mentd. Bedford v. Birley* (1822), 1 State Tr. N. S. 1071. *Tooth v. Bagwell* (1825), 2 C. & P. 187; *R. v. Blake* (1844), 6 Q. B. 126; *R. v. Duffy* (1849), 7 State Tr. N. S. 795.

**3803.** ———.]—A witness called to prove that he had seen a prisoner at a particular spot at a certain time added that he had since seen a number of men in gaol & had pointed out one:—*Held*: the following was a proper form of question to put to the witness: "Who did you point him out as being?"—*R. v. BLACKBURN* (1853), 6 Cox, C. C. 333.

*Annotation*:—*Mentd. R. v. Godinho* (1911), 76 J. P. 16.

**3804. Proof of identification—Evidence of peculiarities of accused—Left-handedness.**]—*R. v. PATCH* (1806), *Wills' Circumstantial Evidence*, 6th ed. p. 442.

**3805.** ——— Footmarks insufficient.]—Evidence of footmarks of highway robbers held *per se* insufficient evidence on which to convict of a felony.—*R. v. BUTTON* (1858), 1 F. & F. 354.

**3806.** ——— Handwriting insufficient on charge of perjury in an affidavit.]—B. was indicted for perjury committed in an affidavit alleged to have been made by him, in order to obtain a marriage licence. The evidence showed that some person went to the vicar general's office, & gave certain instructions in accordance with which an affidavit was filled up by one of the clerks, which, after having been read over to *appet.*, was signed by him. B.'s father proved that the signature to the affidavit was in his son's handwriting. The custom of the vicar general's office is, for the clerk who fills up the affidavit to go with *appet.* & get him to swear to it before a surrogate. Neither the clerk in the vicar general's office nor the surrogate could identify B. as having sworn to the present affidavit; & although the clergyman who married B. recognised him as being the person who was married under the licence granted on the strength of the affidavit signed by him, yet he did not receive the licence from him on the day of the marriage, but on the previous day from the verger of his church:—*Held*: further proof of the identity of the person who swore to the affidavit with the person who signed it was necessary before B. could be convicted of perjury assigned on a false statement contained in it.—*R. v. BARNES* (1867), 31 J. P. 408; 10 Cox, C. C. 539.

**3807.** ——— Finger-prints may be sufficient.]—The ct. may accept the evidence of finger-prints though it be the sole ground of identification.—*R. v. CASTLETON* (1909), 3 Cr. App. Rep. 74, C. C. A.

**3808.** ——— Voice sufficient.]—There may be sufficient identification of a person by his

was evidence identifying the accused person with the person who committed the crime, & the judge was right in not withdrawing the case from the jury.—*R. v. MORRIS* (No. 2), [1914] S. R. Q. 274.—*AUS.*

**3807 iii.** ———.]—*R. v. KRAUSCH* (1913), 32 N. Z. L. R. 1229.—*N.Z.*

1. ——— Enlarged photographs admissible.]—Upon the trial of

**Sect. 2.—Identification of accused. Sect. 3: Subsect. 1, A.]**

voice.—*R. v. KEATING* (1909), 2 Cr. App. Rep. 61, C. C. A.

**3809. ——— Telephone conversation.]**

—Telephone conversations in which a prisoner is alleged to have taken part may be given in evidence.—*R. v. LEWIS & HICKMAN* (1920), 84 J. P. 64.

**3810. — Denial of identity on charge of gross indecency—Evidence of possession of lewd pictures.]**

—On the trial of a man on a charge of gross indecency the prosecution tendered evidence to prove that at the time the accused was carrying powder puffs & that in his rooms he had indecent photographs of nude boys. The defence was that the accused was not the man who committed the alleged offence, & he adduced evidence to prove an alibi:—*Held*: the evidence was admissible on the issue as to identity.—*THOMPSON v. R.*, [1918] A. C. 221; 87 L. J. Q. B. 478; 118 L. T. 418; 82 J. P. 145; 34 T. L. R. 204; 62 Sol. Jo. 266; 26 Cox, C. C. 189; 13 Cr. App. Rep. 61, H. L.; *affg.* S. C. *sub nom.* *R. v. THOMPSON*, [1917] 2 K. B. 630, C. C. A.

*Annotations*:—*Foll.* *R. v. Twiss*, [1918] 2 K. B. 853. *Reid*, *R. v. Armstrong*, [1922] 2 K. B. 555; *R. v. Manning* (1923), 17 Cr. App. Rep. 85.

**3811. — By prosecutor—In presence of other witnesses—Demeanour of accused when accusation made in his presence.]**—(1) There is no rule of law that evidence of a statement made in the presence & hearing of the accused is not admissible as having a bearing on his conduct unless he accepts the statement; but where the accused denies the truth of the statement the presiding judge, in the absence of special circumstances, should intimate to counsel for the prosecution that, inasmuch as the evidence, though admissible, would have little value & might unfairly prejudice the jury against the accused, it ought not to be admitted.

*Resp.* was convicted of an indecent assault upon a little boy. At the trial the boy's mother stated in evidence that, as she & her son came up to *resp.* shortly after the act complained of, the little boy said in *resp.*'s hearing: "That is the man," & described what *resp.* did to him, & that *resp.* replied, "I am innocent." The Ct. of Criminal Appeal quashed the conviction upon the authority of *R. v. Norton*, No. 4137, *post*, on the ground that evidence of a statement, made in the presence of the accused was not admissible against him unless he acknowledged the truth of the statement:—*Held*: the evidence was admissible in law in reference to the demeanour of *resp.*, & as part of the act of identification.

a prisoner photographs of a thumb-print found on a box alleged to be that of the prisoner, & a photo of prisoner's thumb-print, were put in evidence. The Crown also tendered enlarged photographs of these prints which, however, did not show the whole of the print found on the box or the whole of prisoner's thumb-print, but did show the characteristics of the thumb-print relied upon for purposes of identification:—*Held*: the enlarged prints were admissible in evidence.

*BLACKER v. R.* (1910), 10 C. L. R. 604; 27 N. S. W. N. 76.—*AUS.*

**E. ——— Accused cannot be compelled to give his finger-prints in court.]**—Evidence obtained by compelling an accused to give his finger-prints in ct. is improperly obtained, & a conviction resulting therefrom must be quashed.—*GOORPURSHAD v. R.* (1914), 35 N. L. R. 87.—*S. AF.*

**Foot-prints — Plaster casts.]**—To prove certain foot-prints had been made by accused evidence was given that one of his had been pressed into the soil beside the foot-prints & had made a similar impression. Plaster casts were produced in ct.:—*Held*: evidence properly procured & admissible.—*R. v. O'BRIEN* (1884), 10 V. L. R. 243.—*AUS.*

**K. — Previous identification — Evidence admissible to show person identified was accused.]**—Upon the trial for murder, a witness stated that he could not then identify prisoner as the person who had struck the blow, but added that on a former occasion he had so identified him:—*Held*: evidence was admissible to show that the person so identified was the prisoner.—*R. v. TOBIN* (1839), 1 *Craw. & D.* 298.—*IR.*

**L. ———.]**—A witness who

(2) The principles of the laws of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action. There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials, & which have acquired their force by the constant & invariable practice of judges when presiding at criminal trials. They are rules of prudence & discretion, & have become so integral a part of the administration of the criminal law as almost to have acquired the full force of law (*LORD READING*).

(3) By virtue of the Children Act, 1908 (c. 67), s. 30, Christie could not be convicted unless the boy's testimony was "corroborated by some other material evidence in support thereof implicating the accused." There was no sufficient direction, & there was misdirection to the jury of the requisites of corroboration under this statute. Such direction as was given by the deputy chairman was erroneous inasmuch as it treated the statement by the boy, given in evidence by the mother & the constable, as corroboration of the boy's evidence implicating the accused. This is manifestly wrong. It was for the deputy chairman to satisfy himself that there was evidence of corroboration fit to be submitted to the jury within the meaning of the statute, & then to direct them not to convict unless they accepted the evidence of corroboration (*LORD READING*).

(4) It is not a rule of law that the evidence of an accomplice must be corroborated in order to render a conviction on his evidence valid; but it is a general rule of practice that judges should advise juries not to convict on the evidence of an accomplice unless it be corroborated, & this is a matter entirely for the discretion of the judge before whom a case is tried (*LORD ATKINSON*).

(5) The boy's statement was so separated by time & circumstance from the actual commission of the crime that it was not, I think, admissible as part of the *res gestae* (*LORD ATKINSON*).—*R. v. CHRISTIE*, [1914] A. C. 545; *sub nom.* *PUBLIC PROSECUTIONS DIRECTOR v. CHRISTIE*, 83 L. J. K. B. 1097; 111 L. T. 220; 78 J. P. 321; 30 T. L. R. 471; 58 Sol. Jo. 515; 24 Cox, C. C. 249; 10 Cr. App. Rep. 141, H. L.; *affg.* (1913), 109 L. T. 746, C. C. A.

*Annotations*:—*As to* (1) *Apld.* *Chantler v. Bromley* (1921), 14 B. W. C. C. 14. *Reid*, *R. v. Curmoke* (1914), 111 L. T. 816; *Perkins v. Jeffery*, [1915] 2 K. B. 702; *R. v. Smith* (1915), 114 L. T. 239; *R. v. Feigenbaum*, [1919] 1 K. B. 431; *R. v. Adams* (1922), 17 Cr. App. Rep. 77. *As to* (4) *Reid*, *R. v. Boyv* (1916), 12 Cr. App. Rep. 15. *Generally*, *Mentd.* *R. v. Altschuler* (1915), 11 Cr. A. v. Hall (1915), 11 Cr. App. Rep. 221.

**3812. — Statement by person when accused**

had, two days after the occurrence, identified one of a party who had robbed him, when asked if he saw the person in ct., pointed to a prisoner, & said that he thought he was one of the men, but he was not sure; but he had identified a man two days after the robbery; that at the time he was sure that it was the right man, & that he thought prisoner, K., was the man whom he had identified, but he had very different clothes on then:—*Held*: the Crown were entitled to show by other witnesses that prisoner, K., was the man who had been previously identified by the former witness.—*L. v. BURKE & KELLY* (1847), 9 L. T. O. S. 514.—*IR.*

**m. ——— Evidence admissible to rebut.]**—Upon a trial for stabbing with intent to kill, evidence having been given that the offence was committed by the prisoner, A. & B. being

not present—Inadmissible.]—*R. v. TAYLOR* (1874), 13 Cox, C. C. 77.

*Annotation*.—*Reid*. *R. v. Lillyman*, [1896] 2 Q. B. 167.

**3813. By photograph—In general.**—On an indictment for bigamy, a photographic likeness of the first husband allowed to be shown the witnesses present at the first marriage, in order to prove his identity with the person mentioned in the marriage certificate.

The photograph was admissible because it is only a visible representation of the image or impression made upon the minds of the witnesses by the sight of the person or the object it represents; &, therefore is, in reality, only another species of the evidence which persons give of identity, when they speak merely from memory (*WILLES, J.*).—*R. v. TOLSON* (1864), 4 F. & F. 103.

**3814. — Effect of showing photograph to identifying witness.**—Evidence of identification is weakened if the identifying witness has previously been shown a photograph of the accused for the express purpose.—*R. v. CHADWICK, MATTHEWS & JOHNSON* (1917), 12 Cr. App. Rep. 247, C. C. A.

**3815. — To obtain evidence.**—The police are justified in showing photographs of a person whom they suspect with a view of getting information, & evidence that they had a photograph of deft. may be given at his trial.—*R. v. KINGSLAND* (1919), 14 Cr. App. Rep. 8, C. C. A.

**3816. — Effect of production at trial by police.**—*R. v. PALMER* (1914), 10 Cr. App. Rep. 77, C. C. A.

**3817. — — — — —**—*R. v. VARLEY* (1914), 10 Cr. App. Rep. 125, C. C. A.

### SECT. 3.—AS TO CHARACTER.

#### SUB-SECT. 1.—OF ACCUSED.

##### A. Good Character.

**3818. General rule.**—*A.-G. v. BOWMAN* (1791), 2 Bos. & P. 532, n.; 126 E. R. 1423.

**3819. What is evidence of good character.**—A general examination on behalf of a prisoner as to the surrounding circumstances is not evidence of good character so as to entitle the prosecution to prove or to cross-examine as to other offences or convictions. Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii.) is intended to apply to cases where witnesses to character are called, or where evidence of the good character of prisoner is sought to be elicited from the witnesses for the prosecution.

present, proof was admitted of an *alibi* of A. & B. Identification of a prisoner at the trial effected by showing that he is the same person, whom the witnesses had previously identified.—*R. v. NASH* (1832), 1 Craw. & D. 178.—*IR.*

**n. — Sufficiency of—Question for jury.**—At the trial of prisoner, an official stenographer from the Province of Quebec verified the deposition of D. taken in a civil action before the Superior Ct., at M., & stated that the prisoner resembled the person whose deposition he had taken in M., but, as this took place over six months previously, he could not sufficiently remember his face to swear positively that the prisoner was really the same man, but stated, however, that to the best of his knowledge he was the same man, & that he had no doubt that he was the same man.—*Held*: there was sufficient evidence of the identity of prisoner with the person whose deposition was put in to warrant the judge in submitting the deposition to the jury, the question of identity being one entirely for them.—*R. v. DOUGLAS*

(1896), 11 Man. L. R. 401.—*CAN.*

**o. — — — — —**—Defts. were tried by a judge without a jury upon a charge of conspiring to defraud the complainant. At the trial the complainant, in the witness-box, would not swear positively that deft., H., then present in ct. as a prisoner in the dock, was the man, or one of the men, who had defrauded him, although he had identified the same man at the preliminary hearing in the police ct. The complainant said: "To the best of my knowledge, he was the man. . . . There is another man here to-day, & I am undecided which it is." The judge thought the evidence of identity sufficient, & convicted defts.—*Held*: the conviction could not be disturbed, there being some evidence to sustain it.—*R. v. HARVEY & TAYLOR* (1918), 42 O. L. R. 187; 13 O. W. N. 455.—*CAN.*

**p. — Witness unable to identify**—*Though able to identify accused at former trial.*—A witness produced on the part of the Crown, who swears that he cannot positively identify the

It is to this class of evidence that the statute refers, not to mere assertions of innocence or repudiation of guilt on the part of prisoner, nor to reasons given by him for such assertion or repudiation.

*Applt.* was convicted upon an indictment for obtaining from D. cheques by false pretences. The indictment alleged that he sold various articles of virtu to D. under an agreement that he was to charge D. the cost price plus 10 per cent. profit; that *applt.* represented to D. that the cost was much in excess of the real cost; & that by this means he had obtained from D. much larger sums than he was entitled to. *Applt.* gave evidence on his own behalf, & in cross-examination questions were put to him suggesting that in other transactions he had obtained money from D. by alleging that certain china figures were genuine pieces of old Dresden china, whereas he knew that they were not.—*Held*: the alleged false pretences in representing the articles to be genuine old Dresden china when they were not so were entirely distinct from those with which prisoner was charged, &, as upon that ground evidence of the false representations with regard to the articles being genuine old Dresden china was not admissible to show that he was guilty of the false pretences with which he was charged, the questions put in cross-examination were improperly allowed, inasmuch as they tended to show that *applt.* had committed an offence other than that with which he was charged, & that the conviction must be quashed, as the jury must have been influenced by the questions & answers.—*R. v. ELLIS*, [1910] 2 K. B. 746; 79 L. J. K. B. 841; 102 L. T. 922; 74 J. P. 388; 26 T. L. R. 535; 22 Cox, C. C. 330; 5 Cr. App. Rep. 41, C. C. A.

*Annotations*.—*Consd.* *R. v. Starkie*, [1922] 2 K. B. 275; *Jenkins v. Feit* (1923), 129 L. T. 95. *Reid*. *Barker v. Arnold*, [1911] 2 K. B. 120; *R. v. Boyle & Merchant*, [1914] 3 K. B. 339; *R. v. Mason* (1914), 111 L. T. 336; *R. v. Baird* (1915), 84 L. J. K. B. 1785; *R. v. Ratcliffe* (1919), 89 L. J. K. B. 135.

**3820. — Not voluntary statement by witness.**—*Applt.*, who was tried for housebreaking & robbery, called a witness for the purpose of producing certain letters. This witness, without any question being put to him by *applt.*, voluntarily made a statement as to *applt.*'s good character. Counsel for the prosecution then claimed that as evidence of *applt.*'s good character had been given he was entitled to cross-examine the witness as to *applt.*'s real character, & he thereupon proceeded to ask the witness as to the number of

prisoners, may be examined by the Crown as to his having identified them on a former trial.—*R. v. CURTAIN* (1840), 1 Leg. Rep. 166.—*IR.*

**3814 i. By photograph—Effect of showing photograph to identifying witness.**—At the hearing of a trial for assault in which the defence was an *alibi*, witnesses for the Crown stated, in their evidence in chief, that a fortnight after the assault the police showed them several photographs from which they had picked out accused's photograph, & that they had subsequently identified the accused when lined up with several others at the police station.—*Held*: the evidence relating to the photographs was admissible.—*R. v. FANNON* (1922), 22 S. R. N. S. W. 427.—*AUS.*

#### PART XII. SECT. 3, SUB-SECT. 1.—A.

**3818 i. General rule.**—In criminal cases evidence of good character of prisoner is to be taken into consideration only in cases of doubt.—*R. v. PHILLIPS* (1868), 8 N. S. W. S. C. R. 54.—*AUS.*

*Sect. 3.—As to character: Sub-sect. 1, A. & B.]*

times applt. had been convicted:—*Held*: applt. was not under the circumstances endeavouring to establish a good character by calling a witness who voluntarily made a statement as to applt.'s good character, & therefore the questions as to applt.'s previous convictions were not admissible.—*R. v. REDD*, [1923] 1 K. B. 104; 92 L. J. K. B. 208; 128 L. T. 30; 87 J. P. 43; 67 Sol. Jo. 171; 27 Cox, C. C. 318; 17 Cr. App. Rep. 36, C. C. A.

**3821. Elicited by cross-examination.]**—If a prisoner's counsel elicit, by his cross-examination of the witnesses for the prosecution, a statement that the prisoner has borne a good character, evidence may be given of a previous conviction just the same as if witnesses to character had been called on his behalf.—*R. v. GADBURY* (1838), 8 C. & P. 676.

*Annotation*:—*Apld.* *R. v. Redd* [1923] 1 K. B. 104.

**3822.** —[—]—On a trial for a felony after a prisoner's conviction, if prisoner's counsel obtain evidence of good character by cross-examination, this entitles prosecutor to go into evidence of the previous conviction before the jury find a verdict on the new charge, the same as if prisoner had obtained evidence of good character by calling a witness.—*R. v. SHRIMPTON* (1851), 3 Car. & Kir. 373; 2 Den. 319; T. & M. 628; 21 L. J. M. C. 37; 18 L. T. O. S. 175; 15 J. P. 801; 15 Jur. 1089; 5 Cox, C. C. 387, C. C. R.

*Annotation*:—*Refd.* *R. v. Rowton* (1865), 13 W. R. 436.

**3823.** —[—]—*R. v. REDD*, No. 3820, *ante*.

—[—]—*See, further*, Sect. 12, sub-sect. 2, C., *post*.

**3824. How material—To show unlikelihood of accused committing offence.]**—Indictment for publishing a seditious libel alleging an intent to create discontent, & to incite to violence:—*Held*: evidence by persons acquainted with deft. as to his general character, & as to his opinions on subjects connected with the alleged libel was admissible in his favour to show the general character of his publications & opinions on such subjects. Evidence of a report of a speech made by deft. in 1822, & published at that time, was also admissible in his favour on the same grounds.—*R. v. COBBETT* (1831), 2 State Tr. N. S. 789.

**3825.** —[—]—On the trial of an indictment for perjury, the witnesses to character were asked, "What is the character of deft. for veracity & honour?" & "Do you consider him a man likely to commit perjury?"—*R. v. HEMP* (1833), 5 C. & P. 468, N. P.

**3826.** —[—]—The object of laying evidence of character before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, & it is strictly evidence in the case (*PATTESON, J.*).—*R. v. STANNARD* (1837), 7 C. & P. 673.

*Annotation*:—*Refd.* *R. v. Bliss Hill* (1918), 82 J. P. 194.

**3827.** —[—]—The nature of evidence given to character is to show that prisoner who is of a peaceable disposition & averse from mixing himself up in such quarrels & affrays & tumults as are now laid to his charge, is not a person likely

to be guilty of a crime of High Treason by levying war on the Queen (*TINDAL, C.J.*).—*R. v. FROST* (1840), 9 C. & P. 129; 2 Mood. C. C. 140; 4 State Tr. N. S. 85; 1 Town. St. Tr. 1; Gurney's Rep. 749.

*Annotations*:—*Refd.* *R. v. Bliss Hill* (1918), 82 J. P. 194. *Mentd.* *Redford v. Birley* (1822), 1 State Tr. N. S. 1071; *R. v. Tyrrell* (1843), 2 L. T. O. S. 175; *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *R. v. Cuffey* (1848), 7 State Tr. N. S. 467; *R. v. Smith O'Brien* (1848), 7 State Tr. N. S. 1; *R. v. Duffy* (1849), 7 State Tr. N. S. 795; *R. v. Bird* (1851), 5 Cox, C. C. 20; *Munsell v. R.* (1857), 8 E. & B. 54; *R. v. Bernard* (1858), 8 State Tr. N. S. 887; *R. v. Burke* (1867), 10 Cox, C. C. 519; *Dillon v. O'Brien & Davis* (1887), 16 Cox, C. C. 245; *R. v. Crippen*, [1911] 1 K. B. 149.

**3828. When material—In cases of doubt.]**—The witnesses he called in point of reputation, that I must leave to you. Few men that come to be questioned, but shall have some come & say, he is a very honest man; but is this anything against the evidence of the fact? (*HYDE, L.C.J.*).—*R. v. TURNER* (1864), 6 State Tr. 565; 1 Sid. 171; 82 E. R. 1038.

**3829.** —[—]—*R. v. SWENSDEN* (1702), 14 State Tr. 559; Holt, K. B. 319; 7 Mod. Rep. 101; 90 E. R. 1076.

**3830.** —[—]—*R. v. DAMMAREE* (1710), 15 State Tr. 521.

*Annotations*:—*Mentd.* *R. v. Horne Tooke* (1794), 25 State Tr. 1; *R. v. O'Connell* (1844), 5 State Tr. N. S. 1.

**3831.** —[—]—If the fact of publication were doubtful & if it referred to a man who had such a character given to him this would be evidence to go to the jury in answer to the charge & in that way it would be most material (*ELLENBOROUGH, C.J.*).—*R. v. DRAPER* (1807), 30 State Tr. 959.

*Annotations*:—*Mentd.* *R. v. Burdett* (1820), 1 State Tr. N. S. 1; *R. v. Halpin* (1829), 7 L. J. O. S. M. C. 75.

**3832.** —[—]—This is the whole evidence on the subject of character. As I have already stated to you, if the evidence were in even balance, character should make it preponderate in favour of a deft.; but in order to let character have its operation, the case must be reduced to that situation (*ELLENBOROUGH, C.J.*).—*R. v. DAVISON* (1809), 31 State Tr. 99.

*Annotations*:—*Refd.* *R. v. Rowton* (1865), 10 Cox, C. C. 25; *R. v. Bliss Hill* (1918), 82 J. P. 194.

**3833.** —[—]—If the evidence leaves it a matter of fair & reasonable doubt whether a party is guilty or not; in common cases, if you prove that a prisoner up to that time has always maintained a good character, it will apply & balance in his favour; but if the evidence of guilt is satisfactory to the minds of a jury, evidence of previous good character cannot & ought not to have any avail (*LE BLANC, J.*).—*R. v. HAIGH* (1813), 31 State Tr. 1092.

**3834.** —[—]—Where evidence of the good character of a prisoner in a criminal trial is given it is a correct direction for the judge to tell the jury that, if the remaining evidence left them in doubt whether the charge had been brought home to prisoner, they should take into consideration the evidence of good character, but that, if the other evidence satisfied them of prisoner's guilt, the previous good character which he had borne afforded no answer to the charge.—*R. v. BLISS HILL* (1918), 82 J. P. 194; *sub nom.* *R. v. BROADHURST, MEANLEY & BLISS HILL*, 13 Cr. App. Rep. 125, C. C. A.

**3828 i. When material—In cases of doubt.]**—Evidence of a good character of an accused is of value only in cases where the other evidence leaves the jury in doubt as to what its findings should be.—*R. v. LETAIN*, [1918] 1 W. W. R. 595; 29 Can. Crim. Cas.

**389.—CAN.**

**q. Effect of—Direction of judge.]**—At the trial of a person charged with stealing from the person, evidence was given as to the inexceptional character of the accused prior to the charge.

When summing up judge used expressions which Ct. of Appeal considered carried a strong suggestion that accused had been guilty of previous similar misconduct:—*Held*: accused had been deprived of that benefit to which evidence as to character entitled



**3835. Confined to general reputation.]**—When prisoner calls evidence of good character, the prosecutor may call evidence to rebut it.

Evidence of the general character of a prisoner must be confined to evidence of reputation & not of disposition; & the personal judgment of a witness as to prisoner's disposition cannot be received in evidence.—*R. v. ROWTON* (1865), *Le. & Ca.* 520; 5 *New Rep.* 428; 34 *L. J. M. C.* 57; 11 *L. T.* 745; 29 *J. P.* 149; 11 *Jur. N. S.* 325; 13 *W. R.* 436; 10 *Cox, C. C.* 25, *C. C. R.*

**3836. Time for calling.]**—In general, witnesses to character cannot be examined after verdict & before sentence, where deft. might have examined them upon the trial.

A person employed by govt. to mix with conspirators, & pretend to aid their designs for the purpose of betraying them, does not require corroboration as an accomplice.—*R. v. MULLINS* (1848), 12 *J. P.* 776; 3 *Cox, C. C.* 526.

*Annotations:—**Refd.* *R. v. Bickley* (1909), 73 *J. P.* 239; *R. v. Wilson, Lewis & Havard* (1911), 6 *Cr. App. Rep.* 126; *R. v. Watson* (1913), 109 *L. T.* 335; *R. v. Baskerville*, [1916] 2 *K. B.* 658.

**3837. Cross-examination of witnesses to character.]**—It is not usual to cross-examine witnesses to character, except the counsel cross-examining have some distinct charge to which to cross-examine them.—*R. v. HODGKISS* (1836), 7 *C. & P.* 298.

**3838. — Extent of.]**—In cross-examining a witness to character, it is competent to ask whether he has heard of a particular felony having been committed some years previous; & on his answering in the affirmative, to ask whether prisoner was not suspected of having been the perpetrator of it.—*R. v. WOOD & PARKER* (1841), 5 *Jur.* 225.

**3839. — —.]**—A witness to the good character of a prisoner cannot be cross-examined as to circumstances of suspicion against prisoner, which occurred upon the same day as the alleged offence was committed.—*R. v. ROGAN & ELLIOTT* (1846), 1 *Cox, C. C.* 291.

**3840. Evidence in rebuttal.]**—No witnesses should be asked how deft. stands affected; but if deft. give evidence of a general reputation, it may be answered by particular instances on the other side for the King.—*R. v. HAINS* (1695), *Comb.* 337; 90 *E. R.* 513.

*Annotations:—**Mentd.* *Cox v. Allingham* (1822), *Jac.* 514; *R. v. Smith* (1828), 8 *B. & C.* 341; *Police Comr. v. Donovan*, [1903] 1 *K. B.* 895.

**3841. —.]**—*R. v. GADBURY*, No. 3821, *ante*.

**3842. —.]**—Where witnesses to character are called by prisoner, the prosecutor may call others to contradict them, though, except in the case of a previous conviction, it is very uncommon to do

so.—*R. v. HUGHES* (1843), 2 *L. T. O. S.* 247; 1 *Cox, C. C.* 44.

*Annotation:—**Refd.* *R. v. Rowton* (1865), 34 *L. J. M. C.* 57.

**3843. —.]**—*Semble*: if witnesses to character are called for prisoner, witnesses may be called in reply on behalf of the prosecution, to show general or specific acts of bad conduct.—*R. v. LOVEJOY* (1850), 14 *J. P.* 592.

**3844. —.]**—Where witnesses are called on the part of prisoner to give evidence of his general good character, it is not competent to the prosecution to call witnesses to give evidence of prisoner's general bad character.—*R. v. BURT* (1851), 5 *Cox, C. C.* 284.

*Annotation:—**Refd.* *R. v. Rowton* (1865), 13 *W. R.* 436.

**3845. —.]**—*R. v. SHRIMPTON*, No. 3822, *ante*.

**3846. —.]**—*R. v. GERARD* (1852), *T. & M.* 631.

**3847. —.]**—*R. v. ROWTON*, No. 3835, *ante*.

### B. Bad Character.

**3848. Whether admissible.]**—*R. v. COLE* (1810), 3 *Russell on Crimes & Misdemeanours*, 6th ed. p. 251; 1 *Phillips on Evidence*, 10th ed. p. 508.

*Annotations:—**Refd.* *R. v. Bond*, [1906] 2 *K. B.* 389; *Thompson v. R.*, [1918] *A. C.* 221.

**3849. —.]**—On the trial of a prisoner for wounding a constable who had arrested him on suspicion of felony, the following question, in order to assist in showing that there were reasonable grounds for the arrest, was put to the constable on the part of the prosecution, "What do you know had been prisoner's previous character?" The answer was, "I know prisoner to be a very bad character":—*Held*: this question ought not to have been put in the examination-in-chief, although it was open to prisoner to have cross-examined the constable as to the grounds of his suspicion.—*R. v. TURBERFIELD* (1864), *Le. & Ca.* 495; 34 *L. J. M. C.* 20; 13 *W. R.* 102; 10 *Cox, C. C.* 1; *sub nom. R. v. TURBERFIELD*, 11 *L. T.* 385; 29 *J. P.* 4; 10 *Jur. N. S.* 1111, *C. C. R.*

**3850. — Previous caution against commission of offence.]**—Evidence of a previous caution against committing an offence of a certain kind is not admissible on the trial of an indictment for an offence of that kind.—*R. v. MULLINS* (1910), 5 *Cr. App. Rep.* 13, *C. C. A.*

*Annotation:—**Mentd.* *Ibrahim v. R.*, [1914] *A. C.* 599.

**3851. When evidence of bad character wrongfully given—Caution by judge.]**—On an appeal against the verdict of a jury convicting a prisoner of having feloniously uttered a counterfeit coin where the only evidence of guilty knowledge was

him.—*R. v. MURPHY* (1913), 13 *S. R. N. S. W.* 646.—**AUS.**

**r. —.]**—Where positive evidence of good character is called by the accused, the judge, if he refers to it, ought to direct the jury that they are entitled to consider it as evidence on the question of guilt or innocence. A direction that such evidence may amount to no more than that the accused has not been found out may have a misleading effect.—*R. v. MALOUF* (1918), 18 *S. R. N. S. W.* 142.—**AUS.**

### PART XII. SECT. 3, SUB-SECT. 1.—B.

**3848 i. Whether admissible.]**—Evidence of police constables that a prisoner is known to them as a bad character & associate of thieves is not admissible as evidence of general bad character.—*R. v. PEARCE* (1877), 3 *V. L. R.* 125.—**AUS.**

**3848 ii. —.]**—If a judge upon the evidence, uninfluenced by any extrinsic thereto, has found & adjudged the accused guilty of the offence with which he was charged & upon which he was being tried, it is then proper for him to permit either the Crown or the accused or both to give evidence, not only respecting the character, good or evil, of the accused, but also of any other relevant circumstances or conditions with the view of enabling him to form an opinion as to what would be a suitable & proper sentence to impose.—*R. v. PINDER*, [1923] 2 *W. W. R.* 997; [1923] 3 *D. L. R.* 707; 40 *Can. Crim. Cas.* 272.—**CAN.**

**3848 iii. —.]**—It is improper to allow witnesses for the prosecution to state that the accused is not of good character.—*R. v. TIMMI* (1864), 2 *Bom.* 131.—**IND.**

**3848 iv. —.]**—Evidence of bad

character should not be put before the jury, but is only for consideration of the judge in determining the sentence to be awarded.—*R. v. MAHIMA CHANDRA DAS* (1871), 6 *B. L. R. App.* 108.—**IND.**

**3848 v. —.]**—The character of accused not being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft, punishable under sect. 401 of the Penal Code, evidence of bad character or reputation of the accused is inadmissible for the purpose of proving the commission of that offence.—*MANKURA PARI v. R.* (1899), 1 *L. R.* 27 *Calc.* 139; 4 *C. W. N.* 97.—**IND.**

**3848 vi. —.]**—A man's guilt is to be established by proof of the facts alleged & not by proof of his character; such evidence might create a prejudice but not lead a step towards substantiation of guilt.—*AMRITA LAL*



**Sect. 3.—As to character: Sub-sect. 1, B.; sub-sect. 2.]**

the fact that prisoner had run away when followed by a policeman & where prisoner had proved conclusively that he had not uttered another counterfeit coin to the same person a fortnight before—as was alleged—for he was in prison at the time, the Ct. allowing the appeal on the ground that the judge had not expressly warned the jury that they must disregard the fact that prisoner had been in prison before.—*R. v. LEE* (1908), 72 J. P. 253; 24 T. L. R. 627; 52 Sol. Jo. 518; 1 Cr. App. Rep. 5, C. C. A.

*Annotations:—*Consd. *R. v. Warner* (1908), 73 J. P. 53. *Refd. R. v. Joyce* (1908), 72 J. P. 483. *Mentd. R. v. Laws* (1908), 72 J. P. 271.

**3852. ——— Accused may cross-examine.]**

—On a trial for larceny, where a witness, put forward by the prosecution as an accomplice, gave evidence which suggested that prisoner had been previously concerned with him in coining offences, & the judge, who tried the case, prevented prisoner, who was not defended by counsel, from cross-examining on the point, & stopped him in the middle of his explanation of the matter, in his address to the jury, the Ct. of Criminal Appeal quashed the conviction.

If evidence of a previous conviction is accidentally given at the trial, the jury must be emphatically directed to disregard it.—*R. v. WARNER* (1908), 73 J. P. 53; 25 T. L. R. 142; 1 Cr. App. Rep. 227, C. C. A.

**3853. ———.]**—The judge ought emphatically to caution a jury against being influenced by the unfounded suggestion of a previous conviction.—*R. v. EVISON* (1909), 3 Cr. App. Rep. 75, C. C. A.

*Annotation:—*Refd. *R. v. Stratton* (1909), 3 Cr. App. Rep. 255.

**3854. Evidence of previous conviction—By accused—Effect on jury.]**—If a prisoner chooses to talk about his convictions, it cannot be said that the jury may not take them into consideration.—*R. v. HORSEFALL & JONES* (1908), 1 Cr. App. Rep. 37, C. C. A.

**3855. ———.]**—Where deft. has unnecessarily let in evidence of a previous conviction, the Ct. of Criminal Appeal will take into account its effect on the jury.—*R. v. FRANKS* (1915), 11 Cr. App. Rep. 104, C. C. A.

**3856. Publication of evidence of previous conviction—By newspaper—Hearing before magistrate—Case committed for trial.]**—Where evidence of previous convictions is given at a police Ct. in a case which is committed for trial, such evidence ought not to be referred to by a newspaper in its report of the proceedings.—*R. v. SANDERSON* (1915), 31 T. L. R. 447; 11 Cr. App. Rep. 197, C. C. A.

**Identification of accused—By photograph.]**—See Part XII., Sect. 2, *ante*.

See, also, Part VII., Sect. 7, sub-sect. 8, D., *ante*.

*HAZRA v. R.* (1915), 1 L. R. 42 Calc. 957.—IND.

**s. Evidence of previous conviction—Whether relevant as to character of accused.]**—In charging the jury upon the trial of a prisoner for being dishonestly in the possession of stolen goods, the judge directed the jury to consider the proof of previous convictions for theft as evidence from which inference might fairly be drawn as to the character of accused:—*Held*: this amounted to a misdirection; for, the fact that

prisoner has a bad character is irrelevant.—*ROSHUN DOOSADH v. R.* (1880), 1 L. R. 5 Calc. 768; 6 C. L. R. 219.—IND.

**PART XII. SECT. 3, SUB-SECT. 2.**

**3859 i. Charge of rape—Evidence of**

of the prosecutrix for want of chastity, is admissible.—*R. v. MCCLURE* (1841), 2 Craw. & D. 244.—IR.

**3859 ii. ———.]**—In a trial

**SUB-SECT. 2.—OF PERSON PROSECUTING—MOTIVE.**

**3857. Whether motive material.]**—*R. v. COYLE* (1851), Wills' Circumstantial Evidence, 5th ed. p. 211.

**3858. ———.]**—*R. v. ROBERTS* (1886), Wills' Circumstantial Evidence, 5th ed. p. 211.

**3859. Charge of rape—Evidence of general bad character admissible—Not as to specific acts.]**—

(1) The prosecutrix of an indictment for an assault with intent to commit a rape, having been cross-examined as to crimes committed by her several years before the alleged offence, evidence may be adduced to show that her character has since been good. Deft. in such case may impeach her character for chastity, by general, but not by particular evidence.

(2) The fact of her making complaint of the outrage, & the state in which she was at the time of making the complaint are evidence, although the particulars of her statement are not evidence to prove the truth of her statement.—*R. v. CLARKE* (1817), 2 Stark. 241.

*Annotations:—*As to (1) *Folld. R. v. Tissington* (1843), 1 L. T. O. S. 458. *Refd. R. v. Clay* (1851), 5 Cox, C. C. 146. As to (2) *Consd. R. v. Lillyman*, [1896] 2 Q. B. 167. *Generally, Mentd. R. v. Holmes* (1871), L. R. 1 C. C. R. 334.

**3860. ———.]**—On the trial of an indictment for a rape:—*Held*: (1) prisoner's counsel might ask the prosecutrix the following questions, with a view to contradict her: "Were you not on ———, since the time of the alleged offence, walking in the High Street at Oxford, to look out for men?" "Were you not on ———, since the time of the alleged offence, walking in the High Street, with a woman reputed to be a common prostitute?" (2) Evidence might be adduced by prisoner to show the general light character of the prosecutrix, & general evidence might be given of her being a street walker; but *semble*: evidence of specific acts of criminality by her would not be admissible.—*R. v. BARKER* (1829), 3 C. & P. 589.

*Annotations:—*As to (2) *Folld. R. v. Clay* (1851), 5 Cox, C. C. 146. *Refd. R. v. Holmes* (1871), L. R. 1 C. C. R. 334. *Generally, Mentd. R. v. Gibbons* (1862), 26 J. P. 149.

**3861. ———.]**—On a trial for rape, witnesses may be called on prisoner's behalf to prove general indecency of the prosecutrix, & witnesses for the prosecution may then be called to rebut their testimony.—*R. v. TISSINGTON* (1843), 1 L. T. O. S. 458; 1 Cox, C. C. 48.

**3862. ———.]**—On a trial of rape, evidence of the general character of the prosecutrix, as that she had been a reputed prostitute, is admissible.—*R. v. CLAY* (1851), 5 Cox, C. C. 146.

**3863. ——— Cross-examination as to specific acts with other persons—Not compellable to answer—Evidence of acts not admissible.]**—Upon an indictment for a rape, the woman is not compellable to answer, whether she has not had connection with other men or with a particular person named; nor is evidence of her having had such connection

for rape or assault with intent to ravish, while it is competent on due notice being given to attack the woman's character for chastity by putting questions to herself, or to prove her general bad repute at the time of the alleged offence, or to prove that she had recently yielded her person to accused, it is not in to prove individual on her part with other men.—*DICKIE v. H.M. ADVOCATE* (1897), 24 R. (Ct. of Sess.) 82; 35 Sc. L. R. 5; 5 S. L. T. 120.—SCOT.

admissible.—*R. v. HODGSON* (1812), Russ. & Ry. 211, C. C. R.

*Annotations*:—*Consd. R. v. Barker* (1829), 3 C. & P. 589; *R. v. Martin* (1834), 6 C. & P. 562. *Foll. R. v. Holmes* (1871), L. R. 1 C. C. R. 334. *Mentd. R. v. Gibbons* (1862), 26 J. P. 149.

**3864.** — — — — —.]—The prosecutrix in a case of rape may be asked, on cross-examination, whether she had not allowed another man than prisoner to take liberties with her, in the interval between the commission of the alleged offence & the first complaint of it.

The question may be asked, but the witness is not bound to answer it (*GURNEY, B.*).—*R. v. MERCER* (1842), 6 Jur. 243.

**3865.** — — — — —.]—**Denial of prosecutrix—Whether evidence to rebut denial admissible.**—On a trial for rape, the prosecutrix having on cross-examination denied that she had had connection with other men than prisoner, those men may be called to contradict her.—*R. v. ROBINS* (1843), 2 Mood. & R. 512; 1 L. T. O. S. 505; 1 Cox, C. C. 55.

*Annotations*:—*N.F. R. v. Holmes* (1871), L. R. 1 C. C. R. 334. *Refd. R. v. Gibbons* (1862), 26 J. P. 149.

**3866.** — — — — —.]—**Prosecutrix, on a charge of rape, having, on cross-examination, said that she herself had been charged with stealing money, & on that occasion had accounted to a police constable for the possession of the money, by stating that it was given her for not complaining of a person who had insulted her by solicitations against her chastity, but denied that she had said the money was given her for having connection with him:—Held:** prisoner could not call the constable as a witness, to contradict the prosecutrix, by proving that she had said that the money was given her for that purpose.—*R. v. DEAN* (1852), 6 Cox, C. C. 23.

**3867.** — — — — —.]—Although you may cross-examine the prosecutrix as to particular acts of connection with other men, you may not, if she deny it, call witnesses to contradict her.—*R. v. COCKCROFT* (1870), 11 Cox, C. C. 410.

*Annotation*:—*Consd. R. v. Holmes* (1871), L. R. 1 C. C. R. 334.

**3868.** — — — — —.]—H. having been indicted for an indecent assault on P., & P. being cross-examined as to whether she had not had connection with a third party:—*Held:* that on T. denying the imputation, such third party could not be called to contradict her, & that this rule applied to indictments for rape, & attempts at rape, & all indecent assaults.—*R. v. HOLMES* (1871), L. R. 1 C. C. R. 334; 41 L. J. M. C. 12;

**3864 i.** — — — — —.]—**Cross-examination as to specific acts with other persons—Not compellable to answer.**—On the trial of an indictment for aiding & abetting the commission of rape, the evidence showed that, prior to the commission of the offence, prosecutrix & B. had been together all the evening, & early in the morning were for some time together in a room in an hotel with the door closed & the gas turned out. On leaving the hotel they were met by the prisoner & another man, who attacked B. & caused him to leave, whereupon the offence was committed. The prosecutrix & B. were called as witnesses for the Crown, & on cross-examination were questioned as to what took place in the room, which they refused to answer:—*Held:* while prosecutor could properly be asked the question as going to her credit she was not bound to answer.—*R. v. FINNESSEY* (1906), 11 O. L. R. 338; 7 O. W. R. 383.—*CAN.*

**3864 ii.** — — — — —.]—The charge of rape is easily made, & most difficult to be repelled. The evidence required is, that resistance had been made;

25 L. T. 669; 36 J. P. 564; 20 W. R. 123; 12 Cox, C. C. 137, C. C. R.

**3869.** — — — — —.]—**Cross-examination as to previous acts with accused.**—*R. v. ASPINALL* (1827), 3 Starkie on Evidence, 3rd ed. p. 952.

*Annotations*:—*Apprvd. R. v. Riley* (1887), 18 Q. B. D. 481. *Mentd. A.-G. v. Hitchcock* (1847), 11 Jur. 478.

**3870.** — — — — —.]—On the trial of an indictment for a rape the prosecutrix may be asked, whether, previously to the commission of the alleged offence, prisoner had not had intercourse with her by her own consent.—*R. v. MARTIN* (1834), 6 C. & P. 562.

*Annotations*:—*Consd. R. v. Holmes* (1871), L. R. 1 C. C. R. 334; *R. v. Riley* (1887), 56 L. T. 371. *Refd. R. v. Clay* (1851), 5 Cox, C. C. 146.

**3871.** — — — — —.]—**Denial of prosecutrix—Whether evidence to rebut denial admissible.**—On the trial of an indictment for assault with intent to commit a rape, the prosecutrix may be asked whether previously to the commission of the alleged offence prisoner has not had sexual intercourse with her by her own consent, & if she denies the fact, evidence on behalf of prisoner may be called to contradict her.—*R. v. RILEY* (1887), 18 Q. B. D. 481; 56 L. J. M. C. 52; 56 L. T. 371; 35 W. R. 382; 16 Cox, C. C. 191, C. C. R.

**3872.** — — — — —.]—**Cross-examination as to bad character—Evidence in rebuttal admissible.**—*R. v. CLARKE*, No. 3859, *ante*.

**3873.** — — — — —.]—**Evidence called as to bad character—Evidence in rebuttal admissible.**—*R. v. TISSINGTON*, No. 3861, *ante*.

**3874.** **Charge of unlawful carnal knowledge—Cross-examination as to specific acts with other men—Denial of prosecution—Whether evidence to rebut denial admissible—Questions affecting credit.**—At the trial of a prisoner for an offence under Criminal Law Amendment Act, 1885 (c. 69), s. 5, sub-s. 1, counsel for the prosecution stated in his opening speech that prisoner upon the occasion when he committed the offence had seduced the girl, & in her examination-in-chief she gave evidence to that effect. No objection to the opening statement of counsel for the prosecution or to the questions put by him to the girl in her examination-in-chief was taken by counsel for prisoner. She was cross-examined by counsel for prisoner as to whether she had previously had connection with other men whose names were mentioned & also as to whether she was a loose & abandoned girl. She answered these questions in the negative. Counsel for prisoner tendered evidence to prove

that the female had called for assistance, & had discovered the injury she sustained to the first person she met. It is no defence to give in evidence that the female had slept with other men; nor is there any right to put a question to her, upon her cross-examination, except what relates to the transaction in question.—*R. v. MADDERS* (1822), Rowe, 343, 354.—*IR.*

**t.** — — — — —.]—**Evidence of previous voluntary connection with accused—& specific acts with other men.**—Proof tending to show in terms of a special defence, which had been lodged that the girl on whom a rape was said to have been committed had shortly before had voluntary connection with the panel:—*Held:* admissible.—*H.M. ADVOCATE v. BLAIR* (1844), 2 Broun, 167.—*SCOT.*

**a.** — — — — —.]—**Evidence of good character admissible—Not at commencement of trial.**—In a trial for rape, it is competent for the Public Prosecutor to lead evidence of the good character of the woman alleged to have been ravished, although the panel has not

lodged special defences impugning her character; but this evidence ought not to be brought forward at the commencement of the trial.—*H.M. ADVOCATE v. M'MILLAN* (1846), Arkley, 209.—*SCOT.*

**c.** — — — — —.]—**Cross-examination as to previous general character—Before character impeached.**—On a trial for rape, counsel for the prosecution was not permitted to examine as to the previous general character of the prosecutrix, before her character had been impeached.—*R. v. ALEXANDER* (1841), 2 Crawl. & D. 126.—*IR.*

**e.** **Charge of unlawful carnal knowledge—Cross-examination as to specific acts with other men.**—*R. v. MCPHERSON*, [1922] 2 W. W. R. 723; 69 D. L. R. 301; 37 Can. Crim. Cas. 315.—*CAN.*

**d.** **Charge under Merchandise Marks Act, 1887—Cross-examination as to committal of similar offence.**—At the trial upon a complaint by a private prosecutor alleging a contravention of the Merchandise Marks Act, 1887, the prosecutor was, in cross-examination, asked whether he had committed a similar offence to

*Sect. 3.—As to character: Sub-sect. 2. Sect. 4: Sub-sect. 1.]*

the previous specific acts of connection by the prosecutrix & to show generally that she was of bad & light character & therefore not to be believed. The judge rejected this evidence as going to credit only. The jury convicted prisoner. Upon an appeal by prisoner against his conviction:—*Held*: the judge at the trial had rightly rejected the evidence inasmuch as the allegation that prisoner had seduced the girl was not relevant to the issue, & therefore no evidence could be given to contradict it. Nor could the evidence be given for the purpose of contradicting the witness in order to show that she was unworthy of belief, as the rule that the answers of a witness to questions put in cross-examination which merely go to credit cannot be contradicted applied.—*R. v. CARGILL*, [1913] 2 K. B. 271; 82 L. J. K. B. 655; 108 L. T. 816; 77 J. P. 347; 29 T. L. R. 382; 23 Cox, C. C. 382; 8 Cr. App. Rep. 224, C. C. A.

*Annotation*:—*Mentd. R. v. Bottomley* (1922), 87 J. P. 26.

#### SECT. 4.—RELEVANT FACTS—ADMISSIBILITY OF EVIDENCE.

##### 1.—MOTIVE OR MALICE.

**3875. Evidence for prosecution—Expressions of ill-will—Motive.**—A. was indicted for the murder of H. It was opened that A., having malice against P., hired H. to murder him, & that H. did so, but that H. being detected, A. had murdered H. to prevent a discovery of his, A.'s, guilt respecting the murder of P. Evidence was given of expression of malice used by A. towards P.:—*Held*: the prosecutor might also give evidence to show that H. was, in fact, the person by whom P. had been murdered.

A., a prisoner charged with murder, was visited by B., who was both a magistrate & a clergyman; B. told him, that if he was not the person who struck the fatal blow, & he would tell all he knew, he, B., would use his endeavours & influence to prevent anything from happening to him; & that if he, A., did not make a disclosure, some one else would probably do so. After this B. wrote to the Secretary of State, who returned an answer that mercy could not be extended to A.; which answer was communicated by B. to A. After this, A. sent

that charged in the complaint:—*Held*: the question had rightly been disallowed.—*JENKINSON & INGLIS v. NEILSON BROTHERS* (1899), 2 F. (Cl. of Sess.) 13; 37 Sc. L. R. 100; 7 S. L. T. 56.—*SCOT*.

##### PART XII. SECT. 4, SUB-SECT. 1.

**3880 I. Evidence for prosecution—Antecedent threats.**—On the trial of prisoner for murder, the evidence was clear that the death of deceased was caused by gun-shot wound inflicted by the prisoner. Deceased & prisoner were neighbouring farmers, & there had been quarrels between them. A few days before the fatal occurrence accused shot a pig, property of deceased. On hearing of this act deceased ran in great passion unarmed towards the house of prisoner, who was standing alone at his door with a gun in his hand. He called out to deceased to stop—which he did—being within a few yards of the door, & prisoner then, without further words on either side, fired, & the shot eventually proved fatal. Prisoner was

a quiet & inoffensive & deceased a violent & dangerous person. The judge directed jury that previous quarrels of the parties were no part of the *res gesta*, & they were to disregard the evidence of peaceable character of the prisoner & violent character of deceased, unless there were any doubt as to prisoner's act, when evidence of his general good conduct might be taken into consideration:—*Held*: jury ought to have been directed to take into consideration evidence of previous threats & quarrels & of character & habits of both parties, with the view of finding *quo animo* the act was committed.—*R. v. GRIFFIN* (1871), 10 N. S. W. S. C. R. 91.—*AUS*.

**3880 II.** —.—.]—Evidence of threats uttered by the accused that he would shoot any person who took land formerly his held admissible against him on his trial for the murder of a person who had occupied an allotment of such land & had been shot dead, though such threats had been uttered several years before &

for the coroner, & wished to make a statement. The coroner told him that if he did so, it would be used as evidence against him. Prisoner made a confession:—*Held*: this confession was admissible.—*R. v. CLEWES* (1830), 4 C. & P. 221.

*Annotations*:—*Refd. R. v. Richardson* (1861), 8 Cox, C. C. 448. *Mentd. R. v. Oddy* (1851), 2 Den. 264.

**3876.** —.—.]—*R. v. FOWKES* (1856), *Times*, Mar. 8.

**3877.** —.—.]—Expressions denoting a bad feeling toward deceased made use of some time before the crime is committed are admissible in evidence, but the jury must receive them with great caution.—*R. v. HAGAN* (1873), 12 Cox, C. C. 357.

*Annotation*:—*Refd. R. v. Bond*, [1906] 2 K. B. 389.

**3878.** —.— **Depositions in previous charge.**—Where deceased person, a constable, in the course of his duty made shortly before his death & in the absence of the accused a verbal statement in the nature of a report to his superior officer as to where deceased was going & what he was going to do; such report being material to the case for the Crown:—*Held*: such statement & report were admissible in evidence for the prosecution.

In order to prove malice or motive against the accused, the deposition of deceased against him taken before the magistrates on another charge & for which he was afterwards convicted was tendered in evidence:—*Held*: it was admissible.—*R. v. BUCKLEY* (1873), 13 Cox, C. C. 293.

**3879.** —.— **Antecedent acts.**—Prisoner was indicted for murder. The same took place at night in a churchyard. Previous to the mortal wound being inflicted, prisoner & two others had been seen lurking near the spot. The prosecution proposed to tender evidence that they were lurking there clandestinely with a bundle of cloth, the object being to raise a presumption that they were there with an evil intent, & therefore that they must have had malice against all persons coming in their way, & likely to interrupt them:—*Held*: the evidence was not admissible.—*R. v. WILSON* (1829), 1 Lew. C. C. 112.

**3880.** —.— **Antecedent threats.**—On the trial of an indictment for murder, it is not a misdirection to call the jury's attention to the evidence that deft. threatened to kill the person in respect of whom he is charged, though it be proved that he was intoxicated at the time he made the threat.—*R. v. MASON* (1912), 8 Cr. App. Rep. 121, C. C. A.

**3881.** —.— **Unexplained acts of violence in**

with special reference to another allotment.—*R. v. O'BRIEN* (1884), 10 V. L. R. 242.—*AUS*.

**3880 III.** —.—.]—Prisoner was convicted of the murder of P. The facts deposed to at the trial were that on May 1 prisoner had been standing in the streets at F. & had been ordered to move on by a constable. He returned to his ship, procured a revolver & shot P., with whom it was claimed he was unknown. Evidence was given by A. of certain statements made to him by prisoner when returning to the ship before the murder: "Prisoner, when we were walking, seemed to be offended at being moved on & said if he had had a gun he would shoot the constable or some one else. He asked me to return with him, saying, 'If you don't I will shoot you.'"

The evidence was objected to:—*Held*: the evidence was rightly admitted.—*R. v. CARLSEN* (1904), 6 W. A. L. R. 154.—*AUS*.

**e.** —.— **Evidence of what accused said shortly before assault.**—On a trial

**admissible.]**—Prisoner was indicted for the murder of his wife:—*Semble*: evidence of an act of violence committed by him towards deceased some days previously, unaccompanied by any declaration, is not receivable.—*R. v. MOBBES* (1853), 17 J. P. 712; 6 Cox, C. C. 223.

**3882. — Of motive in other similar deaths.]**—Upon an indictment for murder by poison of S. in Oct. 1877, evidence is admissible of the previous & subsequent deaths of J. & L., under like circumstances & from similar symptoms, to show that the poisoning was not accidental; & where it was proved that a motive for the death of S. might exist, by the fact of prisoner having insured the life of S. in a benefit & insurance society, evidence may also be given upon the same indictment that there might be an equal motive for the deaths of J. & L. by showing that they were also each of them insured by prisoner in the same or kindred societies.—*R. v. HEESON* (1878), 14 Cox, C. C. 40.

**3883. Evidence for defence—In rebuttal of suggested motive.]**—*R. v. HORNE TOOKE* (1794), 25 State Tr. 1; 1 East, P. C. 60.

*Annotations:—***Reid.** *R. v. Lambert & Perry* (1810), 31 State Tr. 335. **Mentd.** *R. v. Stone* (1796), 25 State Tr. 1155; *Eagleton & Coventry v. Kingston* (1803), 8 Ves. 438; *R. v. Watson* (1817), 32 State Tr. 1; *Redford v. Birley* (1822), 3 Stark. 76; *R. v. Smith* (1828), 8 B. & C. 341; *R. v. Parry* (1837), 7 C. & P. 836; *R. v. Frost* (1840), 4 State Tr. N. S. 85; *R. v. Lulueta* (1843), 1 Car. & Kir. 215; *Conway & Lynch v. R.* (1845), 5 L. T. O. S. 458; *R. v. Grant, Ranken, & Hamilton* (1848), 7 State Tr. N. S. 507; *Mansell v. R.* (1857), 8 E. & B. 54; *R. v. Meany* (1867), 15 W. R. 1082.

**3884. — —.]**—In a case of burning, it had been opened by the counsel for the prosecution that evidence would be given of expressions of ill-will used by prisoner towards the prosecutor:—*Held*: prisoner's counsel might cross-examine the prosecutor, to show that other persons besides prisoner had used expressions of ill-will towards him.—*R. v. STALLARD* (1835), 7 C. & P. 263.

**3885. — —.]**—On an indictment for arson, one count laying an intent to defraud, & it being opened for the prosecution that the motive might have been to realise the money insured by prisoner upon her goods; evidence was received that she was in easy circumstances, with a view to show that she was at all events under no pecuniary temptation to commit such an act.—*R. v. GRANT* (1865), 4 F. & F. 322.

for assault, & after the offence was fully proved, a witness who had not seen the assault was called for the prosecution & questioned whether he had seen deft. shortly before the assault was committed & what then took place between them. An objection was taken to the question on the ground that the answer might tend to aggravate the offence by showing malicious deliberation, of which deft. might have repented. Judge disallowed the objection & admitted evidence of a conversation between witness & deft. respecting the prosecutor.—*R. v. KENNEDY* (1871), 10 N. S. W. S. C. R. 57.—**AUS.**

**1. — Previous acts of violence—Where connected with act complained of.]**—Acts of violence committed by accused some time before the act complained of are admissible to explain the later act, if accompanied by declarations or circumstances connecting them with the act complained of.—*R. v. CHOMATSU YABU* (1903), 5 W. A. L. R. 35.—**AUS.**

**2. — Evidence of previous crime—To show motive.]**—Evidence of one crime may be given to show a motive for committing another.—*R. v. CHASSON*

(1876), 3 Pug. 546.—**CAN.**

**h. — —.]**—Prisoner was tried, in 1858, for the murder of C., in 1857. In 1856, C. had sworn informations against the prisoner for rape. The informations were sworn by her, & subscribed by her in the presence of the prisoner, & a recognisance was executed for prisoner to appear at the spring assizes in 1856. Prisoner married C. before the assizes, & consequently the charge was not proceeded with. At the trial in 1858, the information so sworn & the recognisances were offered in evidence by the Crown. The judge received them, telling the jury that they were to regard them, not as evidence of the truth or falsehood of the charge so made, but as evidence of the fact of a charge having been so made, & that the facts evinced by the mere existence of these documents, might be taken into their consideration upon the question of the existence of a motive:—*Held*: the documents were properly admitted in evidence for that purpose.—*R. v. LYDANE* (1858), 10 Ir. Jur. 362.—**IR.**

**k. — Motive not made clear by Crown witnesses—No ground for dis-**

**3886. — Motive against commission of offence.]**—*R. v. BINGHAM* (1811), Wills' Circumstantial Evidence, 5th ed. p. 217.

**3887. — —.]**—*R. v. DOWNING* (1822), Wills' Circumstantial Evidence, 6th ed. p. 289.

**3888. — Justification in self-defence.]**—To show the nature of the assault by the wife that prisoner had reason to apprehend at the time, evidence of former attacks of this sort was allowed to be given. Prisoner was sensitive about the neck from old sores. Deceased used to seize his handkerchief, twist it round so tightly as almost to strangle him & his handkerchief had to be cut to release him from his wife's violence.—*R. v. HOPKINS* (1866), 31 J. P. 105; 10 Cox, C. C. 229.

**3889. — —.]**—On an indictment for murder, the death having been caused by shot from a gun in the hands of prisoner, evidence of former threats by deceased of deadly violence, with words & circumstances on the occasion in question likely to provoke similar threats, received as evidence of danger to life, or serious violence or reasonable apprehension of it, on the occasion, such as might excuse or justify recourse to a loaded firearm in self-defence.—*R. v. WESTON* (1879), 14 Cox, C. C. 346.

**3890. — In libel—Evidence as to other passages in same paper.]**—On the trial of an information for a libel in a newspaper, deft. has a right to have read in evidence any extract from the same paper connected with the subject of the passage charged as libellous, although disjoined from it by extraneous matter & printed in a different character.

Passages of the same paper tending to show the intention & mind of defts. with respect to this specific paragraph must be very material for the consideration of the jury (*LORD ELLENBOROUGH, C.J.*).—*R. v. LAMBERT & PERRY* (1810), 2 Camp. 298; 31 State Tr. 335.

*Annotations:—***Reid.** *Thornton v. Stephen* (1837), 2 Mood. & R. 45. **Mentd.** *R. v. O'Connell* (1844), 5 State Tr. N. S. 1; *R. v. Grant, Ranken & Hamilton* (1848), 7 State Tr. N. S. 507.

**3891. Depositions of witness against accused—On distinct charge—Whether admissible.]**—*R. v. BUCKLEY*, No. 3878, *ante*.

**belief.]**—The fact of the evidence of motive not being clear is no reason for disbelieving a plain straightforward case made out by the prosecution witnesses.—*R. v. BALAVAM DAS* (1921), 1 L. R. 49 Cal. 358.—**IND.**

**3882i. — Of motive in other similar deaths.]**—Evidence of motive for a crime is admissible even though its tendency is to show that all members of a class or even persons generally, would have an inducement to commit the crime in question. Two accused were charged with the murder of a child who had been found lying on its back with its throat cut, & the body also cut open in front. The heart had been cut out & the left ventricle containing the fatty portion removed. In order to supply proof of a motive for the crime evidence was led for the Crown to the effect that it was a practice amongst Zulu tribes, & especially on the part of witch-doctors, to kill & mutilate young persons & use portions of the body, & particularly fat, as a charm against ill-luck, & that the first accused was a Baqora, an offshoot from the Zulu tribe:—*Held*: the evidence was admissible against the first accused.—*R. v. KUMALO & NKOSI*, [1918] App. D. 500.—**S. AF.**

**Sect. 4.—Relevant facts—Admissibility of evidence:**  
**Sub-sect. 2, A.]**

**SUB-SECT. 2.—ACTS OF ACCUSED.**

**A. Forming part of same Transaction.**

**3892. General rule.]**—To prove the guilty knowledge of an utterer of a forged banknote, evidence may be given of his having previously uttered other forged notes knowing them to be forged.

If several & distinct offences do so intermix & blend themselves with each other, the detail of the party's whole conduct must be pursued (LORD ELLENBOROUGH, C.J.).—*R. v. WYLIE* (1804), 1 Bos. & P. N. R. 92; 127 E. R. 393; *sub nom. R. v. WHILEY*, 2 Leach, 983.

*Annotations:—***Refd.** *R. v. Francis* (1874), L. R. 2 C. C. R. 128; *R. v. Bond*, [1906] 2 K. B. 389.

**3893. —.]**—Where several felonies are so connected together as to form part of one entire transaction, evidence of them all may be given in order to prove a party indicted guilty of one.—*R. v. ELLIS* (1826), 6 B. & C. 145; 9 Dow. & Ry. K. B. 174; 4 Dow. & Ry. M. C. 268; 5 L. J. O. S. M. C. 25; 108 E. R. 406.

*Annotations:—***Refd.** *R. v. Salisbury* (1831), 5 C. & P. 155; *R. v. Westwood* (1831), 4 C. & P. 517; *R. v. Mansfield* (1841), Car. & M. 140; *R. v. Wright* (1858), 7 Cox, C. C. 413. **Mentd.** *R. v. Holden* (1833), 5 B. & Ad. 347; *R. v. Palmer* (1856), 2 Jur. N. S. 235; *R. v. Ball*, [1911] A. C. 47.

**3894. —.]**—Upon an indictment against principal & receiver, where it appears that goods are found on the receiver's premises which have been taken from the prosecutor's premises, it is competent to the prosecutor to give evidence of the finding of other goods at the house of the principal, notwithstanding there is no evidence to connect the receiver with them, & the judge will not, under such circumstances, put the prosecutor to his election, either at the opening or the close of his case.

It is in the discretion of the judge whether he will allow several felonies to be given in evidence under one indictment; where they are in fact so mixed as not to be separated without inconvenience, it will be allowed.—*R. v. HINLEY* (1843), 2 Mood. & R. 524; 2 L. T. O. S. 287; 1 Cox, C. C. 12.

**3895. — Effect of interval of time.]**—Transactions of the same class extending over a long period may have a material relation to each other. Whether there was a *nexus* between the earlier & later transactions is a question for the jury.—*R. v. MOHR* (1909), 2 Cr. App. Rep. 39, C. C. A.

**3896. — Similar acts done at same time.]**—When two similar acts, separately charged on two

indictments, are done at practically the same time, on the trial of the former evidence of the latter may be admissible as part of the *res gestæ*.—*R. v. GREENLEY* (1914), 10 Cr. App. Rep. 273, C. C. A.

**3897. What is part of same transaction—Larceny—At intervals of time.]**—*R. v. RICKMAN* (1789), 2 East, P. C. 1034, 1035.

**3898. — — —.]**—A prisoner was indicted for stealing three articles. It appeared that, having taken the first article, he returned in about two minutes & took the second, & then returned in half an hour & took the third:—**Held:** the last taking was a distinct felony, & could not be given in evidence with the other two. But, the interval of time between the first & second takings was so short, that they must be considered as parts of the same transaction.—*R. v. BIRDSEYE* (1830), 4 C. & P. 386.

**3899. — — — & poaching.]**—Prisoner was indicted for night poaching, & it was proposed to show that, on the occasion in question, one of the prosecutor's game-keepers had lost his coat, & that it was found in prisoner's house. There was another indictment against prisoner for stealing the coat:—**Held:** this evidence was inadmissible, unless the prosecutor consented to an acquittal on the indictment for the larceny.—*R. v. WESTWOOD* (1831), 4 C. & P. 517; 2 Man. & Ry. M. C. 509.

*Annotation:—***Consd.** *R. v. Ollis*, [1900] 2 Q. B. 758.

**3900. — — — From post-office.]**—*R. v. SALISBURY* (1831), 5 C. & P. 155.

**3901. — Arson.]**—A. was charged with setting fire to the ricks of B., C., & D., upon the oath of E., an accessory before the fact, & a warrant to apprehend A. was granted, mentioning all the three charges, & stating them to be made on the oath of E. The person who apprehended A. told her that "a very serious oath had been made against her by E." on these three charges. After this A. made a statement, which was received in evidence.

A. set fire to the ricks of B., C., & D., one immediately after the other. There were three indictments, one for each fire. The rick burnt last was the subject of the indictment first tried. An accessory before the fact was called, & was allowed to give evidence of the whole transaction as to the three ricks.—*R. v. LONG* (1833), 6 C. & P. 179.

**3902. — — —.]**—In a case of arson, the indictment contained five counts, each of which charged a firing of a house of a different owner. It was opened that the five houses were in a row,

respecting the prosecutor.—*R. v. KENNEDY* (1871), 10 N. S. W. S. C. R. 57.—**AUS.**

**m. — Cattle stealing—Conversations of accused—Before search for alleged lost cattle.]**—*F. & W.* were charged with stealing a bullock, & they found the bullock running on a reserve, they took him to their own place, & finding the brand undecipherable, sold him after keeping him three weeks. Prisoners' case was that F. had lost a bullock out of a mob he was driving, that he sent W. to look for it, & that W. brought back the bullock in question by mistake thinking it was the one F. had lost:—**Held:** what F. said to W. when giving him instructions to look for the lost bullock was admissible as part of *res gestæ* & to show the animus of W. when he took the bullock.—*R. v. SMITH* (1897), 18 N. S. W. L. R. 366; 14 N. S. W. N. N. 110.—**AUS.**

**n. — Malicious wounding—& larceny.]**—Prisoner was charged with

**PART XII. SECT. 4, SUB-SECT. 2.—A.**

**3892 i. General rule.]**—Where several felonies are all parts of the same transaction, evidence of all is admissible upon the trial of an indictment for any of them, but where a prisoner indicted for murder committed while resisting constables about to arrest him, had with others, been guilty of riotous acts several days before, it is doubtful if evidence of such riotous conduct is admissible, even for the purpose of showing prisoner's knowledge that he was liable to be arrested, & therefore had a motive to resist the officers.—*R. v. CHASSON* (1876), 3 Pug. 546.—**CAN.**

**3892 ii. —.]**—It is the general rule, in justice to a person accused of an offence, that evidence of an unconnected offence be given merely to prove his vicious character, or his readiness to commit such a crime as he is upon trial for; but evidence of facts relevant to the immediate charge against him is not the less admissible

because it necessarily discloses several grounds upon which the attack upon D. was relevant to the charge of having murdered R.; as the existence & accomplishment of a scheme of robbery of which the prisoner's conduct towards the two men was a part; as indicating a motive for the murder of R., as proof of an attempt by prisoner to get rid of part of the evidence of his crime; & as accounting for the otherwise unexplained possession by prisoner of more money than he could have taken from R.—*R. v. GIBSON* (1913), 28 O. L. R. 525; 4 O. W. N. 1167.—**CAN.**

**1. What is part of same transaction—What accused said shortly before offence committed.]**—On a trial for assault, & after the offence was fully proved, a witness who had not seen the assault was called for the prosecution & questioned whether he had seen deft. shortly before the assault was committed & what then took place between them, & gave evidence of a conversation between witness & deft.

& that one fire burnt them all. Upon this opening, the judge would not put the prosecutor to elect, as it was all one transaction.—*R. v. TRUEMAN* (1839), 8 C. & P. 727.

**3903. — Robbery of two persons with violence.**—*A. & B.*, when riding in a gig together, were robbed at the same time, *A.* of his money, & *B.* of his watch, & violence used towards both. There was an indictment for the robbing of *A.*, & another for the robbing of *B.*:—*Held*: on the trial of the first indictment, evidence might be given of the loss of the watch by *B.*, & that it was found on one of the prisoners, but no evidence ought to be given of any violence offered to *B.* by the robbers.—*R. v. ROONEY* (1836), 7 C. & P. 517.

**3904. —**—*]*—An indictment for robbery, which charges prisoners with having assaulted *G. & H.* & stolen 2s. from *G.*, & 1s. from *H.*, is correct, if the robbing of *G. & H.* was all one act, & if it were so, counsel for the prosecution will not be put to elect.—*R. v. GIDDINS* (1842), Car. & M. 634.

**3905. — Conspiracy—Similar acts done on different days.**—An indictment for a misdemeanour, containing several counts, alleging several misdemeanours of the same kind on the same day, prosecutor may give evidence of such misdemeanours on different days.—*R. v. LEVY* (1819), 2 Stark. 458, N. P.

**3906. — Separate act of one accused.**—*A.* was charged with having conspired with *J. & others* unknown, to raise insurrection & obstruct the laws. It was proved that *A. & J.* were members of a Chartist lodge, & that *A. & J.* were at the house of the latter on a certain day, on the evening of which *A.* directed people assembled at the house of *J.* to go to the race-course at *P.*, whither *J. & other* persons had gone:—*Held*: (1) on the trial of *A.* evidence was receivable that *J.* had at an earlier part of the same day, directed other persons to go to the race-course; & (2) it being proved that *J. & an armed party* of the persons assembled, went from the race-course to the New Inn, evidence might be given of what *J.* said at the New Inn it being all one transaction.—*R. v. SHELLARD* (1840), 9 C. & P. 277; 4 State Tr. N. S. App. 1386.

**3907. — And receiving stolen property.**—Prisoner was to be tried on three indictments, for receiving stolen tin, for stealing iron, for receiving stolen brass. It appeared that a constable went with a search-warrant, to search prisoner's premises for stolen iron, & that, having read the warrant to prisoner, the latter made a statement:—*Held*: on the trial of the first

indictment, the whole of this statement was receivable in evidence, although part of it related to the charge respecting the iron; and also evidence might be given, that, at the time of the search, prisoner endeavoured to conceal some brass; & also, almost immediately after prisoner was taken away from the premises, at the conclusion of the search, his wife carried some tin under her cloak, from a warehouse on the premises.—*R. v. MANSFIELD* (1841), Car. & M. 140; 5 Jur. 661.

*Annotation*:—*Reid. R. v. Oddy* (1851), 15 Jur. 517.

**3908. — False pretences.**—Where an untrue statement was made for the purpose of obtaining money, but did not then succeed, & a month afterwards a true statement relating to the same matter was made, upon which money was obtained:—*Held*: the matters which happened on the two occasions were connectable, & it was a question for the jury whether they were connected so as to amount to a false pretence; also that the case was within the statute.—*R. v. WELMAN* (1853), Dears. C. C. 188; 22 L. J. M. C. 118; 17 J. P. 311; 17 Jur. 421; 1 W. R. 361; 6 Cox, C. C. 153, C. C. R.; *sub nom. R. v. WELLMAN*, 1 C. L. R. 201.

**3909. — Breaking & entering.**—Upon a trial for breaking into a booking-office at a railway station, evidence was admitted that prisoners had, on the same night, broken into three other booking-offices belonging to three other stations on the same railway, the four cases being all mixed up together.—*R. v. COBDEN* (1862), 3 F. & F. 833.

**3910. — Procuring prostitution.**—Applts. were convicted of living on the earnings of prostitution on an indictment which charged the living on such earnings on a day named & not on divers days:—*Held*: on such an indictment evidence is admissible of anything done on days other than the day named. It is clearly relevant to ascertain what prisoner's relations with the woman in question had been either before or after the day named in the indictment in order to determine whether he was or was not living on the earnings of her prostitution on that particular day.—*R. v. HILL*, *R. v. CHURCHMAN*, [1914] 2 K. B. 386; 83 L. J. K. B. 820; 110 L. T. 831; 78 J. P. 303; 24 Cox, C. C. 150; 10 Cr. App. Rep. 56, C. C. A.

**3911. — Continuing offence—Larceny—Of coal from separate mines.**—Where prisoner was indicted in one count, for stealing from the mine of one *G.*, coal, the property of the said *G. &*, in the same count, for stealing from the mines of thirty other proprietors coal, the property of each

the offence of maliciously wounding with intent to do grievous bodily harm. At the trial it was proved that a constable saw the prisoner with a bag, stopped him & asked him where he was going, & that prisoner thereupon ran away but was caught by the constable & brought back. When the constable began to examine the contents of the bag prisoner ran away again & on being pursued struck the constable on the head. The bag contained 19 pigeons & a claw-hammer. The prisoner escaped, but was afterwards arrested. A question of identity of the prisoner was raised at the trial. For the prosecution a witness gave evidence that he had been robbed of 19 pigeons & a claw-hammer the night before the offence charged, that the pigeons were returned to him, but that he could not identify the prisoner nor the claw-hammer. Jury found prisoner guilty of unlawfully wounding.—*Held*: evidence of the theft of the pigeons & claw-hammer was admissible.

J.—VOL. XIV.

—*R. v. LUDLOW* (1898), 24 V. L. R. 93.  
—**AUS.**

**o. — Murder of wife—Accumulating insurances on her life.**—On a charge of wife murder, the Crown sought to prove that prisoner had been with evil design accumulating insurance on his wife's life:—*Held*: evidence of various applications for insurance, though in some cases resulting in rejection of the risk, was admissible, all being made practically at the same time & forming part of one transaction which could be properly given in evidence as a whole.—*R. v. HAMMOND* (1898), 29 O. R. 211.—**CAN.**

**p. — Threats.**—*R. v. JONES* (1868), 28 U. C. R. 416.—**CAN.**

**q. — Rape—Not statement made after offence committed—Reasonable opportunity afforded before.**—On the trial of deft. on an indictment containing a count for rape statements made to the aunt of prosecutrix the morning after the afternoon on which

the rape was alleged to have been committed, disclosing that accused had had illicit intercourse with her, but not claiming that she had been assaulted or that accused had committed violence, where she might have disclosed the offence to a stranger immediately after the outrage, & to her father on the evening of the same afternoon, & again to her father on the following morning, prior to the disclosure to the aunt, were not made at the earliest reasonable opportunity, & should not have been admitted.—*R. v. AKERLEY* (1919), 46 N. B. R. 195.—**CAN.**

**r. — Robbery & Murder.**—Persons convicted of robbery by a judge & a jury, & of murder, by the sessions judge with assessors, appealed against the conviction on the charge of murder. The two offences constituted parts of the same transaction:—*Held*: recent & unexplained possession of the stolen property which

B B



**Sect. 4.—Relevant facts—Admissibility of evidence:**  
**Sub-sect. 2, A. & B. (a).]**

of such other proprietors, & it appeared that all the coal so alleged to have been stolen had been raised at one shaft:—*Held*: (1) although, for the sake of convenience in trying prisoner, the judge might direct the jury to confine their attention to one particular charge, yet the prosecutor was entitled to give evidence in support of all the charges laid in the indictment; (2) proof of such charges might be relied on, in order to show a felonious intent. As long as coal is gotten from one shaft, it is continuous taking, though the working is carried on by means of different levels & cuttings, & into the lands of different people.—*R. v. BLEASDALE* (1848), 2 Car. & Kir. 765.

*Annotations*:—*As to* (1) *Refd.* *R. v. Rearden* (1864), 4 F. & F. 76. *As to* (2) *Consd.* *R. v. Firth* (1869), L. R. 1 C. C. R. 172. *Refd.* *R. v. Henwood* (1870), 22 L. T. 486.

**3912.** ——— **Of gas.]—F.**, by an underground pipe connected with the main, which was always filled with gas, supplied his mill; the consumption of such gas was unknown to the company for some years:—*Held*: on an indictment for stealing 1,000 cubic feet of gas, the evidence of using gas during all the years was admissible, the whole being one entire act.—*R. v. FIRTH* (1869), L. R. 1 C. C. R. 172; 38 L. J. M. C. 54; 19 L. T. 746; 33 J. P. 212; 17 W. R. 327; 11 Cox, C. C. 234, C. C. R.

*Annotations*:—*Refd.* *R. v. Henwood* (1870), 22 L. T. 486; *It. v. Bond*, [1906] 2 K. B. 389. *Mentd.* *Erie County Natural Gas & Fuel Co. v. Carroll*, [1911] A. C. 105.

**3913.** ——— **]**—An indictment charged an assistant to a photographer with stealing divers articles belonging to his employer. It did not appear when the articles were taken, whether at one or more times, but only that one particular article could not have been taken before a given month:—*Held*: this was not a case in which prosecutor should be put to elect upon which articles to proceed under Larceny Act, 1861 (c. 96), s. 6.

To make the statute applicable it must appear that the different articles enumerated in the indictment were stolen at different times, but there is nothing in this case inconsistent with all having been taken at one time, or in such a way as to form one continuous taking (*BOVILL, C.J.*).—*R. v. HENWOOD* (1870), 22 L. T. 486; 34 J. P. 580; 11 Cox, C. C. 526, C. C. R.

**3914.** ——— **Rape.]—On** an indictment for rape on a child under ten years of age, evidence admitted of subsequent perpetrations of the same offence on different days previous to complaint to the mother, it appearing that prisoner had threatened the child on the first occasion:—*Held*: virtually it was in such a case all one continuous offence.—*R. v. REARDEN* (1864), 4 F. & F. 76.

*Annotations*:—*Consd.* *R. v. Ball*, [1911] A. C. 47. *Refd.* *It. v. Harris* (1864), 4 F. & F. 342; *It. v. Bond*, [1906] 2 K. B. 389; *It. v. Stone* (1910), 6 Cr. App. Rep. 89.

**3915.** ——— **Malicious damage to property.]—Indictment** for cutting eight trees with an intent to steal.

The question for us is, whether there was any evidence to go to the jury upon which they could

would be presumptive evidence against prisoners on the charge of robbery was similarly evidence against them on the charge of murder.—*It. v. SAMI* (1890), L. R. 13 Mad. 426.—**IND.**

**s.** ——— **Importation of contraband—Intercepted letters & telegram.]—A** letter written by an accused is *prima facie* evidence against him if it relates distinctly to a relevant point. It is not necessary that it should be signed; it is enough if it is traced to

the writer, & it is admissible though it may have been intercepted or surreptitiously detained & opened. An unsigned letter, proved to have been written by accused addressed to a firm in London, which had shipped certain contraband cocaine which the accused was charged with importing into Bengal, is admissible in evidence, though intercepted under the order of the magistrate at the post office during the course of transit. A letter written

find that prisoner had cut the trees down at one time, or so continuously as to form one transaction (*COCKBURN, C.J.*).—*R. v. SHEPHERD* (1868), L. R. 1 C. C. R. 118; 37 L. J. M. C. 45; 17 L. T. 482; 32 J. P. 116; 16 W. R. 373; 11 Cox, C. C. 119, C. C. R.

*Annotations*:—*Refd.* *R. v. Firth* (1869), L. R. 1 C. C. R. 172; *R. v. Henwood* (1870), 22 L. T. 486.

**3916.** ——— **Permitting licensed premises to be used as a brothel.]—Motion** *ex p.* on behalf of B. the licensed occupier of a public house, for a *certiorari* to bring up to be quashed a conviction of the said B. for having on Jan. 26, 28, 29 & 31, Feb. 1, 4, 5 & 6, 1901, permitted his premises to be used as a brothel. The objection to the conviction was that it was bad on the face of it as being one conviction for eight separate offences committed upon eight separate & discontinuous days whereas Summary Jurisdiction Act, 1848 (c. 43), s. 10 provides that every information "shall be for one offence only & not for two or more offences":—*Held*: notwithstanding that the days mentioned in the conviction were not continuous, the offence stated was one continuing offence.—*Ex p. BURNBY*, [1901] 2 K. B. 458; 45 Sol. Jo. 579; *sub nom.* *R. v. BURNBY*, 70 L. J. K. B. 739; 85 L. T. 168; 20 Cox, C. C. 25, D. C.

**3917.** ——— **Subornation of evidence by accused.]—On** the trial of an action by pltf. & wife for injuries sustained by the wife owing to deft.'s negligence, pltf.'s case was proved by the evidence of the wife & other witnesses; & defts. having called evidence to prove that the wife was in fault, tendered the following evidence, which was received, subject to objection. W. deposed that he, pltf., & C., a clerk of pltf.'s attorney, were together at pltf.'s house; that pltf. said that if W. would give evidence as to the accident he should share the compensation; pltf. knew that W. was not present at the accident, & W. said he was not, & C. said if W. would not come forward he, C., would get other witnesses. Two other witnesses deposed to similar proposals made to them by C., but not in pltf.'s presence, to give false evidence. Pltf. was not present at the accident; & neither he nor C. had been called as witnesses:—*Held*: the evidence was rightly received, as amounting to evidence of an admission, by conduct, of pltf. that he had a bad case. C. having been shown to be acting in concert with pltf. to suborn false witnesses, what C. did in furtherance of that object in the absence of pltf. might be inferred to have been done with pltf.'s privity.—*MORIARTY v. LONDON, CHATHAM & DOVER RY. CO.* (1870), L. R. 5 Q. B. 314; 39 L. J. Q. B. 109; 22 L. T. 163; 34 J. P. 692; 18 W. R. 625.

*Annotation*:—*Refd.* *R. v. Watt* (1905), 70 J. P. 29.

**3918.** ——— **]**—The conduct in a litigation of a party to it, if such as to lead to the reasonable inference that he disbelieves in his own case, may be proved & used as evidence against him. So, where deft. was indicted for endeavouring to persuade certain other persons to kill & murder another person, evidence of a witness who had

by the exporter of certain contraband cocaine, the subject of the charge against accused, containing a reference to a telegram signed in a different name but bearing the same business address as that of the accused, is relevant as showing that the accused was the sender of the telegram, though the letter was intercepted at the post office under an order of the magistrate before delivery.—*BOOTH v. R.* (1913), L. L. R. 41 Calc. 545.—**IND.**



given evidence at the police ct. for the defence, but who now swore that such evidence was false, & that he had been induced to give such evidence by deff. was admitted.—*R. v. WATT* (1905), 70 J. P. 29; 20 Cox, C. C. 852.

**3919. Admissible to rebut alibi.**—In answer to an alibi set up on a trial for felony, the prosecutor may show the circumstances in which prisoner was seen near the spot in question, though those circumstances involve the commission of another felony by him.—*R. v. BRIGGS* (1839), 2 Mood. & R. 199, N. P.

*B. Not forming part of same Transaction.*

*(a) In General.*

**3920. General rule.**—Upon the trial of an indictment for murder by stabbing, it appeared that prisoner when arrested, about an hour after the alleged crime, had in his possession a blood-stained knife :—*Held* : admissible to give evidence of the stabbing of another person by prisoner immediately before his arrest.

Evidence relating to facts entirely disconnected from the charge before the ct. are inadmissible (*CHARLES, J.*)—*R. v. CRICKMER* (1889), 16 Cox, 701.

—[Prisoner, a medical man, was indicted for feloniously using certain instruments on a certain woman with intent to procure her miscarriage. At the trial evidence was tendered on behalf of the prosecution to show that some nine months previously prisoner had used similar instruments upon another woman with the avowed intention of bringing about her miscarriage, & that he had then used expressions tending to show that he was in the habit of performing similar operations for the same illegal purpose. The evidence was admitted, & prisoner was convicted :—*Held* : the evidence was rightly admitted, & the conviction must be upheld.

Evidence of this kind has been admitted in cases which may be grouped under three heads : Where the prosecution seeks to prove a system or course of conduct ; where the prosecution seeks to rebut a suggestion on the part of prisoner of accident or mistake ; & where the prosecution seeks to prove the knowledge by prisoner of some fact (*BRAY, J.*)—*R. v. BOND*, [1906] 2 K. B. 389 ; 75 L. J. K. B. 693 ; 95 L. T. 296 ; 70 J. P. 424 ; 54 W. R. 586 ; 22 T. L. R. 633 ; 50 Sol. Jo. 512 ; 21 Cox, C. C. 252, C. C. R.

*Annotations.*—*Consd.* *R. v. Ball*, [1911] A. C. 47. *Apld.* *v. Thomson* (1912), 76 J. P. 431. *Consd.* *R. v. Rodley*, [1913] 3 K. B. 468 ; *R. v. Boyle & Merchant*, [1914] 3 K. B. 339 ; *Perkins v. Jeffery*, [1915] 2 K. B. 702. *Refd.* *R. v. Chitson*, [1909] 2 K. B. 945 ; *R. v. Charlesworth* (1910), 4 Cr. App. Rep. 167 ; *R. v. Ellis*, [1910] 2 K. B. 746 ; *R. v. Shellaker* (1913), 110 L. T. 351 ; *R. v. Mason* (1914), 111 L. T. 336 ; *Thompson v. R.*, [1918] A. C. 221 ; *R. v. Lovegrove*, [1920] 3 K. B. 643 ; *R. v. Starkie*, [1922] 2 K. B. 275. *Mentd.* *R. v. Stone* (1910), 6 Cr. App. Rep. 89 ; *R. v. Price* (1913), 9 Cr. App. Rep. 15.

**PART XII. SECT. 4, SUB-SECT. 2.—**  
**B. (a).**

**3920 i. General rule.**—Evidence of the commission of one crime entirely unconnected with the offence charged is inadmissible to prove the offence charged ; but, where the commission of one act, criminal or otherwise, is in itself circumstantial evidence of the commission of another act, it is perfectly proper evidence to establish the commission of the latter act.—*R. v. MINCHIN* (1913), 26 W. L. R. 633 ; 18 D. L. R. 340 ; 6 W. W. R. 800.—**CAN.**

**3920 ii.**—[In a criminal trial evidence otherwise admissible is not rendered inadmissible by the fact that it discloses the commission of an offence other than that in respect of

which the trial is being held.—*R. v. MULUA* (1892), 1 L. R. 14 All. 502.—**IND.**

**3923 i. To show general disposition to commit offence.**—When intention, knowledge, good or bad faith, malice or any other state of mind is relevant to the issue, evidence of acts or words of a similar character on other occasions may be admitted to show the intention of the person so acting or speaking on the occasion in question. Husband & wife were charged with assaulting one of their minor children on certain specific occasions.—*Held* : evidence of other assaults by the accused on the child, of its continued ill-treatment prior to the alleged assaults & of its general physical condition was admis-

**3922.**—[On the trial of a prisoner for forgery of a will two accomplices were called for the prosecution, who deposed that the will was forged by prisoner in pursuance of a scheme by which they were to endeavour fraudulently to obtain an advance from third persons to a legatee under the will of the faith of his legacy. One of the accomplices was to figure as the legatee & the other as an exor.

They said that prisoner told them that he objected to appearing as exor. himself because he had forged a will under a similar scheme some years before, that on that occasion he had played the part of exor., & that if he did it again suspicion might be directed to him. Prisoner gave evidence in his own defence, & denied, amongst other things, the accomplices' statement that he had admitted the earlier forgery. In cross-examination counsel for the prosecution went into details of that earlier forgery & asked questions tending to show that prisoner had in fact committed it :—*Held* : the cross-examination was rightly admitted. If prisoner had in fact been guilty of a similar forgery in connection with the earlier will, the probability was that the accomplices' story that he told them so & gave that as his reason for not being exor. under the later will was true, & therefore the answers to the questions might afford corroboration of their evidence. The cross-examination was consequently relevant to the issue at the trial, & was not open to objection under Criminal Evidence Act, 1898 (c. 36).

Evidence otherwise admissible can be given against an accused person notwithstanding that it may show that he had committed an offence other than that with which he was charged, or was of bad character.—*R. v. KENNAWAY*, [1917] 1 K. B. 25 ; 86 L. J. K. B. 300 ; 115 L. T. 720 ; 81 J. P. 99 ; 25 Cox, C. C. 559 ; 12 Cr. App. Rep. 147, C. C. A.

**3923. To show general disposition to commit offence.**—*R. v. COLE*, No. 3848, *ante*.

**3924.**—[Evidence tending to show guilt of criminal acts other than those charged is not admissible except upon the issue whether the acts charged were designed or accidental, or unless to rebut a defence otherwise open. M. & his wife were convicted of the murder of an infant, received from its mother on representations as to their willingness to adopt it on payment of a sum inadequate to its support beyond a very limited time, & whose body was found buried in the garden of a house occupied by them :—*Held* : evidence of other infants having been received from their mothers on like representations & terms, & that bodies of infants had been found buried in the gardens of several houses occupied by prisoners, was relevant to the issue which had been tried by the jury.

Evidence is not admissible to show that the

sible to show that the alleged assaults were in excess of legal chastisement.—*R. v. JANKE* (1913), T. P. D. 382.—**S. AF.**

**t.**—*Subsequent conduct.*—[The accused was charged with carnally knowing a girl in his employ who at the date of the offence charged was 15 years & 10 months old. At the trial the admission of evidence as to his conduct with the girl subsequently to the date of the offence charged was objected to :—*Held* : the evidence was admissible.—*R. v. LANGDON*, [1920] N. Z. L. R. 495.—**N.Z.**

**a.**—*Not charge in foreign indictment.*—[Evidence against prisoner of having uttered a forged instrument not being otherwise sufficient, the ct.

*Sect. 4.—Relevant facts—Admissibility of evidence:*  
*Sub-sect. 2, B. (a).]*

accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely, from his criminal conduct or character, to have committed the offence for which he is being tried.—*MAKIN v. A.-G. FOR NEW SOUTH WALES*, [1894] A. C. 57; 63 L. J. P. C. 41; 69 L. T. 778; 58 J. P. 148; 10 T. L. R. 155; 17 Cox, C. C. 704; 6 R. 373, P. C.

*Annotations:—***Consd.** *R. v. Wyatt*, [1904] 1 K. B. 188. **Apld.** *R. v. Smith* (1905), 92 L. T. 208. **Consd.** *R. v. Bond*, [1906] 2 K. B. 389. **Apld.** *R. v. Ball*, [1911] A. C. 47. **Consd.** *R. v. Rodley*, [1913] 3 K. B. 468; *Ibrahim v. R.*, [1914] A. C. 599; *R. v. Boyle & Merchant*, [1914] 3 K. B. 339; *R. v. Smith* (1915), 84 L. J. K. B. 2153; *Thompson v. R.*, [1918] A. C. 221. **Distd.** *R. v. Lovegrove*, [1920] 3 K. B. 643. **Consd.** *R. v. Armstrong*, [1922] 2 K. B. 555. **Refd.** *R. v. Ollis*, [1900] 2 Q. B. 758; *R. v. Mean* (1904), 69 J. P. 27; *R. v. Chitson*, [1909] 2 K. B. 945; *R. v. Schani Yousey* (1914), 84 L. J. K. B. 1272; *Perkins v. Jeffery*, [1915] 2 K. B. 702. **Mentd.** *R. v. Dyson*, [1908] 2 K. B. 454; *R. v. Westacott* (1908), 25 T. L. R. 192; *Arnold v. King-Emperor*, [1914] A. C. 644.

**3925. — Or bad character.**—On an indictment for obtaining by false pretences or other frauds, evidence of similar offences to that charged committed by deft. is only admissible, a *prima facie* case being made, to negative a defence of mistake or accident, or to prove a systematic course of fraudulent conduct, but not to prove general bad character.

At the trial of a prisoner on an indictment charging him with obtaining a pony & cart by false pretences on June 4, 1909, evidence was admitted that on May 14, 1909, and on July 3, 1909, prisoner had obtained provender from other persons by false pretences different from those alleged in the indictment. Prisoner was convicted:—**Held:** the evidence was wrongly admitted, as it did not show a systematic course of fraud, but merely that prisoner was of a general fraudulent disposition, & therefore it did not tend to prove the falsity of the representations alleged in the indictment.—*R. v. FISHER*, [1910] 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122; 22 Cox, C. C. 270; 3 Cr. App. Rep. 176, C. C. A.

*Annotations:—***Apld.** *R. v. Ellis*, [1910] 2 K. B. 746. **Consd.** *R. v. Rodley*, [1913] 3 K. B. 468. **Apld.** *R. v. Kurusch*, [1915] 2 K. B. 749; *R. v. Wilson* (1915), 11 Cr. App. Rep. 251. **Refd.** *R. v. Ball* (1910), 5 Cr. App. Rep. 238; *Ibrahim v. R.*, [1914] A. C. 599; *R. v. Baird* (1915), 84 L. J. K. B. 1785.

**3926. When related to distinct offence.**—An indictment for a conspiracy charged deft. with conspiring, with other persons unknown, to cheat & defraud D. & others, & laid as overt acts that deft. did falsely pretend to D. that he was a merchant named G., & did under colour of a pretended contract with D., for the purchase of certain goods of D. & others, obtain a large quantity of the goods of D. & others, with intent to defraud D. & others:—**Held:** on the trial of this indictment evidence was not admissible to show that deft. attempted to defraud other persons wholly unconnected with D.—*R. v. STEEL* (1841), Car. & M. 337; 2 Mood C. C. 246; 5 J. P. 500, C. C. R.

**3927. —**—A. was indicted for stealing a

could not look at an indictment against him found by the grand jury of an American criminal case.—*R. v. HOVEY* (1880), 8 P. R. 345.—**CAN.**

**3926 i. When relating to distinct offence.**—The mere fact that evidence tends to show the commission of crimes other than the one charged in the indictment does not render it inad-

missible if it be relevant to an issue before the jury, & it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged were designed or accidental, or to rebut a defence which would otherwise be open to the accused.—*R. v. LEVIN*, [1918] 1 W. W. R. 505; 29 Can. Crim. Cas. 389.—**CAN.**

shilling which had been previously marked & put into a till. A constable found the shilling in his possession, & asked him if he had any more money of S.'s about him. Prisoner produced some half-crowns, & then made a statement:—**Held:** this statement was not receivable in evidence, on the ground that it related to another & distinct felony.—*R. v. BUTLER* (1846), 2 Car. & Kir. 221; 2 Cox, C. C. 132.

*Annotation:—***Refd.** *R. v. Bond*, [1906] 2 K. B. 389.

**3928. —**—On an indictment for arson in setting fire to a rick the property of A., evidence may be given of prisoner's presence & demeanour at fires of other ricks the property respectively of B. & C., occurring the same night, although those fires are the subject of other indictments against prisoner, such evidence being important to explain his movements & general conduct before & after the fire of A.'s rick; but evidence is not admissible of threats, statements or particular acts pointing alone to the other indictments, & not tending to implicate or explain the conduct of prisoner in reference to that fire.—*R. v. TAYLOR* (1851), 5 Cox, C. C. 138.

**3929. —**—Prisoner was charged with obtaining a specific sum from W. by false pretences. It appeared that he was employed by his master to take orders, but not to receive moneys, & he was proved to have obtained the specific sum from W. by representing that he was authorised by his master to receive it. Evidence was then admitted of prisoner's having obtained another sum of money from another person by a similar false pretence, such obtaining not being mentioned in the indictment in any way:—**Held:** such evidence was not admissible for the purpose of proving the intent of prisoner when he committed the acts charged in the indictment.—*R. v. HOIT* (1860), Bell, C. C. 280; 30 L. J. M. C. 11; 3 L. T. 310; 24 J. P. 757; 6 Jur. N. S. 1121; 9 W. R. 74; 8 Cox, C. C. 411, C. C. R.

*Annotations:—***Distd.** *R. v. Rhodes*, [1899] 1 Q. B. 77. **Consd.** *R. v. Ollis*, [1900] 2 Q. B. 758. **Expld.** *R. v. Smith* (1905), 92 L. T. 208. **Refd.** *R. v. Francis* (1874), 43 L. J. M. C. 97; *R. v. Stephens* (1874), 43 L. J. M. C. 97; *R. v. Bond*, [1906] 2 K. B. 389.

**3930. —**—Deft. was indicted for obtaining a cheque by falsely pretending that another cheque, which he then gave to prosecutor, was a good & valid order for the payment of money. Prosecutor deposed that he gave his cheque to deft. on the faith of deft.'s statement that a cheque which deft. then gave to prosecutor, was a good cheque. The cheque given by deft. was dishonoured. Deft. stated that when he gave the cheque he expected a payment which would have enabled him to meet it. Deft. was acquitted. He was then tried on a second indictment, charging him with obtaining from other persons three sums of money on three cheques which were dishonoured. To prove guilty knowledge prosecutor in the first case was called & gave the same evidence as in the first case. Deft. was convicted, & the question as to the admissibility of the evidence was reserved:—**Held:** the evidence which had been given on the first indictment, upon which deft. had been tried & acquitted, was legally admissible upon the trial of the second indictment, for the purpose of proving guilty knowledge, & the

**3926 ii. —**—In a charge of murder by the panel of his wife & her mother it was proposed by the prosecutor to ask a witness, a female servant in the house, whether during a time stated the wife had seen the panel use any familiarities with witness. Question objected to as leading to a separate line of inquiry, of which no notice had

conviction was right.—*R. v. OLLIS*, [1900] 2 Q. B. 758; 69 L. J. Q. B. 918; 83 L. T. 251; 64 J. P. 518; 49 W. R. 76; 16 T. L. R. 477; 44 Sol. Jo. 593; 19 Cox, C. C. 554, C. C. R.

*Annotations*.—*Consd.* *R. v. Wyatt*, [1904] 1 K. B. 188; *It. v. Shellaker*, [1914] 1 K. B. 414. *Refd.* *R. v. Smith* (1905), 92 L. T. 208; *It. v. Bond*, [1906] 2 K. B. 389; *It. v. Boyle & Merchant*, [1914] 3 K. B. 339; *Perkins v. Jeffery*, [1915] 2 K. B. 702; *It. v. Thompson*, [1917] 2 K. B. 630; *R. v. Lovegrove*, [1920] 3 K. B. 643.

**3931.** —.]—Deft. was indicted for obtaining certain furniture by false pretences from a furniture dealer in Brighton between Oct. 14 & 17. Evidence was given that deft. a few days afterwards obtained other goods from another Brighton tradesman by means of false pretences the same as, or similar to, those charged in the indictment:—*Held*: the evidence was admissible as it appeared that it really related to one transaction & was all part of the same system of fraud.—*R. v. SMITH* (1905), 92 L. T. 208; 69 J. P. 51; 49 Sol. Jo. 261; 20 Cox, C. C. 804, C. C. R.

**3932.** —.]—*R. v. FISHER*, No. 3925, *ante*.

**3933.** —.]—*R. v. ELLIS*, No. 3893, *ante*.

**3934.** —.]—Conviction quashed on the ground that a witness had been allowed to depose to the admission by prisoner that he had committed offences unconnected with the pending charge.—*R. v. COULTER* (1910), 5 Cr. App. Rep. 147, C. C. A.

**3935.** —.]—Applt. was indicted for having in the night time broken & entered a dwelling-house with intent to ravish a woman. The evidence for the prosecution was to the effect that applt. broke into the house between midnight & 1 a.m., that the prosecutrix, hearing a noise, came downstairs, when applt. seized her, & pulled up her clothes, & that upon the woman's father coming downstairs he went away. The defence at the trial was that the evidence for the prosecution was not true, that applt. went to the house for the purpose of courting the prosecutrix with her consent, & that he did not break into the house & did not intend or attempt to ravish her. The prosecution tendered evidence that applt. at about 2 a.m. on the same morning went to the house of another woman, about three miles from the prosecutrix's house, & gained access to her bedroom down the chimney, & with her consent had connection with her. It was contended that this evidence was admissible to show the state of the applt.'s mind & body at the time when he broke into the prosecutrix's house, & coupled with the evidence of what happened when he was in the house was admissible to show the intent with which he broke in. The evidence was admitted & applt. was convicted:—*Held*: the evidence was not relevant to any of the issues in the case, & was not admissible.—*R. v. RODLEY*, [1913] 3 K. B. 468; 82 L. J. K. B. 1070; 109 L. T. 476; 77 J. P. 465; 29 T. L. R. 700; 58 Sol. Jo. 51; 23 Cox, C. C. 574; 9 Cr. App. Rep. 69, C. C. A.

*Annotations*.—*Consd.* *R. v. Burelson* (1914), 11 Cr. App. Rep. 39; *R. v. Kurasch*, [1915] 2 K. B. 749. *Refd.* *R. v. Jones* (1922), 127 L. T. 160.

**3936.** When not related to offence of similar nature—*Obtaining credit by fraud.*—Applt. was charged for obtaining credit by fraud. Evidence was given of two previous occasions upon which he had obtained credit & had not paid:—*Held*:

as the ct. thought that those transactions could not properly have been the subject of a criminal charge, they were not transactions of a similar nature with the transaction in question, & therefore could not be given in evidence to show fraud on the latter occasion.—*R. v. BAIRD* (1915), 84 L. J. K. B. 1785; 113 L. T. 608; 25 Cox, C. C. 86; 11 Cr. App. Rep. 186, C. C. A.

**3937.** To prove suspicion of subsequent felony.]—On an indictment against prisoner for the murder of her husband by arsenic, in Sept. 1848, evidence was tendered on behalf of the prosecution of arsenic having been taken by prisoner's two sons, one of whom died in Dec. & the other in Mar. subsequently, & also by a third son, who took arsenic in Apr. following, but did not die. Proof was given of a similarity of symptoms in the four cases. Evidence was also tendered that prisoner lived in the same house with her husband & sons, & that she prepared their tea, cooked their victuals & distributed them to the four parties:—*Held*: (1) this evidence was admissible for the purpose of proving, first, that the deceased husband actually died of arsenic; secondly, that his death was not accidental; & (2) it was not inadmissible by reason of its tendency to prove or create a suspicion of a subsequent felony.—*R. v. GEERING* (1849), 18 L. J. M. C. 215; 8 Cox, C. C. 450, n.

*Annotations*.—*As to* (1) *Consd.* *R. v. Richardson* (1861), 8 Cox, C. C. 448. *Fold.* *It. v. Cotton* (1873), 12 Cox, C. C. 400; *R. v. Heeson* (1878), 14 Cox, C. C. 40; *R. v. Flannagan & Higgins* (1884), 15 Cox, C. C. 403. *Apprvd.* *Makin v. A.-G.* for New South Wales, [1894] A. C. 57. *Consd.* *It. v. Bond*, [1906] 2 K. B. 389. *Appld.* *It. v. Armstrong*, [1922] 2 K. B. 555. *Refd.* *It. v. Salt* (1862), 3 F. & F. 834; *R. v. Harris* (1864), 4 F. & F. 342; *R. v. Francis* (1874), L. R. 2 C. C. R. 128; *Blake v. Albion Life Assoc. Soc.* (1878), 48 L. J. Q. B. 169. *As to* (2) *Refd.* *R. v. Bond*, [1906] 2 K. B. 389.

**3938.** To prove motive.]—F. & H. were jointly charged, on indictment for the murder of the husband of H., with causing his death by the administration of arsenic.

Evidence having been given that deceased had died from arsenic, & had been attended by prisoners:—*Held*: it was competent for the prosecution to tender evidence of other cases of persons who had died from arsenic, & to whom prisoners had access, exhibiting exactly similar symptoms before death to those of the case under consideration, for the purpose of showing that this particular death arose from arsenical poisoning—not accidentally taken, but designedly administered by some one.

Such evidence, however, is not admissible for the purpose of establishing motives; though the fact that the evidence offered may tend indirectly to that end is no ground for its exclusion.—*R. v. FLANNAGAN & HIGGINS* (1884), 15 Cox, C. C. 403.

**3939.** Evidence in previous charge—*Acquittal.*—*R. v. OLLIS*, No. 3930, *ante*.

**3940.** Charge abandoned.]—On the hearing of a charge of sodomy with a boy, evidence was admitted which had reference to a previous charge of the same nature, but which was abandoned:—*Held*: the evidence given could not be made use of to rebut the defence of innocent assocn., & was wrongly admitted.—*R. v. BARRON* (1913), 110 L. T. 350; 78 J. P. 184; 30 T. L. R. 187; 24 Cox, C. C. 83; 9 Cr. App. Rep. 236, C. C. A.

**3941.** When admissible—Not until defence of

been given but allowed in the circumstances.—*H.M. ADVOCATE v. PRITCHARD* (1865), 5 Irv. 88.—*SCOT.*

**b.** When not related to offence of similar nature.]—On the trial of an indictment for riot & unlawful assembly on Jan. 15, evidence was given on the part of the prosecution of the conduct

of prisoners on the day previous, for the purpose of showing as was alleged that B., in whose office one act of riot was committed, had reason to be alarmed when prisoners came to his office. Prisoners thereupon claimed the right to show that they had met on Jan. 14 to attend a school meeting, & claimed the right to give evidence

of what took place at the school meeting, but the evidence was rejected:—*Held*: the evidence was properly rejected, because the conduct of the prisoners on Jan. 14 could not qualify or explain their conduct on the following day.—*R. v. MAILLOUX* (1876), 3 Pug. 493.—*CAN.*

*Sect. 4.—Relevant facts—Admissibility of evidence :  
Sub-sect. 2, B. (a), (b), (c) & (d).]*

**accident, mistake, or absence of intent raised.]—**Resp. was charged under Vagrancy Act, 1824 (c. 83), s. 4, with having on July 16, 1914, exposed his person in Small Heath Park, Birmingham, with intent to insult a certain female, T. In her evidence T. stated that on July 16, she saw resp. in Small Heath Park, & that he exposed his person to her; she also said she had seen him in the early part of May 1914. Resp. when arrested said, "They have made a mistake; they have got the wrong man." In giving evidence on his own behalf resp. denied having been guilty of the offence, & in cross-examination he said, "I do not remember seeing her on first or second week in May, 1914"; he was then asked, also in cross-examination, "Do you deny exposing yourself to the same young lady in Small Heath Park in the first or second week in May last?" Resp. replied, "I do deny it." The justices ruled that this question should not have been put, on the ground that it was not relevant to the issue they had to determine & was contrary to the provisions of Criminal Evidence Act, 1898 (c. 36), s. 1. The solr. for the prosecution intimated that to rebut resp.'s denial he desired to recall T. to prove that resp. had been guilty of the same conduct to her at the same time & place on May 16, 1914; he also desired to call other witnesses to show that resp. had been guilty of a systematic course of conduct by indecently exposing himself with intent to insult females on other occasions at the same place & about the same hour. The justices refused to hear such evidence:—*Held*: (1) the question put to resp. in cross-examination, which the justices ruled should not have been put, & the evidence tendered of T. to show that resp. had been guilty of the same conduct to her at the same place in May, 1914, were admissible relevant for the purpose of showing that T. was not mistaken in her identification; (2) what was done

by resp. was done wilfully & not accidentally, & that it was done to insult her; (3) but the evidence tendered of other witnesses was not admissible, unless & until the defence of accident or mistake, or an absence of intention to insult, was definitely put forward; & (4) it appeared that the other occasions on which it was said that resp. indecently exposed himself were sufficiently proximate to the alleged offence to show a systematic course of conduct.—*PERKINS v. JEFFERY*, [1915] 2 K. B. 702; 84 L. J. K. B. 1554; 113 L. T. 456; 79 J. P. 425; 31 T. L. R. 444; 25 Cox, C. C. 59, D. C.

*Annotations*:—As to (1) *Refd.* R. v. Thompson, [1917] 2 K. B. 630. As to (3) *Consd.* R. v. Armstrong, [1922] 2 K. B. 555.

**3942. — After prima facie case established.]—**R. v. SMITH, No. 3992, *post*.

*(b) To show System or Design.*

**3943. General rule.]—**Upon an indictment for maliciously shooting, if it be questionable, whether the shooting was by accident or design, proof may be given that the person at another time intentionally shot at the same person.—R. v. VOKE (1823), Russ. & Ry. 531, C. C. R.

*Annotations*:—*Fold.* R. v. Dossett (1846), 2 Cox, C. C. 243. *Distd.* R. v. Oddy (1851), 2 Den. 264.

**3944. —.]—**R. v. FLANNAGAN & HIGGINS, No. 3938, *ante*.

**3945. —.]—**MAKIN v. A.-G. FOR NEW SOUTH WALES, No. 3924, *ante*.

**3946. —.]—**R. v. BOND, No. 3921, *ante*.

**3947. —.]—**R. v. FISHER, No. 3925, *ante*.

**3948. What is systematic course of conduct—**Not general fraudulent disposition.]—R. v. FISHER, No. 3925, *ante*.

**3949. — Proximity of offences.]—**PERKINS v. JEFFERY, No. 3941, *ante*.

*(c) To show Guilty Knowledge.*

**3950. General rule.]—**R. v. WYLIE, No. 3892, *ante*.

**PART XII. SECT. 4, SUB-SECT. 2.—**  
**B. (b).]**

**3943 i. General rule.]—**Evidence of the commission of similar acts is relevant to the offence charged where the essence of the offence consists not only of the overt act done but also of the intention or design with which the act was done. Such evidence is not admissible to show a propensity to commit offences of the kind charged.—R. v. HERBERT, [1916] V. L. R. 343.—**AUS.**

**3949 i. What is systematic course of conduct—Proximity of offences—Murder by abortion—Not discovery of three buried fetuses.]—**During trial, evidence was admitted, subject to objection, of the fact that three infants *fœtus* had been found buried at the back of accused's house:—*Held*: evidence should not have been admitted.—R. v. SMITH (1898), 1 W. A. L. R. 43.—**AUS.**

**3949 ii. —.]—**Upon the trial of a person charged with unlawfully using an instrument with intent to procure the miscarriage of a woman, another woman gave evidence that the prisoner had on the same day & at the same place made to her the same statement as to the fee, & performed upon her acts similar to those proved as to the offence charged:—*Held*: evidence was admissible to prove systematic pursuit of the same criminal object.—R. v. GRAHAM, [1915] V. L. R. 402.—**AUS.**

**3949 iii. —.]—**Where accused was charged with fraudulently transferring three properties to three different persons on a certain day in order to prevent their being seized

in execution of a decree, & the prosecution tendered evidence of five other fraudulent transfers of property effected by accused on the same day & apparently with the same object:—*Held*: this evidence was admissible to prove either that all those transfers were parts of one entire transaction or that the particular transfers which were specified in the charge were made with a fraudulent intent.—R. v. VAJIRAM (1892), 1 L. R. 16 Bom. 414.—**IND.**

**3949 iv. —.]—**On a trial for murder of A. by poison, evidence that the prisoner administered poison to B. is not, *per se*, admissible to prove the administration by the prisoner to A. It may be admissible generally where the poisonings are so linked together in a series of occurrences as to form part of one & the same transaction. It may also be admissible where both crimes are committed in pursuance of a common design.—R. v. HALL (1887), 5 N. Z. L. R. C. A. 93.—**N.Z.**

**d. — Not conduct subsequent to date of charge in indictment.]—**At the trial of A. & B., father & son, indicted for conspiracy to charge C. & D. with having posted threatening notices on Oct. 16, 1911, it was sought to give evidence for the prosecution against A. & B., that on Nov. 17, 1911, after the grand jury at quarter sessions had thrown out the bill charging C. & D. with having posted the threatening notices on said date, another threatening notice was produced to the police by B. in the presence of A. as having been found on A.'s lands wrapped up in part of a torn newspaper, which was found to fit in exactly with the rest of

the paper which was discovered by the police in a concealed position in A. & B.'s house:—*Held*: as the indictment set out only one specific date on which the offence charged against C. & D. was alleged to have been committed the proposed evidence against A. & B. was not admissible.—R. v. QUINTER (1913), 47 L. L. T. 264.—**IR.**

*Arson—Previous attempt twelve months before—Whether admissible.]—*In support of a charge of arson the Crown tendered evidence that about twelve months prior to the date of the alleged offence accused was found in an unoccupied house; that when discovered he appeared agitated, gave no satisfactory explanation of his presence, & left immediately; & that preparations for setting the house on fire were discovered on the premises being searched. The Crown also proposed to tender evidence that the accused had been noticed at other fires occurring some twelve to fifteen months previously:—*Held*: (1) the first evidence was inadmissible, being an isolated instance of suspicious conduct on the part of the accused some twelve months prior to the date of the alleged arson, not in any way connected with the fire in question in the case, & as such being too remote to show system or to negative the defence of accident; (2) that the latter evidence was also clearly inadmissible.—R. v. WILLOUGHBY (1913), 32 N. Z. L. R. 1295.—**N.Z.**

**PART XII. SECT. 4, SUB-SECT. 2.—**  
**B. (c).]**

**3950 i. General rule.]—**Evidence which tends to show that accused is

3951. —.]—*R. v. OLLIS*, No. 3930, *ante*.

3952. —.]—*R. v. BOND*, No. 3921; *ante*.

3953. *Letter written by accused.*—In a case of forging & uttering a forged bill, a letter written by prisoner to a third person, saying that that person's name is on another bill, & desiring him not to say that that bill is a forgery, is receivable in evidence, to show guilty knowledge; but the jury ought not to consider it as evidence that that other bill is forged, unless such bill is produced, & the forgery of it proved in the usual way.—*R. v. FORBES* (1835), 7 C. & P. 224.

*Annotations*:—*Refd.* *R. v. Francis* (1874), 22 W. R. 663. *Mentd.* *R. v. Parish* (1837), 8 C. & P. 94.

3954. *Conversations with accused.*—On indictments for uttering forged Polish notes:—*Held*: conversations with prisoners respecting the forgery & circulation of forged Austrian notes were admissible in evidence to prove the *scienter*.—*R. v. HARRIS* (1836), 7 C. & P. 429.

3955. —.]—Appl., who had been convicted under Official Secrets Act, 1911 (c. 28), ss. 1 (1), & 4, of attempting, for a purpose prejudicial to the safety or interests of the State, to obtain information calculated to be useful to an enemy, appealed against his conviction on the grounds, (1) that evidence of a conversation, which he had had after the date of the offence, had been wrongly admitted; (2) that the trial was prejudiced by a suggestion as to the contents of a document which was not put in evidence; & (3) that the judge had unfairly questioned prisoner & misunderstood his answers. The Ct. dismissed the appeal on all three grounds.—*R. v. OLSSON* (1915), 31 T. L. R. 559, C. C. A.

*Receiving stolen property.*—*See* Sub-sect. 2, B. (h) v., *post*.

*Coinage offences.*—*See* Sub-sect. 2, B. (h) x., *post*.

guilty of some offence not charged in the indictment is admissible where it shows a guilty knowledge & establishes the fraudulent nature of some of the acts with which he is charged.—*R. v. RORKE* (1915), App. D. 145.—*S. AF.*

f. *Previous conviction for same offence.*—Evidence that accused had been previously convicted of the same offence was admissible to show guilty knowledge or intention.—*R. v. ALLOMIYA HUSAN* (1904), 1 L. R. 28 Bom. 129.—*IND.*

g. *Previous issues of forged stamps.*—Prisoner, who was the stamp distributor of the Q. B. Div., was indicted for uttering three law forms with forged stamps impressed thereon. The forms which were the subject of the indictment were those ordinarily, used by the stamp distributor of the Exch. Div., & bore his particular mark. It sometimes happens that in the process of stamping a second sheet of paper is inadvertently placed under the sheet which is brought into contact with the die; this second sheet receives an impression but of a fainter character, & one which can be distinguished from the impression made on the outer sheet. These second sheets are called "blinds," & are never supposed to be issued by the Stamping Department, nor are they regarded as genuine dies. The principal defence was that when prisoner sent to purchase genuine stamps his messenger, either deceived by the guilty party or in collusion with him, brought back "blinds," which were then innocently sold by prisoner. To meet this defence counsel for the Crown proposed to give in evidence several documents from the files of the Q. B. Div., which were on forms bearing prisoner's particular mark, & the stamps on which were, in the opinion of the expert, forgeries of a similar character as those the subject of the indictment. Counsel

for the prisoner objected to these documents being given in evidence, as there was not sufficient evidence to connect the prisoner with them; but the judge received them in evidence, but reserved the question for the Ct. whether he was warranted in permitting the jury to regard these documents as having been uttered by the prisoner, & having been so uttered as evidence of guilty knowledge:—*Held*: there was sufficient evidence to connect the prisoner with the documents on the file of the Q. B. Div., & of these having been uttered by him; & they were rightly submitted to the jury as evidence of guilty knowledge.—*R. v. CONCLOUGH* (1882), 15 Cox, C. C. 92.—*IR.*

h. *Previous attempts by accused.—To sell glass as diamonds.*—Accused were convicted of the crime of theft by means of false pretences in selling pieces of glass as diamonds. Evidence was admitted of their having on a previous occasion endeavoured to sell glass as diamonds:—*Held*: such evidence was rightly admitted, though it tended to prove a fraudulent transaction other than the one with which the prisoners were charged, as it was relevant on the question of guilty knowledge.—*R. v. KELLER & PARKER* (1915), App. D. 98.—*S. AF.*

#### PART XII. SECT. 4, SUB-SECT. 2.—B. (d).

k. *Attempt to murder.—Administering similar poison.*—On *dates subsequent to date charged.*—Prisoner was indicted for administering poison to her husband with intent to murder him. At the trial evidence that prisoner's husband had at other times subsequent to the date of the offence charged suffered from the effects of similar poison was tendered. This evidence after objection was admitted. On a special case reserved as to its admissibility:—*Held*: although there

(d) *To show Intent.*

3956. *General rule.—Fraud.*—*R. v. HOLT*, No. 3929, *ante*.

3957. —.]—When it is material to prove an intent to defraud, evidence may be given of similar offences by deft.—*R. v. SIMMONDS* (1909), 2 Cr. App. Rep. 303, C. C. A.

3958. —.]—*R. v. WEST* (1916), 12 Cr. App. Rep. 145, C. C. A.

3959. —.]—*Incest.*—Defts., who were brother & sister, were indicted under the Punishment of Incest Act, 1908 (c. 45), for having had carnal knowledge of each other during stated periods in 1910. Evidence was given on behalf of the prosecution to the effect that, at the times specified in the indictment, defts. were seen together at night in the same house, which contained only one furnished bedroom, & that there was in the bedroom a double bed which bore signs of two persons having occupied it. The witnesses for the prosecution were not cross-examined. The prosecution then tendered evidence of previous acts of defts. with the view of showing what were the relations between them. The evidence was objected to, but was admitted. The evidence was to the effect that the male deft. in Nov. 1907, took a house to which he brought the female deft. as his wife; that they lived there as husband & wife for about sixteen months; that at the end of Mar. 1908, the female deft. gave birth to a child, & that she registered the birth, describing herself as the mother & the male deft. as the father. Defts. having been convicted, they appealed, & the C. C. A. quashed the conviction & directed a "judgment & verdict of acquittal to be entered," on the ground that the evidence objected to was not in the first instance admissible,

was no direct proof that the other poisons had been administered by prisoner, the evidence was properly admitted to prove the intent alleged in the indictment.—*R. v. DAVIS* (1872), 3 V. R. (Law) 95.—*AUS.*

l. —.]—*Loitering with loaded revolver.—& burglar's tools in his possession.*—*R. v. MOONEY* (1905), Q. B. 15 K. B. 57.—*CAN.*

m. *Wounding with intent to murder.—Previous attempt on another person same day.*—In a count framed charging prisoner with wounding K., with intent to murder, the felonious intention against K. must be proved; a felonious intention against a third person cannot be transferred.

Evidence that, two hours previously on the same day, prisoner had come to the same place, & had fired two shots at T., with a felonious intention:—*Held*: to be admissible as part of the *res gestæ*, & as explaining the circumstances connected with the commission of the offence.—*R. v. COOK* (1886), 12 V. L. R. 650.—*AUS.*

n. *Performing similar operation on same day.*—Upon the trial of a person charged with unlawfully using an instrument with intent to procure the miscarriage of a woman, another woman gave evidence that the prisoner had on the same day & at the same place made to her the same statement as to the fee & performed upon her acts similar to those proved as to the offence charged:—*Held*: the evidence was admissible to show the intention or design with which the act constituting the offence was done.—*R. v. GRAHAM*, [1915] V. L. R. 402.—*AUS.*

o. *Arson.—Murder committed by another.—Attempted concealment of body by accused.*—Prisoner being indicted for unlawfully & maliciously attempting to burn his own house by setting fire to a bed in it, it appeared in evidence that the dead body of a woman

**Sect. 4.—Relevant facts—Admissibility of evidence:**  
**Sub-sect. 2, B. (d), (e), (f), (g) & (h) i.]**

& that nothing had occurred in the conduct of the defence to render it admissible as evidence in rebuttal:—*Held*: the evidence objected to was admissible on the issue; for the object of that evidence was to establish that defts. had a guilty passion towards each other & to rebut the defence of innocent assocn. as brother & sister.—*R. v. BALL, R. v. BALL*, [1911] A. C. 47; 75 J. P. 180; *sub nom. PUBLIC PROSECUTIONS DIRECTOR v. BALL* (No. 2), 80 L. J. K. B. 691; 103 L. T. 738; 55 Sol. Jo. 139; 22 Cox, C. C. 366; 6 Cr. App. Rep. 31, II. L.

**Annotations:—***Consd. R. v. Bloodworth* (1913), 9 Cr. App. Rep. 80. *Refd. R. v. Stone* (1910), 6 Cr. App. Rep. 89; *R. v. Rodley*, [1913] 3 K. B. 468; *R. v. Thompson* (1913), 9 Cr. App. Rep. 252; *R. v. Shellaker*, [1914] 1 K. B. 414; *R. v. Thompson*, [1917] 2 K. B. 630. *Mentd. R. v. Curtis* (1913), 9 Cr. App. Rep. 9; *R. v. Cooper* (1914), 10 Cr. App. Rep. 195.

**(e) To rebut Defence of Accident or Mistake.**

**3960. General rule.]—***R. v. VOKE*, No. 3943, *ante*.

**3961. —.]—***R. v. GEERING*, No. 3937, *ante*.

**3962. —.]—***R. v. FLANNAGAN & HIGGINS*, No. 3938, *ante*.

**3963. —.]—***MAKIN v. A.-G. FOR NEW SOUTH WALES*, No. 3924, *ante*.

**3964. —.]—***R. v. BOND*, No. 3921, *ante*.

**3965. —.]—***R. v. FISHER*, No. 3925, *ante*.

was in the bed at the time; that her death had been caused by violence; that she had been recently delivered of a child, whose body had been found in the kitchen; & that she had lived in the house since it had been rented by the prisoner, who frequently went there at night. It was also shown that the prisoner had been indicted for the murder of this woman & acquitted, & the record of his acquittal was put in. This evidence was objected to as tending to prejudice prisoner's case:—*Held*: admissible, for the house being prisoner's, it was necessary to show that his attempt to set fire to it was unlawful & malicious, & these facts might satisfy the jury that the murder being committed by another, the prisoner's act was intended to conceal *v. GREENWOOD* (1864), 23 R. 250.—**CAN.**

**p. Fraud—Previous fraudulent removal of goods.]—**Accused were convicted by the jury at the trial on a count for concealing certain household goods for the purpose of defrauding the insurance co. by which they had been insured by representing that they had been destroyed by fire & collecting the insurance money upon them, also on a count which alleged a removal of said goods on or about Sept. 11, 1900, for a like fraudulent purpose. Evidence was given at the trial showing the removal of some of the goods in question on Aug. 13, 1900, & of others on Sept. 11, & in his charge to the jury, the trial judge did not distinguish between the goods removed on Aug. 13 & those removed on Sept. 11, but left the case to them in such a way that they could convict on both counts or on either of them as to both sets of goods:—*Held*: the evidence of the removal in Aug. was admissible for the purpose of showing a criminal intent in the Sept. removal.—*R. v. HURST* (1901), 13 Man. L. R. 584.—**CAN.**

**q. Previous issues of requisitions for potable liquor for balking purposes.]—**Deft., a practising physician, was convicted by a magistrate of an offence against the Ontario Temperance Act, 1916, as amended by the Ontario Temperance Amendment Act, 1917, by giving to M. a prescription for one pint of alcohol, in evasion & violation

of the Act, & for the purpose of enabling & assisting him to evade the Act & to obtain intoxicating liquor for use as a beverage:—*Held*: evidence tending to establish that deft. had issued a great number of requisitions for potable liquor for bathing purposes, was properly admitted by the magistrate. Where the question of motive is involved, such evidence is admissible.—*R. v. WELFORD* (1918), 42 O. L. R. 359; 14 O. W. N. 20.—**CAN.**

**r. Sedition—Previous statements by accused.]—**Evidence of previous statements of a similar character was properly admitted to prove intention.—*R. v. BARRON*, [1919] 1 W. W. R. 262; 44 D. L. R. 332.—**CAN.**

**s. Murder—Subsequent killing by accused of another person—Attempt to escape arrest.]—**On a trial for murder, evidence that the subsequent killing by accused, while trying to escape arrest, of another person, was murder, is admissible in evidence as evidence of conduct from which an inference as to a state of mind may be drawn of value in determining the guilt of the accused.—*R. v. CAMPBELL*, [1919] 1 W. W. R. 1076.—**CAN.**

**t. Theft of bonds from employer—Fraudulent scheme of obtaining money from employer.]—**Prisoner was convicted of the theft of certain bonds, his employer's property. Upon a trial before a jury it was proved that prisoner had taken the bonds & placed them in his sister's custody. The testimony of a witness who swore to a conversation with prisoner in which the latter had suggested a means of obtaining a large sum of money from his employer by a fraudulent scheme was admitted:—*Held*: that the evidence was admissible to show the intent.—*R. v. DOUGHTY* (1921), 64 D. L. R. 423; 38 Can. Crim. Cas. 83; 50 O. L. R. 360.—**CAN.**

**u. Obtaining by false pretences—Uttering worthless cheque—Similar acts by accused.]—**The external act of an accused person in obtaining property in exchange for a worthless cheque must be proved without reference to evidence of similar acts arising about the same time, but the external act having been proved, evidence of similar

**(f) To corroborate, explain, or rebut Evidence.**

**3966. By prosecution—To explain fact—Elicited on cross-examination.]—**Evidence of a distinct felony may be given in re-examination where it will serve to explain an apparently contradictory fact elicited by cross-examination. A statement of a prisoner is admissible in evidence, although he was previously told that whatever he said would be used against him.—*R. v. CHAMBERS* (1848), 3 Cox, C. C. 92.

**3967. — To rebut—Alibi set up by accused.]—***R. v. BRIGGS*, No. 3919, *ante*.

**3968. — Defence of innocent association—Charge of incest.]—***R. v. BALL, R. v. BALL*, No. 3959, *ante*.

**3969. — Charge of sodomy.]—***R. v. BARRON*, No. 3940, *ante*.

**3970. — To corroborate—By cross-examination.]—***R. v. KENNAWAY*, No. 3922, *ante*.

**3971. — Witness in charge of abortion.]—**Applt. was indicted for unlawfully killing, & for feloniously using certain instruments to procure the miscarriage of, a certain woman. At the trial evidence was given for the prosecution by the husband of the woman that, having obtained applt.'s name & address from another woman, he went to her for his wife to go there in order that applt. might perform an operation on her which would procure a miscarriage, & that his wife subsequently went to applt.'s house & afterwards

acts, proximate in point of time & of the same specific kind as that in question, is then admissible, for the limited purpose, however, of showing accused's intent in performing the act on which the charge is founded.—*It. v. LEVINE*, [1922] 3 W. W. R. 428; 1 D. L. R. 739; 38 Can. Crim. Cas. 182.—**CAN.**

**PART XII. SECT. 4, SUB-SECT. 2.—**  
**B. (e).**

**b. Misappropriation o.**

post office, having failed to account for moneys received by him in the course of his duty as a servant of the Commonwealth, was charged with misappropriation of public moneys. At the trial evidence was admitted that a few months before the discovery of the deficiency prisoner had received moneys on behalf of the Savings Bank for which he failed to account. It was his duty to render an account of his dealings in connection with those latter moneys to the State:—*Held*: the evidence was properly admitted, the earlier transaction being sufficiently similar to & connected with the defalcations in respect of which prisoner was charged to render evidence of them relevant to the defence of mistake or accident that might have been set up.—*HARDGRAVE v. R.* (1906), 4 C. L. R. 232.—**AUS.**

**c. Manslaughter of child—Previous harsh treatment.]—**A mother was indicted for the manslaughter of her child:—*Held*: evidence of previous harsh treatment of the child was admissible to show that the killing was not accidental.—*It. v. MARTIN* (1841), Arm. M. & O. 110.—**IR.**

**PART XII. SECT. 4, SUB-SECT. 2.—**  
**B. (f).**

**d. By prosecution—To explain meaning of publications.]—**Indictment under the 11 & 12 Vict. c. 12:—*Held*: (1) publications were overt acts, & the word "publication," as laid in the indictment, might be taken to mean a compassing in one day, & the expression of it on subsequent days; (2) the parting with the control of printings or writings, so that they might be read,



had a miscarriage & died of septic abortion. The evidence of the other woman was tendered by the prosecution to show that applt. had performed a similar operation on her some months previously. The evidence was objected to on the ground that the defence was a denial of the husband's evidence & that applt. had never seen the deceased woman. The evidence was admitted, & applt. was convicted:—*Held*: the evidence was rightly admitted, as it tended to corroborate the husband's evidence & was, therefore, relevant to an issue before the jury.—*R. v. LOVEGROVE*, [1920] 3 K. B. 643; 90 L. J. K. B. 285; 124 L. T. 288; 85 J. P. 75; 26 Cox, C. C. 683; 15 Cr. App. Rep. 50, C. C. A.

**3972. By defence—To rebut—Charge of negligence.**—*R. v. WILLIAMSON* (1807), 3 C. & P. 635.

*Annotations*:—*Mentd.* *R. v. Long* (1830), 4 C. & P. 398; *R. v. Webb* (1834), 2 Lew. C. C. 196; *R. v. Whitehead* (1848), 3 Car. & Kir. 202; *R. v. Elliott* (1889), 16 Cox, C. C. 710; *R. v. Burdee* (1916), 86 L. J. K. B. 871.

**3973. — Charge of false pretences.**—Prisoner was charged with having obtained goods by false pretences. The false pretence alleged in the indictment was that he had pretended that he was carrying on a genuine & *bona fide* business as a manufacturers' agent & merchant:—*Held*: receipts sworn to by prisoner as having been given to him as acknowledgments of payments for goods purchased by him other than those the subject of the charge, & entries in his bank pass-books showing payments made by him for goods supplied to him, were admissible as evidence on his behalf that he was in fact carrying on a genuine & *bona fide* business.—*R. v. SAGAR*, [1914] 3 K. B. 1112; 84 L. J. K. B. 303; 112 L. T. 135; 79 J. P. 32; 24 Cox, C. C. 500; 10 Cr. App. Rep. 279, C. C. A.

(g) *To identify Accused or Exhibit.*

**3974. To identify accused—Arson.**—Upon an indictment for arson, with intent to injure the person in occupation of the premises, prisoner may be found guilty, although his intent is proved to have been to obtain a reward for giving the earliest information of a fire at the engine station. Upon such an indictment it is not competent for

was a publication; (3) speeches delivered prior to the commission of the offence charged, might be given in evidence for the purpose of explaining the meaning of the publications alleged to be felonious.—*R. v. DUFFY* (1849), 1 Ir. Jur. 188.—*IR.*

*e.* — *To rebut.*—Upon a prosecution for being in the street for the purposes of betting evidence was admitted of the accused having a fortnight previously made a bet in the same street, & of a conversation on that occasion as to being able to find him there between 7 & 8 in the evening:—*Held*: the evidence was properly received to show the purpose for which the accused was in the street & as negating the suggestion that he was there for another purpose.—*O'DONNELL v. BOLAND* (1904), 29 V. L. R. 655.—*AUS.*

#### PART XII. SECT. 4, SUB-SECT. 2.—*B. (g).*

**1. To identify exhibit—Article found on accused—Similar to article alleged to be stolen—Larceny.**—On a charge of larceny, similarity of goods found in possession of accused with goods alleged to have been stolen, may be evidence both of the identity of the goods.—*R. v. ROCHE* (1887), 13 V. L. R. 150.—*AUS.*

#### PART XII. SECT. 4, SUB-SECT. 2.—*B. (h) i.*

**g. Act affecting person murdered—Previous abortion procured by accused**

prosecutors to show that other fires, of which notice was given by prisoner, were of a similar nature to the one in question, & different from those of which notice was given by other parties.—*R. v. REGAN* (1850), 14 J. P. 467; 4 Cox, C. C. 335.

**3975. —**—*On a charge of arson, the case turning on identity, evidence was rejected that, a few days previous to the fire in question, another building of the prosecutor's was found on fire, & prisoner was seen standing by, with a demeanour which showed indifference or gratification.*—*R. v. HARRIS* (1864), 4 F. & F. 342, N. P.

**3976. — False pretences.**—*Qu.*: whether on the trial of an indictment for obtaining by false pretences evidence of exactly similar conduct by deft. at a date subsequent to that charged is admissible as evidence of identity.—*R. v. BURLISON* (1914), 11 Cr. App. Rep. 39.

**3977. — Indecent behaviour.**—*PERKINS v. JEFFERY*, No. 3941, *ante*.

**3978. To identify instrument used—Stabbing.**—A. was indicted for stabbing B., there being another indictment against him for stabbing C.:—*Held*: on the trial of the indictment for stabbing B., both C. & the surgeon might be asked as to what kind of wound C. received with a view to identifying the instrument used.—*R. v. FURSEY* (1833), 6 C. & P. 81; 3 State Tr. N. S. 543.

(h) *Particular Offences.*

i. *Murder.*

**3979. Act affecting person murdered—Poisoning.**—On a charge of murder by arsenic poison administered in tea in Nov., evidence that deceased in the previous Oct. suffered from arsenic poisoning after drinking tea with prisoner is admissible.—*R. v. DONNALL* (1817), 2 Car. & Kir. 308, n.

**3980. —**—*R. v. TAWELL* (1845), 2 Car. & Kir. 309, n.

**3981. — & other means of killing.**—On a trial for murder by violence, evidence that deft. had conspired to murder deceased by other means is admissible.—*R. v. THOMPSON* (1922), 17 Cr. App. Rep. 71, C. C. A.

**3982. Act affecting person other than person**

*on deceased.*—On a trial of a prisoner for manslaughter, death being caused by the use of instruments for the purpose of procuring abortion, evidence that on a former occasion prisoner had procured abortion on the deceased is admissible.—*R. v. WALLACE* (FORMERLY CLEAVE) (1898), 19 N. S. W. L. R. 155; 14 N. S. W. N. 167.—*AUS.*

*h. — Acts of violence.*—Prisoner was convicted of manslaughter in killing his wife, who died Nov. 10, 1881. The immediate cause of death was acute inflammation of the liver, which might be occasioned by a blow or a fall against a hard substance. On Oct. 17 preceding her death, prisoner had knocked his wife down with a bottle; she fell against a door, & remained on the floor insensible for some time. Evidence was given of frequent acts of violence by prisoner upon his wife within a year of her death, by knocking her down & kicking her in the side:—*Held*: the evidence was properly received.—*THEAL v. R.* (1882), 7 S. C. R. 397.—*CAN.*

*k. Act affecting person other than person murdered—Committal of felonies—Where proof of motive.*—On a trial of a prisoner for murder evidence is admissible of other felonies committed by him where they prove a motive for the commission of the crime or form part of *res gestæ*.—*R. v. GRIFFIN* (1868), 1 Q. S. C. R. 176.—*AUS.*

*l. — Shooting.*—Prisoner quarrelled with L. in the street; L.

knocked prisoner down. Prisoner drew a revolver & fired, killing L. A constable who saw the shooting followed the prisoner & called on him to surrender. Prisoner turned & fired a shot at the constable, hitting him in the face. At the trial prisoner said that other men besides L. were attacking him, that he had been knocked down & brutally kicked, that he drew & pointed the revolver at L. to frighten him, but that in his nervous & exhausted state he pulled the trigger without any intention to kill:—*Held*: evidence that prisoner shot at the arresting constable although such shooting constituted another & distinct offence than that charged was admissible & that judge rightly directed the jury that it might help to show what was the state of the prisoner's mind when he shot L.—*R. v. O'BRIEN* (1920), 20 S. R. N. S. W. 486; 37 N. S. W. N. 154.—*AUS.*

*m. — Life insurance.*—On a trial for murder, the alleged motive being the obtaining of insurance moneys on policies effected by prisoner on the life of deceased, evidence of a previous attempt by prisoner to insure another person for his own benefit cannot be given in evidence against him.—*R. v. HENDERSHOTT* (1895), 26 O. R. 678.—*CAN.*

**3982 i. — Poisoning.**—Upon the trial of prisoner for the murder of her husband, who was living with & attended by her in his last illness, it was proved that his death was due to



*Sect. 4.—Relevant facts—Admissibility of evidence :  
Sub-sect. 2, B. (h) i. & ii.]*

**murdered—Poisoning.]—***R. v. GEERING*, No. 3937, *ante*.

**3983.** ———.]—On an indictment against prisoner for murdering J. evidence is not admissible that three others in the same family died of similar poison, & that prisoner was present at all the deaths, & administered "something" to two of these patients.—*R. v. WINSLOW* (1860), 8 Cox, C. C. 397, N. P.

*Annotations :—Distd. R. v. Flannagan & Higgins* (1884), 15 Cox, C. C. 403. *Consd. Makin v. A.-G. for New South Wales*, [1894] A. C. 57. *N.F. It. v. Armstrong* (1922), 127 L. T. 221. *Refd. It. v. Bond*, [1906] 2 K. B. 389.

**3984.** ———.]—Upon the trial of a husband & wife for the murder of the mother of the former by the administration of arsenic to her, for the purpose of rebutting the inference that the arsenic had been taken by accident, evidence was admitted that the male prisoner's first wife had been poisoned with arsenic nine months previously; that the woman who waited upon her, & occasionally tasted her food, showed symptoms of having taken poison; that that food was always prepared by the female prisoner; & that the two prisoners, the only other persons in the house, were not affected with any symptoms of poison.—*It. v. GARNER* (1864), 3 F. & F. 681; 4 F. & F. 346, N. P.

*Annotations :—Folld. R. v. Harris* (1864), 4 F. & F. 342. *Refd. R. v. Rearden* (1864), 4 F. & F. 76; *R. v. Francis* (1874), L. R. 2 C. C. R. 128; *Blake v. Albion Life Assoc. Soc.* (1878), 48 L. J. Q. B. 169; *R. v. Armstrong*, [1922] 2 K. B. 555.

**3985.** ———.]—Where a prisoner was charged with the murder of her child by poison, & the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers & a lodger in her house had died previous to the present charge from the same poison was held to be admissible.—*R. v. COTTON* (1873), 12 Cox, C. C. 400.

*Annotations :—Apld. R. v. Roden* (1874), 12 Cox, C. C. 630. *Refd. R. v. Bond*, [1906] 2 K. B. 389.

**3986.** ———.]—*R. v. HEESON*, No. 3882, *ante*.

**3987.** ———.]—*R. v. FLANNAGAN & HIGGINS*, No. 3938, *ante*.

**3988.** ———.]—Applt. was indicted for the murder of his wife by administering arsenic to her. The defence set up was that deceased had died by arsenical poisoning, but that applt. had nothing to do with her death; but that deceased had herself taken arsenic by accident or had committed suicide by taking arsenic; applt. explaining his possession of arsenic by saying that he bought it to destroy weeds in the garden. At the trial

arsenical poisoning. In order to show that the poisoning was designed & not accidental, the Crown offered evidence to prove that a former husband of prisoner had been taken suddenly ill after eating food prepared by her, & that the circumstances & symptoms attending his illness & death were similar to those attending the illness & death of the second husband, & that such symptoms were those of arsenical poisoning.—*Held*: the evidence was admissible.—*R. v. STERNAMAN* (1897), 29 O. R. 33.—**CAN.**

**3982 ii.** ———.]—Where on the trial for murder of A. by antimonial poisoning evidence that the prisoner, six months subsequently to the alleged murder of A. administered antimony to B. was tendered & admitted, & the judge directed the jury that they might make any use of such evidence, & draw any inference they thought fit from it:—*Held*: as there was not sufficient

proof that the two poisonings formed part of the same transaction, or were effected in pursuance of a common design, the conviction must be quashed.—*It. v. HALL* (1887), 5 N. Z. L. R. C. A. 93.—**N.Z.**

**n. — Murderous assault.]**—Upon the trial of prisoner for the murder of R., the testimony of D. as to a murderous assault alleged by him to have been made upon him by prisoner near to the building where prisoner falsely said that R. was, & within a few yards of the spot where R.'s body was afterwards found, & within about an hour after prisoner had, under false pretences, induced R. to leave D. & go alone with him to that locality:—*Held*: such evidence was properly admitted in evidence.—*R. v. GIBSON* (1913), 28 O. L. R. 525; 4 O. W. N. 1167.—**CAN.**

**o. — Murder & theft.]**—Where P. introduced himself as a raja's or

evidence was admitted which tended to show that applt., some eight months after the death of his wife, attempted to poison another person by administering arsenic in a buttered scone at tea. At the time applt. was arrested arsenic was found on him, & there was evidence of the purchase of arsenic by applt. shortly before the occasions when the prosecution alleged that he administered the arsenic to his wife. There was also evidence that, on the occasions in question, applt. was the only person who had the opportunity of administering arsenic to his wife:—*Held*: the evidence in question was properly admitted; it being an essential part of the case for the prosecution to prove that arsenic was designedly administered by applt. to his wife, any evidence tending to prove design must tend to rebut the suggestion of accident or suicide: the evidence was also admissible to rebut the suggestion that applt. kept the arsenic for an innocent purpose, namely, to destroy weeds.—*R. v. ARMSTRONG*, [1922] 2 K. B. 555; 91 L. J. K. B. 904; 127 L. T. 221; 86 J. P. 209; 38 T. L. R. 631; 66 Sol. Jo. 540; 27 Cox, C. C. 232; 16 Cr. App. Rep. 149, C. C. A.

**3989. — Suffocation of infants.]**—Upon the trial of a prisoner for the murder of her infant by suffocation in bed:—*Held*: evidence tendered to prove the previous death of her other children at early ages was admissible, although such evidence did not show the causes from which such children died.—*R. v. RODEN* (1874), 12 Cox, C. C. 630.

*Annotation :—Refd. R. v. Bond*, [1906] 2 K. B. 389.

**3990. — Bodies of infants buried in premises occupied by accused.]**—*MAKIN v. A.-G. FOR NEW SOUTH WALES*, No. 3924, *ante*.

**3991. — Stabbing.]**—*R. v. CRICKMER*, No. 3920, *ante*.

**3992. — Dead bodies found in bath.]**—Evidence of a confidential communication between a prisoner & his solr. is admissible if the consultation with the solr., in the course of which such communication was made, was sought by prisoner for the purpose of ascertaining how to commit the offence charged against him, or whether it was necessary or expedient to commit it in order to obtain a desired end.

Applt. was convicted of the murder of B., a woman with whom he had contracted a bigamous marriage. She was found dead in her bath at a time when applt. was in the house, & it was proved that he benefited pecuniarily by her death. Evidence was admitted at the trial that two other women with whom he had subsequently contracted bigamous marriages had also been found dead in their baths in very similar circumstances & that

zamindar's son to a prostitute who passed into his keeping & he then introduced G. as his *darwan*, & both afterwards visited her till the night of Dec. 9, 1914, when she was found next morning to have been murdered & robbed, & accused were tried on charges of murder, conspiracy to rob, theft & abetment of each other in the commission of the theft & murder:—*Held*: evidence that P. had similarly introduced himself as a wealthy Babu, successively in 1915 & 1918 to three other prostitutes who each became his mistress, that he introduced G. as his *darwan*, that both visited the women & suddenly disappeared, & that their disappearance was followed by the women in each case losing their money or ornaments was not admissible.—*It. v. PANCHU DAS* (1920), I. L. R. 47 Calc. 671.—**IND.**

**p. — Statements made by accused.]**—Where an accused was

in each of these cases also applt. benefited pecuniarily by the woman's death:—*Held*: as there was *prima facie* evidence, apart from that of the deaths of the other women, that applt. committed the act with which he was charged, the evidence in question was admissible to show that the act charged had been committed, that is, had been designed.

*Qu.*: whether the evidence in question would have been admissible in the absence of *prima facie* evidence.—*R. v. SMITH* (1915), 84 L. J. K. B. 2153; 114 L. T. 239; 80 J. P. 31; 31 T. L. R. 617; 59 Sol. Jo. 704; 25 Cox, C. C. 271; 11 Cr. App. Rep. 229, C. C. A.

## ii. Abortion.

**3993. Procured by drugs—Administration of drugs at other times to same woman.**—The intent with which poison is administered for the purpose of procuring abortion may be shown by evidence of similar medicines administered subsequently to the felony charged.—*R. v. CALDER* (1844), 2 L. T. O. S. 518; 1 Cox, C. C. 348.

**3994.** ———.—*R. v. PERRY* (1847), 8 L. T. O. S. 539; 2 Cox, C. C. 223.

*Annotation*:—*Reid. R. v. Cramp* (1880), 5 Q. B. D. 307.

**3995.** ———.—On the trial of an indictment under Offences against the Person Act, 1861 (c. 100), s. 58, for administering "a noxious thing to the jurors unknown," evidence of the nature of a noxious thing administered to the same individual after the date charged in the indictment, but containing a common ingredient with that charged, is admissible to prove the nature of that administered on the earlier date.

Where there had been a series of attempts to procure abortion, evidence of these is admissible to prove that a drug administered on a certain occasion was administered with that intent.—*R. v. PALM* (1910), 4 Cr. App. Rep. 253, C. C. A.

*Annotation*:—*Reid. R. v. Starkie*, [1922] 2 K. B. 275.

**3996.** ———.—**Use of instruments on other women.**—Applt., a medical man, was charged upon an indictment containing separate counts—(a) for having used instruments with intent to procure the miscarriage of three women, & (b) for having administered & supplied poison or other noxious thing to a fourth woman with the like intent. All four charges were tried together, & upon counts (a) applt. was acquitted, but upon counts (b) he was convicted:—*Held*: the evidence against applt. upon counts (a) was admissible upon the trial of counts (b), & *vice versa*, not to prove the use

of the instrument or the administration of the drug, but to rebut the defence of innocent intention; & that the judge at the trial was right in allowing all the counts to be tried together.—*R. v. STARKIE*, [1922] 2 K. B. 275; 91 L. J. K. B. 663; 86 J. P. 74; 38 T. L. R. 181; 66 Sol. Jo. 300; 16 Cr. App. Rep. 61, C. C. A.

**3997. Procured by instruments—Evidence of use of instruments at other times on same woman.**—At the trial of applt. upon a charge of having used an instrument upon a woman in order to procure miscarriage, his defence was that he had done nothing to her, but that she had performed such an operation upon herself. His counsel, in cross-examination, sought to ask questions of a witness for the prosecution as to statements made by the woman, who was dead, some time before her miscarriage that she intended to operate upon herself, & shortly after her miscarriage that she had operated upon herself; but the learned judge refused to permit these questions:—*Held*: these statements, being mere hearsay, were not admissible in evidence for the defence.

After objection taken applt. was asked questions in cross-examination to show that he had performed an illegal operation on deceased in Sept. 1911:—*Held*: these questions in cross-examination were admissible.—*R. v. THOMSON*, [1912] 3 K. B. 19; 81 L. J. K. B. 892; 107 L. T. 464; 76 J. P. 431; 28 T. L. R. 478; 23 Cox, C. C. 187; 7 Cr. App. Rep. 276, C. C. A.

**3998.** ———.—**Use of instruments on other women.**—Upon the trial of an indictment under Offences against the Person Act, 1861 (c. 100), s. 58, for "feloniously & unlawfully using a certain instrument, to wit, a quill, with intent to procure a miscarriage," it is relevant, in order to prove the intent, to show that at other times, both before & after the offence charged, prisoner had caused miscarriages by similar means.—*R. v. DALE* (1889), 16 Cox, C. C. 703.

*Annotation*:—*Consd. R. v. Bond*, [1906] 2 K. B. 389.

**3999.** ———.—*R. v. BOND*, No. 3921, *ante*.

**4000.** ———.—*R. v. LOVEGROVE*, No. 3971, *ante*.

**4001.** ———.—**Administration of drugs at other times to same woman.**—Deft. was indicted for using a certain instrument with intent to procure miscarriage:—*Held*: the fact of his having administered *savine* & *ergot* of rye, with the same intent, was admissible in evidence.—*R. v. WARD* (1840), 4 J. P. 587.

charged with the murder of an Indian storekeeper, & evidence had been given of the fact that such a crime had been committed & of the connection of the accused therewith:—*Held*: evidence of statements made by the accused at various dates prior to the alleged murder to the effect that he intended to rob & kill Indian storekeepers in general, or the deceased man in particular, in the manner in which it was alleged by the Crown that the latter had actually been robbed & murdered, was admissible against accused.—*R. v. MPANZA* (1915), App. D. 348.—*S. AF.*

## PART XII. SECT. 4, SUB-SECT. 2.— B. (h) ii.

**q. Procured by instruments.**—Upon an indictment of defts. P. & T., for procuring an abortion, the case for the Crown was that defts. had performed an unlawful operation upon a certain woman, for the purpose of procuring a miscarriage. Of this there was evidence to go to the jury. The defence was then entered upon, & the deft., P., swore that the operation

was performed for a lawful purpose, & without any criminal intent. He was cross-examined as to whether he had not, some few weeks previously, performed an operation upon a person then in ct. He denied having done so, & all knowledge of having treated her at all. This person & the man whom she had subsequently married were, against objection, called in reply, & gave evidence that P. had been employed to operate & had operated upon her so as to procure a miscarriage. It was contended that this evidence was admissible, as tending to rebut the evidence of P., or, in other words, to prove the unlawful intent:—*Held*: the testimony was inadmissible.—*R. v. POLLARD & TINSLEY* (1909), 19 O. L. R. 96; 14 O. W. R. 399; 15 Can. Crim. Cas. 74.—*CAN.*

**r.** ———.—**Whether letters found on accused's premises admissible—To show accused an abortionist.**—On a trial for murder where death was alleged to have been caused by an illegal operation performed by prisoner, counsel for prisoner objected to the production

in evidence of two letters found in prisoner's shop, & to other evidence, all of which tended to show that prisoner's house was known as a place where abortion might be procured. The anticipated defence as shown by prisoner's depositions was that prisoner did no nursing, & that deceased had come into prisoner's house without her knowledge or sanction & as an intruder, & it was suggested the operation must have been performed on deceased prior to her arrival at the house. The judge presiding at the trial admitted the evidence as anticipating & negating the defence that deceased had come into the house as an intruder:—*Held*: the letters were properly admitted.—*R. v. O'SHAUGHNESSY, R. v. HASSELL & CAMPBELL* (1912), 31 N. Z. L. R. 928.—*N. Z.*

**s. Undertaking to procure abortion on another woman.**—In a trial on a charge of procuring abortion:—*Held*: competent to lead proof to show that some months before the act charged the accused had undertaken to procure abortion in the case of another woman.

*Sect. 4.—Relevant facts—Admissibility of evidence: Sub-sect. 2, B. (h) ii., iii., iv. & v.]*

**4002. — Administration of drugs to other women.**—*R. v. STARKIE*, No. 3996, *ante*.

iii. *Rape, Incest and Carnal Knowledge.*

**4003. Rape—Other rapes on same person.**—On an indictment for rape evidence may be given of several rapes on the same woman at the same time.—*R. v. FOLKES & LUDDS* (1832), 1 Mood. C. C. 354, C. C. R.

*Annotation:—Refd. R. v. MITCHEL* (1848), 3 Cox, C. C. 1.

**4004. —**—*R. v. REARDEN*, No. 3914, *ante*.

**4005. Assault with intent to commit rape—Previous attempts.**—On an indictment for an assault with intent to commit a rape, evidence that prisoner on a prior occasion had taken liberties with the prosecutrix, is not receivable to show prisoner's intent.—*R. v. LLOYD* (1836), 7 C. & P. 318.

**4006. — Other similar assault.**—On an indictment charging a misdemeanour for an assault in attempting to commit a rape on B., with a count for an assault of the same nature on a different day on D., it is competent to the prosecutor, not only in law, but by ordinary practice, to give evidence of both assaults.—*R. v. DAVIES* (1851), 5 Cox, C. C. 328.

**4007. Offences against Criminal Law Amendment Act, 1885 (c. 69)—Limit of time.**—When the prosecution is bound by statute to be commenced within three months of the offence charged evidence of similar prior offences by prisoner is not admissible either in chief or to rebut prisoner's denial of those prior offences on cross-examination.—*R. v. BEIGHTON* (1897), 18 Cox, C. C. 535.

*Annotation:—Dtd. R. v. SHELLAKER*, [1914] 1 K. B. 414.

**4008. —**—On an indictment for carnal knowledge on a given date, the jury must be distinctly directed to disregard any evidence of a similar offence on another previous date which may have been given.

*Qu.:* whether such evidence may be given in respect of an occasion not within the statutory period of six months prescribed in the second proviso of Criminal Law Amendment Act, 1885 (c. 69), s. 5 as amended by Prevention of Cruelty to Children Act, 1904 (c. 15), s. 27.—*R. v. PROBERTS* (1912), 8 Cr. App. Rep. 113, C. C. A.

—*H.M. ADVOCATE v. RAE* (1888), 15 R. (Ct. of Sess.) 80.—**SCOT.**

## PART XII. SECT. 4, SUB-SECT. 2.— B. (h) iii.

**t. Rape—Previous familiar acts.**—On the trial of a prisoner charged with rape, evidence may be given to show previous acts of familiarity between the prosecutrix & accused.—*R. v. FITZGIBBON* (1885), 11 V. L. R. 232.—**AUS.**

**a. — Other rapes on other women.**—On an indictment for rape upon one woman, evidence by the Crown of a rape committed upon another woman, some few minutes after the rape charged in the indictment was committed, when the two women & accused were working in the field together, & the second woman had made an attempt to assist & defend the first, is not admissible, either as part of the *res gestæ* or otherwise; nor is evidence of an assault upon the second woman many months before, admissible.—*R. v. PAUL* (1912), 21 W. L. R. 699; 2 W. W. R. 616; 5 D. L. R. 347.—**CAN.**

**b. Carnally knowing girl under sixteen—Similar acts by accused—Prior**

*to date charged.*—On a charge of carnally knowing a girl under 16 years of age, evidence of a continuous series of similar acts with the same girl during the 6 months prior to the date on which the act charged was committed & continuing up to the date charged:—*Held:* to have been rightly admitted.—*R. v. GELLIN* (1913), 13 S. R. N. S. W. 27.—**AUS.**

**c. Carnal knowledge of girl under fourteen—Indecent assault—Similar acts.**—*R. v. PARKIN*, [1922] 1 W. W. R. 732; 66 D. L. R. 175; 37 Can. Crim. Cas. 35; 31 Man. L. R. 438.—**CAN.**

**d. Carnal knowledge of girl under sixteen—Subsequent acts with same girl.**—Accused was charged with carnally knowing a girl in his employ who at the date of the offence charged was 15 years & 10 months old. At the trial the admission of evidence as to his conduct with the girl subsequently to the date of the offence charged was objected to. The prisoner was convicted, & a case was stated for the opinion of the Ct. of Appeal:—*Held:* the evidence was admissible.—*R. v. LANGDON*, [1920] N. Z. L. R. 495.—**N.Z.**

**4011 i. Incest.**—Prisoner was pre-

**4009. —**—*R. v. SHELLAKER*, [1914] 1 K. B. 414; 83 L. J. K. B. 413; 110 L. T. 351; 78 J. P. 159; 30 T. L. R. 194; 21 Cox, C. C. 86; 9 Cr. App. Rep. 240, C. C. A.

*Annotations:—Refd. R. v. ROGERS* (1914), 111 L. T. 1115; *R. v. LOVEGROVE*, [1920] 3 K. B. 643.

**4010. —**—On the trial of prisoner charged with having had carnal knowledge of a girl aged fourteen, the prosecutrix stated in her examination-in-chief that on the day after the connection had taken place prisoner told her that he had previously done the same thing to another girl, who was alleged by the prosecution to have been under sixteen at the time. Prisoner gave evidence, & he was asked in cross-examination, & the questions were allowed by the judge, whether he had made the statement attributed to him by the prosecutrix & whether it was true. Prisoner was convicted:—*Held:* prisoner was bound to answer the questions, because, although they tended to show that he had committed another offence or was of bad character, the questions were admissible to show that he was guilty of the offence wherewith he was then charged.—*R. v. CHITSON*, [1909] 2 K. B. 945; 79 L. J. K. B. 10; 102 L. T. 224; 73 J. P. 491; 25 T. L. R. 818; 53 Sol. Jo. 746; 22 Cox, C. C. 286; 2 Cr. App. Rep. 325, C. C. A.

*Annotations:—Refd. R. v. ELLIS* (1910), 5 Cr. App. Rep. 41; *R. v. BALL*, *R. v. BALL*, [1911] A. C. 47; *R. v. KURASCH*, [1915] 2 K. B. 749.

*See, now, Criminal Law Amendment Act, 1922 (c. 56).*

**4011. Incest.**—On indictments under Punishment of Incest Act, 1908 (c. 45), evidence of similar offences to that charged is admissible.—*R. v. ALLEN* (1910), 4 Cr. App. Rep. 181, C. C. A.

**4012. —**—In an indictment under Punishment of Incest Act, 1908 (c. 45), if there is evidence to go to the jury, that the female was a consenting party, they must be clearly cautioned that, if they come to that conclusion, her evidence must be corroborated, as she then becomes an accomplice.

sented & found guilty on a charge of incest with his daughter. Prisoner made a written statement that on a previous occasion some months before he had committed a grossly indecent act on the person of his daughter & had attempted to do so on another occasion. Prisoner's counsel raised as a defence that in all the circumstances of the case it was impossible & incredible for a man to commit the offence with which prisoner was charged:—*Held:* to meet this defence the statement of his former conduct was properly admissible in evidence against prisoner at the trial.—*R. v. BECHAZ* (1899), 24 V. L. R. 639.—**AUS.**

**4011 ii. —**—Prisoner was charged, in three counts of one indictment, with having committed incest with his daughter on three separate occasions. In such case, where the proof of the offence on one occasion is inferential only, evidence of misconduct of accused with the same person on other occasions, & generally, evidence of a relationship between accused & that person, is admissible in support of the charge of misconduct on the particular occasion.—*R. v. HONE MAAKA MOKOMOKO* (1904), 23 N. Z. L. R. 829.—**N.Z.**

*Semble*: evidence of acts of incest subsequent to the date charged is admissible on the trial of such an indictment.—*R. v. STONE* (1910), 6 Cr. App. Rep. 89, C. C. A.

**4013.** —[—]*R. v. BALL, R. v. BALL*, No. 3959, *ante*.

**4014.** —[—]*The rule as to the corroboration of the evidence of accomplices applies to female witnesses who may be liable to prosecution under Punishment of Incest Act, 1908 (c. 45).*

Where such corroboration exists, the evidence of such a witness of other incestuous acts between the same parties, not charged in the indictment, is, on the authority of *R. v. Ball, R. v. Ball*, No. 3959, *ante*, admissible, but if such evidence is uncorroborated the jury should be warned against it.—*R. v. BLOODWORTH* (1913), 9 Cr. App. Rep. 80, C. C. A.

#### iv. Other Offences against the Person.

**4015. Indecent exposure.**—[—]*PERKINS v. JEFFERY*, No. 3941, *ante*.

**4016. Sodomy.**—[—]*R. v. COLE*, No. 3848, *ante*.

**4017.** —[—]*R. v. BARRON*, No. 3940, *ante*.

### PART XII. SECT. 4, SUB-SECT. 2.— B. (i) iv.

**e. Sodomy—Previous acts with same person.**—[—]Upon an indictment for sodomy evidence is not admissible of the commission by the same offence with the same person on other occasions prior to the date alleged in the indictment.—*R. v. ROBINSON* (1909), 9 S. R. N. S. W. 728; 6 N. S. W. W. N. 10.—**AUS.**

**f.** —[—]*R. v. IMAN DIN* (1910), 15 B. C. R. 476.—**CAN.**

**g.** —[—]*Previous act with other boy—Subsequent acts with boy charged.*—[—]Prisoner being charged with having carnal connection with a boy on a certain day, evidence that he had on previous occasions had connection with another boy, & that he had on certain days following the date of the alleged offence had connection with the boy in relation to whom the offence is charged is inadmissible.—*R. v. HERBERT*, [1918] V. L. R. 343.—**AUS.**

**4016 i.** —[—]*Prisoner indicted on 3 counts in one indictment; (1) indecently assaulting boy G. in Dec. 1914; (2) indecently assaulting boy R. in Feb. 1915; (3) indecently assaulting boy M. in Mar. 1915.*

Prisoner's relation to each boy was master & pupil. First two offences alleged to have taken place in prisoner's room at industrial school, of which prisoner was attendant & boys inmates, third in boys' dormitory at same school.

Before trial counsel for prisoner applied to have counts in indictment severed, & said defence was absolute denial of presence of the boys in prisoner's room except in two instances, as to which innocent explanation of medical treatment was offered, & absolute denial of alleged acts at boys' beds.

Judge refused to sever counts in indictment & admitted evidence of conduct of accused towards six boys. Prisoner was convicted on first count & acquitted on other two:—*Held*: evidence of 5 other boys was admissible, & conviction should be upheld.—*R. v. ROGAN*, [1915] 35 N. Z. L. R. 265.—**N.Z.**

**h. Assault on children—Previous assaults.**—[—]Husband & wife were charged with assaulting one of their minor children on certain specific occasions:—*Held*: evidence of other assaults by the accused on the child, of its continued ill-treatment prior to the alleged assaults, & of its general physical condition was admissible to show that the alleged assaults were in

excess of legal chastisement.—*R. v. JANKE* (1913), T. P. D. 382.—**S. AF.**

**k. Indecent assault on child—Indecent assault on previous day.**—[—]Prisoner was charged with indecently assaulting a child on May 22 & June 5. The child gave evidence describing her first meeting with prisoner about May 18 & his indecently assaulting her on that day. She then proceeded to describe the assaults upon the dates mentioned in the presentment:—*Held*: the evidence of what occurred at the first meeting was properly admitted although it disclosed an offence committed on a day not charged in the presentment, & was not necessary for the purpose of explaining any equivocal act on the days charged.—*R. v. WHITEHEAD* (1897), 23 V. L. R. 239.—**AUS.**

**l.** —[—]*Subsequent acts.*—[—]Upon the trial of prisoner, a school teacher, for an indecent assault upon one of his scholars, it appeared that he forbade prosecutrix telling her parents what had happened, & they did not hear of it for two months. After prosecutrix had given evidence of the assault, evidence was tendered of the conduct of prisoner towards her subsequent to the assault:—*Held*: the evidence was admissible, as tending to show the indecent quality of the assault, & as being in effect a part or continuation of the same transaction as that with which the prisoner was charged.—*R. v. CHUTE* (1882), 46 U. C. R. 555.—**CAN.**

**m. Manslaughter of child—Previous treatment of child by accused.**—[—]Where a mother was charged with manslaughter in causing the death of her child, & the question was whether what was done was done *bona fide* by way of correction, or whether mother had been actuated by malice or ill-will towards the child:—*Held*: evidence of the previous treatment of the child by the accused & the history of the relationship between them had been rightly admitted.—*R. v. DRAKE* (1902), 22 N. Z. L. R. 478.—**N.Z.**

### PART XII. SECT. 4, SUB-SECT. 2.— B. (h) v.

**n. Larceny—Articles found in possession of accused—Similar to articles alleged stolen.**—[—]On a charge of larceny, similarity of goods found in possession of the accused with goods alleged to have been stolen, may be evidence both of the fact of the theft & of the identity of the goods.—*R. v. ROCHE* (1887), 13 V. L. R. 150.—**AUS.**

**o.** —[—]*Evidence of similar acts—Proof of fraudulent intent.*—[—]Fraudu-

**4018. Wounding.**—[—]*R. v. VOKE*, No. 3943, *ante*.

**4019.** —[—]*Under an indictment for feloniously wounding, a blow subsequent to that by which the injury was inflicted may be proved, in order to show the intent with which the first was given.*—*R. v. MAHONY* (1848), 12 J. P. 377.

**4020. Neglect of children.**—[—]Defts. were indicted for neglecting their children between Nov. 9, 1900, & Apr. 9, 1901. Evidence was tendered on behalf of the prosecution of neglect before the above-mentioned dates, but was not admitted.—*R. v. MILLER* (1901), 65 J. P. 313.

#### v. Larceny and Receiving Stolen Property.

**4021. Larceny.**—[—]*R. v. MAY* (1845), 5 L. T. O. S. 434; 1 Cox, C. C. 236.

**4022.** —[—]*Attempt to incite to commission of offence.*—[—]*R. v. HILL & LANE* (1908), 1 Cr. App. Rep. 158, C. C. A.

**4023.** —[—]*Applt. was convicted of stealing £30. A girl had been sent to get money from a bank. A man named Alexander, by pretending that there was something irregular about the cheque, induced her to part with the money.*

lent intent is an essential element of the offence of stealing under Criminal Code, 1902, W. A., s. 369. On a prosecution for such offence evidence may be given tending to prove the commission by prisoner of other acts similar to those which form the basis of the offence charged for the purpose of proving that that offence is part of a fraudulent scheme or system, & to rebut an anticipated defence that the acts constituting the offence charged if done by the prisoner were done innocently, accidentally, or inadvertently, & not intentionally. Such evidence having been rightly admitted does not afterwards become irrelevant merely because the only defence actually presented to the jury is a denial of the acts constituting the offence charged.—*R. v. FINLAYSON* (1912), 14 C. L. R. 675.—**AUS.**

**p.** —[—]*Evidence of similar offences by accused.*—[—]Deft. was convicted on a charge that he did unlawfully steal one Ford motor-car of the value of \$400 or thereabouts, the property of R. The evidence showed that R. gave another car to deft. to sell, who disposed of it for the sum of \$300 in cash & a Ford car; that deft. appropriated the cash received to his own use & made use of the Ford car for his own purposes, & that R. after fruitless attempts extending over some months, & being unable to get either car or money, caused deft. to be arrested on the charge:—*Held*: evidence was given of a similar offence committed by deft., as no substantial wrong or miscarriage had been occasioned by the introduction of the evidence referred to, the conviction must stand.—*R. v. EATON* (1920), 54 N. S. R. 99; 35 Can. Crim. Cas. 31.—**CAN.**

**q.** —[—]*Proof of fraudulent intent—Possession & pawning of stolen tie-pin.*—[—]Accused was charged with stealing a tie-pin on Nov. 15 from B., who was unable to say when he last saw the tie-pin. A witness testified that accused pawned the pin which B. identified on Nov. 8 & released it on Nov. 15. The evidence was objected to as implicating the accused in an offence other than offence charged:—*Held*: the evidence was relevant to the issue & therefore admissible.—*R. v. PERKINS*, [1920] App. D. 307.—**S. AF.**

**r.** —[—]*Evidence of previous conviction to prove knowledge of premises.*—[—]On a trial for larceny, evidence that the prisoner had been previously convicted, given incidentally to show his acquaintance with the premises

*Sect. 4.—Relevant facts—Admissibility of evidence:*  
*Sub-sect. 2, B. (h) v. & vi.]*

Applt. was clearly acting with Alexander & the main ground of this appeal is that evidence was admitted to show that a week later applt. was assisting Alexander in the same way. In our opinion that evidence was admissible (PICKFORD, J.).—*R. v. ADAMSON* (1911), 6 Cr. App. Rep. 205, C. C. A.

**4024. Receiving stolen property—Proof of guilty knowledge.]**—On an indictment against a receiver for receiving several articles, if it appear that they were received at different times, the prosecutor may be put to his election.

But evidence may be given of all the receipts, for the purpose of proving guilty knowledge in the receiving, at least, of all prior to that on which the prosecutor elects to proceed.—*R. v. DUNN* (1826), 1 Mood. C. C. 146, C. C. R.

**4025. ———.]**—If prisoners be charged by several indictments with receiving stolen goods:—*Semble*: in strict law, any receiving that was before the one in the indictment which is being tried may be given in evidence, although itself the subject of another indictment.

When, before the committing magistrate, one of the prisoners was examined as a witness against the other, & after being examined was charged as a prisoner:—*Held*: what prisoner said before the magistrate as a witness could not be given in evidence against her on her trial for the offence.—*R. v. DAVIS* (1833), 6 C. & P. 177.

*Annotations*:—*Reffd.* *R. v. Laurent, Barrett & Weekes* (1898), 62 J. P. 250. *Mentd.* *R. v. Wiley* (1850), 2 Den. 37.

**4026. ———.]**—*R. v. HINLEY*, No. 3894, ante.

**4027. ———.]**—*R. v. SIRRELL* (1851), cited in 2 Den. at p. 267.

*Annotation*:—*Apprvd.* *R. v. Oddy* (1851), 2 Den. 264.

**4028. ———.]**—*R. v. ODDY*, No. 4619, post.

**4029. ———.]**—On an indictment against A. for stealing, & B. for receiving goods, evidence that on various former occasions portions of the commodity stolen have been missed, & that prisoners have, after such occasion, been found selling such a commodity; & that on the last occasion it was part of what was stolen:—*Held*: sufficient to fix the receiver with a guilty knowledge.—*R. v. NICHOLLS & CLARK* (1858), 1 F. & F. 51.

**4030. ——— Prevention of Crimes Act, 1871 (c. 112), s. 19.]**—Upon the trial of an indictment for larceny & receiving certain stolen goods, evidence may be given under the above Act that there was found in the possession of prisoner other property stolen within the preceding period of twelve months, although such other property is the subject of another indictment against him, to be

subsequently tried at the same assizes.—*R. v. JONES & HAYES* (1877), 14 Cox, C. C. 3.

*Annotation*:—*Consd.* *R. v. Bromhead* (1906), 71 J. P. 103.

**4031. ———.]**—In order to show guilty knowledge under the above Act, it is not sufficient merely to prove that "other property stolen within the preceding period of twelve months" had at some time previously been dealt with by prisoner; it must be proved that such "other property" was found in the possession of prisoner at the time when he is found in possession of the property which is the subject of the indictment.—*R. v. DRAGE* (1878), 14 Cox, C. C. 85.

*Annotations*:—*Follid.* *R. v. Carter* (1884), 12 Q. B. D. 522; *R. v. Hardy* (1910), 74 J. P. 396.

**4032. ———.]**—Upon the trial of a prisoner for receiving stolen property with a guilty knowledge, evidence was admitted that shortly before the stealing of the property in question, he had been in possession of other stolen property of a similar character, though he had parted with the possession of such other property before the date of the stealing of the property charged in the indictment:—*Held*: such evidence was inadmissible, & did not fall within the words of sect. 19 of the above Act.—*R. v. CARTER* (1884), 12 Q. B. D. 522; 53 L. J. M. C. 96; 50 L. T. 596; 48 J. P. 456; 32 W. R. 663; 15 Cox, C. C. 448, C. C. R.

*Annotations*:—*Follid.* *R. v. Hardy* (1910), 74 J. P. 396. *Reffd.* *R. v. Bond* (1906), 75 L. J. K. B. 693.

**4033. ———.]**—Where a person is indicted for feloniously stealing & receiving certain property, evidence, under the above Act, that there was found in the possession of such person other property, stolen within the preceding period of twelve months, ought not to be admitted if the real offence charged is stealing & not receiving. Such evidence, if properly admitted in the first instance either under the above Act, or to negative the defence of accident, ought to be withdrawn by the judge from the consideration of the jury if the prosecution fails to prove that such property so found was stolen property.—*R. v. GIRON & GIRON* (1906), 70 J. P. 514; 22 T. L. R. 720; 50 Sol. Jo. 651, C. C. R.

*Annotation*:—*Consd.* *R. v. Smith*, [1918] 2 K. B. 415.

**4034. ———.]**—Upon the trial of a prisoner for receiving stolen property, evidence having been given that the stolen property was found in the possession of pawnbrokers with whom prisoner had pawned them, evidence was admitted, with a view of showing guilty knowledge, that prisoner had been convicted within the preceding five years of an offence involving fraud or dishonesty:—*Held*: (1) the evidence of such previous conviction was admissible under the above Act; (2) a prisoner who refuses to give evidence

where the larceny was committed is admissible.—*R. v. FOWLER* (1884), 3 N. Z. L. R. C. A. 64.—*N.Z.*

**s. — Stealing cattle — Obliterating branding marks — Possession of branding irons capable of causing such obliteration.]**—*R. v. COLLYNS* (1898), 3 Terr. L. R. 82.—*CAN.*

**4024 i. Receiving stolen property—Proof of guilty knowledge—Sheep—Stealing & receiving stolen lambs before that date.]**—On a presentment for feloniously receiving a sheep knowing it to have been stolen, evidence that accused a few days before the date of the alleged receiving stole certain lambs belonging to a different owner, & that a few days after the date of the alleged receiving he had in his possession not only the sheep but the stolen lambs & also another stolen sheep belonging to a third owner, is

not admissible.—*R. v. ENNETT*, [1905] V. L. R. 718.—*AUS.*

**4024 ii. ———.]**—On an indictment for receiving goods knowing them to have been stolen, in order to show a guilty knowledge on the part of prisoner, evidence was admitted that the stolen property was found in prisoner's house; & this although distinct indictments were found against prisoner for receiving these last-mentioned goods. Finding stolen plate in the prisoner's house six days after it had been stolen:—*Held*: to raise a presumption against prisoner by the possession of it; *aliter*, as to goods five or six months stolen.—*R. v. COOTE* (1842), Arm. M. & O. 337.—*IR.*

**4024 iii. ———.]**—Criminal Code Act, 1893, s. 262, sub-s. 2 (a), is not confined either to cases where the

other property, evidence of the finding of which in deft.'s possession is sought to be given, is property obtained by means of the same crime as that by means of which the property which is the subject of the charge was obtained, or to cases where the other property is found in deft.'s possession at the same time as that which is the subject of the charge, but applies to all cases where any other property obtained by means of any such crime or act as is mentioned in above sub-sect. has been found in deft.'s possession at any time within twelve months of the charge on which he is being tried being first made against him.—*R. v. WILKINSON* (1898), 17 N. Z. L. R. 1.—*N.Z.*

**a. ——— Evidence of previous conviction within five years.]**—Prevention of Crimes Act, 1871 (c. 112),

on his own behalf, but who gives evidence on behalf of a fellow-prisoner, is liable under Criminal Evidence Act, 1898 (c. 36), s. 1 (e), to be cross-examined in order to show that he himself is guilty of the offence charged.—*R. v. ROWLAND*, [1910] 1 K. B. 458; 79 L. J. K. B. 327; 102 L. T. 112; 74 J. P. 144; 26 T. L. R. 202; 3 Cr. App. Rep. 277, C. C. A.

*Annotation*:—As to (1) *Reid*. *R. v. Hardy* (1910), 74 J. P. 396.

**4035.** ———.—[.]—On a trial for receiving stolen property the evidence of the thief that he has sold stolen property to deft. at any previous time is admissible to prove guilty knowledge; it is not affected by the time limitation of the above Act.—*R. v. POWELL* (1909), 3 Cr. App. Rep. 1, C. C. A.

*Annotation*:—*Mentd.* *R. v. Carter* (1912), 7 Cr. App. Rep. 192.

**4036.** ———.—[.]—*R. v. HARDING* (1909), 53 Sol. Jo. 762; 3 Cr. App. Rep. 10, C. C. A.

**4037.** ———.—[.]—On the trial of a prisoner for receiving goods knowing them to be stolen, it was proposed, under the authority of the first paragraph of sect. 19 of the above Act, to call evidence that there was found in the possession of prisoner other property stolen by the same thief within the preceding period of twelve months, but parted with by prisoner by selling it or pawning it before the property the subject of the indictment had been found in his possession:—*Held*: the proposed evidence was inadmissible, as it was necessary, as a preliminary to calling such evidence, to prove that the property stolen within the preceding twelve months had been found in the actual physical possession of prisoner at the time of his arrest, or at the time when it was alleged the other stolen property was found upon him.—*R. v. HARDY* (1910), 74 J. P. 396.

*See, now*, Larceny Act, 1916 (c. 50), s. 43 (1).

**4038.** ———.—*Larceny Act, 1916* (c. 50), s. 43 (1).—[.]—The evidence which may be given under the above section by the prosecution as to the finding of stolen property in prisoner's possession is not limited to the fact of its having been so found, but includes evidence as to the circumstances in which it was found & as to statements made at the time by prisoner in explanation of the property being found in his possession, & further, that the evidence as to its being stolen property need not be given before, but may be given after, the evidence as to its being found in prisoner's possession, & in the event of a failure by the prosecution to prove, with regard to a portion of it, that it was stolen property, such failure will not, if substantially all the property is proved to have been stolen, be a ground for quashing the conviction.—*R. v. SMITH*, [1918] 2 K. B. 415; 87 L. J. K. B. 1023; 119 L. T. 584;

s. 19, enacts that where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, & "evidence has been given that the stolen property has been found in his possession," then evidence of previous convictions within five years against accused of any offence involving fraud or dishonesty may be given at any stage of the proceedings, in order to prove guilty knowledge:—*Held*: under this enactment previous convictions may be proved if evidence has been given that accused had the stolen goods in his possession, actually or constructively, at any time after they had been stolen.—*WATSON v. H.M. ADVOCATE* (1894), 21 R. (Ct. of Sess.) 26; 31 Sc. L. R. 339; 1 S. L. T.

**468.—SCOT.**

b. ———.—*Possession of notes unaccounted for—Similar to notes stolen.*—[.]—In a case of theft of notes of large value, possession of similar notes unaccounted for three weeks after the date of the theft was evidence from which complicity in the theft might be inferred by the jury.—*H.M. ADVOCATE v. BROWNE, BURNS & WILLIAMS* (1903), 6 F. (Ct. of Sess.) 24; 41 Sc. L. R. 136; 11 S. L. T. 353.—*SCOT.*

**PART XII. SECT. 4, SUB-SECT. 2.—**  
B. (h) vi.

**4039 i. Similar defalcations or entries in books.**—[.]—Prisoner, a clerk in a post office, having failed to account for moneys received by him in the course

34 T. L. R. 480; 26 Cox, C. C. 321; 13 Cr. App. Rep. 151, C. C. A.

vi. *Embezzlement.*

**4039. Similar defalcations or entries in books.**—[.]—Prisoner was indicted for embezzlement; the evidence being that it was prisoner's duty to make out weekly accounts of the payments made by him, by entering them in a book, & adding them up at the end of each week. On three several occasions within six months prisoner entered the payments made by him correctly, but in adding up the items made the totals £2 greater than they really were, & took credit with his employers for the larger amount. These were the cases on which the indictment was founded. At the trial evidence was tendered that on a series of occasions before & after those mentioned in the indictment, precisely similar errors had been made by prisoner, & advantage taken of them by him, & was objected to:—*Held*: to explain motives & intentions this evidence was admissible.—*R. v. RICHARDSON* (1861), 2 F. & F. 343; 8 Cox, C. C. 448.

*Annotations*:—*Consd.* *R. v. Stephens* (1888), 58 L. T. 776. *Reid*. *R. v. Balls* (1871), L. R. 1 C. C. R. 328; *R. v. Francis* (1874), L. R. 2 C. C. R. 128; *R. v. Bond*, [1906] 2 K. B. 389.

**4040.** ———.—[.]—Prisoner, a member of a Friendly Soc., was employed to receive the weekly payments made by the members. He gave correct receipts to the members, but omitted to enter in the contribution & cash books a large number of the sums so received. On being called for an explanation, he admitted that he had received the sums so omitted:—*Held*: he was guilty of embezzlement.

Upon the trial these books were tendered generally in evidence, & received; although it was objected that the evidence ought to be confined to the entries forming the subject of the indictment:—*Held*: they were rightly admitted.—*R. v. PROUD* (1861), L. C. & Ca. 97; 31 L. J. M. C. 71; 5 L. T. 331; 25 J. P. 772; 10 W. R. 62; 9 Cox, C. C. 22; *sub nom.* *R. v. BOND*, 8 Jur. N. S. 142, C. C. R.

*Annotations*:—*Reid*. *R. v. Balls* (1871), L. R. 1 C. C. R. 328. *Mentd.* *R. v. Bruen* (1863), 9 Cox, C. C. 398; *R. v. Tyne* (1869), L. R. 1 C. C. R. 177; *Gordon v. Jennings* (1882), 46 L. T. 534.

**4041.** ———.—[.]—An indictment charged a prisoner with having as a booking clerk of certain steamship owners embezzled the moneys of his masters on three separate occasions, the charges being contained in three counts of the same indictment. In support of the first count it was proved, amongst other things, that prisoner received money for the carriage of animals by steamer which it was his duty to pay over to his masters' cashier; in support of the second count, that he was supplied with a number of tickets for issue to passengers by his masters' steamers, which purported to be numbered

of his duty as a servant of the Commonwealth, was charged with misappropriation of public moneys. At the trial evidence was admitted that a few months before the discovery of the deficiency prisoner had received moneys on behalf of the Savings Bank for which he failed to account. It was his duty to render an account of his dealings in connection with those latter moneys to the State:—*Held*: the evidence was properly admitted, the earlier transaction being sufficiently similar to & connected with the defalcation in respect of which prisoner was charged to render evidence of them relevant to the defence of mistake or accident that might have been set up.—*HARDGRAVE v. R.* (1906), 4 C. L. R. 232.—*AUS.*



**Sect. 4.—Relevant facts—Admissibility of evidence:**  
**Sub-sect. 2, B. (h) vi., vii. & viii.]**

consecutively, but were not examined before they were delivered to him. The tickets were tied up in bundles, & were in prisoner's charge, he alone having a key of the case in which they were kept. Certain tickets, bearing numbers corresponding to the numbers of certain of the tickets in one of the bundles delivered to prisoner, assuming such bundle to have been complete, were put in evidence, which tickets were stamped in a manner similar to other tickets which prisoner had issued to passengers by one of the steamers, & which were notched as they would have been had they been used by passengers on board such steamer, & evidence was given that prisoner had not handed over to the cashier any money in respect of such tickets. Evidence was also given in support of the third count, but upon this count the jury found prisoner not guilty, while they convicted him upon the first & second counts. The jury were directed, as to the first count, that they might take into consideration the evidence given as to prisoner's conduct in relation to the matters charged in the second & the third counts; & as to the second count, that, if they were of opinion from the whole of the evidence that prisoner had issued the tickets for money in the ordinary way, & taken the money he had received for his own use, making false entries in his books to conceal it, they might find him guilty:—*Held*: the jury were justified in presuming from the evidence in support of the second count that prisoner had issued tickets & received money for them, which he had appropriated; & they were at liberty, in order to arrive at a conclusion upon any one of the charges, to take into consideration the evidence given in support of the other charges, notwithstanding the fact that upon one of such charges they found a verdict of not guilty.—*R. v. STEPHENS* (1888), 58 L. T. 776; 52 J. P. 823; 4 T. L. R. 479; 16 Cox, C. C. 387, C. C. R.

**4042. Forged testimonials at entry into service.]**—In an indictment for embezzlement, evidence may be given on the part of the prosecution to show that prisoner entered into the service of the prosecutor by means of forged testimonials to explain the *animus* with which the non-accounting may have taken place; but they should not be gone into till after the receipt & non-accounting has been proved.—*R. v. SYMONDS* (1850), 14 J. P. 500.

**vii. Robbery, Menaces and Burglary.**

**4043. Robbery—Demand made by one of a mob—Evidence of demands made by mob elsewhere.]**—If persons who had formed part of a mob, obtain money from a party by advising him to give money to the mob, & be indicted for this as a

robbery, the prosecutor, to show that this was not *bona fide* advice, may give evidence of demands of money made by

before & afterwards in the course of the same day, if any of the prisoners were present on those occasions.—*R. v. WINKWORTH* (1830), 4 C. & P. 444.

**4044. Demanding with menaces.]—R. v. EGER-TON** (1819), Russ. & Ry. 375, C. C. R.

*Annotations*:—*Distd. Hollingham v. Head* (1858), 4 C. B. N. S. 388. *Refd. R. v. Ellis* (1826), 6 B. & C. 145.

**4045. Threatening letter—Evidence of other letters.]—R. v. ROBINSON** (1796), 2 East, P. C. 1110; 2 Leach, 749.

*Annotation*:—*Refd. R. v. Studer* (1915), 85 L. J. K. B. 1017.

**4046. ———.]—R. v. WARD** (1864), 10 Cox, C. C. 42.

**4047. ———.]—On an indictment for sending a threatening letter demanding money, evidence of the contents of similar letters, themselves the subjects of untied indictments, is admissible.—R. v. GRAHAM** (1909), 3 Cr. App. Rep. 252, C. C. A.

**4048. Verbal threat to accuse of unnatural crime—Evidence of other declarations.]—On the trial of an indictment for accusing a person of an unnatural crime with intent to extort money—prisoner being a soldier & the accusation having been made while he was on duty as sentry:—*Held*: evidence of declaration made by him on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guard-house & accuse him of an unnatural crime, was admissible.—*R. v. COOPER* (1849), 3 Cox, C. C. 547.**

*Annotations*:—*Consd. R. v. Bond*, [1906] 2 K. B. 389. *Refd. R. v. McDonnell* (1850), 5 Cox, C. C. 153.

**4049. Threats in newspaper article—Evidence of other threats.]—R. v. BOYLE & MERCHANT**, [1914] 3 K. B. 339; 83 L. J. K. B. 1801; 111 L. T. 638; 24 Cox, C. C. 406; 10 Cr. App. Rep. 180; *sub nom. R. v. BOYLE, R. v. MERCHANT*, 78 J. P. 390; 30 T. L. R. 521; 58 Sol. Jo. 673, C. C. A.

*Annotations*:—*Consd. Perkins v. Jeffery*, [1915] 2 K. B. 702. *Refd. R. v. Armstrong*, [1922] 2 K. B. 555.

**4050. Burglary—Possession of goods stolen previously.]—In an indictment for burglary with intent to steal, it cannot be shown, with a view of proving the intent, that prisoner was in possession of other goods stolen from the house at a previous time.—R. v. ORIEL** (1845), 9 J. P. 170, 171.

**4051. Burglary with intent to commit rape—Subsequent immoral conduct.]—R. v. RODLEY**, No. 3935, *ante*.

**viii. False Pretences and obtaining Credit by Fraud.**

**4052. Obtaining property by false pretences—Other similar misrepresentations.]—In an indictment for obtaining goods under false pretences,**

**PART XII. SECT. 4, SUB-SECT. 2.—**  
**B. (h) viii.**

**4052 i. Obtaining property by false pretences—Other similar representations.]—Prisoner was charged with obtaining 19s. from R. by falsely pretending that a worthless piece of paper (a tailor's advertisement) presented & delivered by him to her was a one-pound note. At the trial eight other similar pieces of paper were admitted in evidence. As to five of these R. swore that she received them from prisoner as good notes, the other three had been found on another person not before the ct., & they could not be traced to prisoner. It could not pick out the five pieces of paper she had received from prisoner from others:—*Held*: these three pieces**

of paper were wrongly received in evidence.—*R. v. ALLEN* (1872), 11 N. S. W. S. C. R. 23.—*AUS.*

**4052 ii. ———.]—Prisoner was charged with having on Apr. 23, 1888, unlawfully falsely pretended that he was proprietor of an organised theatrical troupe, that the troupe were ready to travel, & that they had done good paying business up-country, & he had by these false pretences unlawfully obtained a sum of money from F. He was also charged on a second count with having on Sept. 6, 1889, falsely pretended that he was possessed of the goodwill of a theatrical business, & that he had a troupe organised & ready to start, & that by means of this false pretence he had obtained a sum of money from S.**

The constable who arrested him gave evidence of searching prisoner's boxes, & stated in effect that prisoner tried to conceal the contents of one of the boxes which contained three agreements. These agreements were signed with prisoner's name with one exception which, though in the same handwriting, was signed in another name. The agreements all contained recitals that he, the prisoner, was the proprietor of a theatrical troupe, & of an advertising agency & of the goodwill of a theatrical business, & were intended to be made between prisoner & any one he could get to join him in the enterprise. The chairman of General Sessions directed a verdict of not guilty on the second count on the grounds that as to the first pretence there was



evidence of previous misrepresentations to show the fraudulent course of dealing of prisoner is inadmissible.—*R. v. RIDGEWAY* (1843), 1 L. T. O. S. 622.

**4053.** ———.]—A false & fraudulent statement to a pawnbroker that a chain offered as a pledge is of silver is indictable as a false pretence under 7 & 8 Geo. 4, c. 29: & upon the trial of such an indictment evidence is admissible of similar misrepresentations made to others about the same time, & of the possession of a considerable number of chains of the same kind.—*R. v. ROEBUCK* (1856), *Dears. & B.* 24; 25 L. J. M. C. 101; 27 L. T. O. S. 143; 20 J. P. 325; 2 Jur. N. S. 597; 4 W. R. 514; 7 Cox, C. C. 126, C. C. R.

*Annotations:—Distd. R. v. Bryan* (1857), 7 Cox, C. C. 312. *Refd. R. v. Gardner* (1856), *Dears. & B.* 40; *R. v. Sherwood* (1857), 7 Cox, C. C. 270; *R. v. Goss, R. v. Itagg* (1860), 29 L. J. M. C. 86; *R. v. Light* (1915), 84 L. J. K. B. 865.

**4054.** ———.]—*R. v. Holt*, No. 3929, *ante*.

**4055.** ———.]—S. & H. were jointly indicted on counts for false pretences & a general count for conspiracy. S. was convicted on the counts for false pretences & both on the count for conspiracy. The evidence was that they were ostensibly carrying on business as publishers under the name of H. & Co., & that A. was the author of a book published by them. To force the sale of this book S. procured M. to write letters, purporting to come from a titled lady ordering a

copy of the book & to address them to country booksellers. These letters were delivered by M. to S. & found their way by post to different country booksellers, & inclosed with them was a printed circular from the firm offering reduced terms for an order of seven copies or more. At the trial two witnesses produced a number of such letters some of which had been given to them by booksellers, other than those named in the indictment, who received them & some came to them from booksellers by post. There were no counts in the indictment alleging any intent to defraud by false pretences these particular booksellers but the count for conspiracy charged generally a conspiracy to defraud B. & others. It was also proved that H., after the frauds charged, had represented himself as H. & Co.:—*Held*: (1) evidence of attempts to defraud other booksellers than those named in the indictment was admissible under the count for conspiracy: (2) the representations of H., after the frauds charged, were admissible in evidence.—*R. v. STENSON & HITCHMAN* (1871), 25 L. T. 660; 36 J. P. 532; 12 Cox, C. C. 111, C. C. R.

**4056.** ———.]—(1) On the trial of an indictment for endeavouring to obtain an advance from a pawnbroker upon a ring by the false pretence that it was a diamond ring, evidence was admitted that two days before the transaction in

no evidence that it was false, & as to the second alleged pretence that there was no evidence that it was made. Chairman left the evidence of the constable to the jury as evidence of fraudulent intent on the first count. Jury found prisoner guilty on first count:—*Held*: evidence of the constable was not admissible as evidence of fraudulent intent on the first count.—*R. v. MOORE* (1890), 16 V. L. R. 129.—*AUS.*

**4052 iii.** ———.]—On a charge of obtaining money by false pretences after evidence had been given of the alleged false representations, further evidence was admitted to show that the accused had on other occasions, to other people, made similar representations. It was not disputed that the representations if made were untrue:—*Held*: the evidence of similar acts was admissible on the question of accused's intent.—*R. v. LUTHERBORROW* (1912), 12 S. R. N. S. W. 289; 29 N. S. W. W. N. 46.—*AUS.*

**4052 iv.** ———.]—Accused was charged with falsely pretending to an hotel-keeper that the front sheet of a £5 note which had been separated from the back sheet was a genuine bank-note, by means of which false pretence he unlawfully attempted to obtain from the hotel-keeper the sum of £5. Expert evidence was given, without objection, that the front sheet by itself was not a valid note. Evidence of facts connected with another charge, in respect of the back of the note of which the accused had been acquitted was, after objection, also admitted:—*Held*: expert evidence & the evidence of the facts connected with the previous charge was rightly admitted.—*R. v. Wilson* (1916), 16 S. R. N. S. W. 295; 33 N. S. W. W. N. 103.—*AUS.*

**4052 v.** ———.]—Accused was charged on three counts with having obtained money from the Naval Dept. by false pretences. In the cross-examination of one of the witnesses for the Crown evidence was elicited to the effect that the accused had repaid to the Dept. a certain sum of money. Crown called evidence to show that the repayment in question was in respect of alleged defalcations other than those charged:—*Held*: evidence objected was properly ad-

mitted on the ground that where one party introduces in evidence part of a transaction the other party may answer that evidence by proving the balance of the transaction, so as to show that the complexion sought to be given is not the right one.—*R. v. DONOGHUE*, [1917] V. L. R. 449.—*AUS.*

**4052 vi.** ———.]—*R. v. DUROCHER* (1882), 12 L. R. O. S. 697.—*CAN.*

**4052 vii.** ———.]—Deft. was indicted for obtaining from one H. a promissory note with intent to defraud. The evidence showed that on May 4, 1887, deft.'s agent called on H., & obtained from him an order addressed to deft. to deliver to H., at R., thirty bushels of Blue Mountain improved Seneca fall wheat, which H. was to put out on shares, & to pay deft. \$240 when delivered, & to equally divide the produce thereof with the holder of the order, after deducting said amount. On May 23, deft. called, produced the order, & by false & fraudulent representations as to the quality of the wheat, & his having full control of it, its growth & yielding qualities, & that a note deft. requested him to sign was not negotiable, induced H. to sign the note. Evidence was received, under objection, of similar frauds on others, showing that deft. was at the time engaged in practising a series of systematic frauds on the community:—*Held*: the evidence objected to was properly receivable.—*R. v. HOPE* (1889), 17 O. R. 463.—*CAN.*

**4052 viii.** ———.]—*R. v. McCULLOUGH & MCGILLIS* (1901), 21 C. L. T. 306.—*CAN.*

**4052 ix.** ———.]—On an indictment charging accused with having obtained goods by false pretences from a co. with intent to defraud, so soon as it has been proved that he did the act charged, evidence of false representations made to persons other than the president & general manager of such co., on other & distinct occasions, is admissible to show that accused, at the time he made the false representations to the president & general manager of the co. on whose information the prosecution was brought, was pursuing a course of similar acts.—*R. v. KOMIENSKY* (1903), Q. R. 12 K. B. 463.—*CAN.*

**4052 x.** ———.]—On a charge against accused of cheating by falsely representing that he was the *devan* of an estate & could procure for the complainant appointment to the vacant post of manager to the estate, & thereby obtaining a sum of money as a pretended security deposit, evidence of instances of similar but unconnected transactions with other persons, before & after the date of the offence charged, is admissible not to establish the *factum* of the offence but to show that the transaction in issue was one of a systematic series of frauds, & that the intention of the accused on the particular occasion in question was dishonest & fraudulent.—*R. v. DEBENDRA PRASAD* (1909), 1 L. R. 36 Calc. 573.—*IND.*

**4052 xi.** ———.]—S., Y. & W. were charged with having cheated B. & P., & thereby obtained from them various sums of money:—*Held*: evidence was admissible that the same three persons had on other occasions made proposals of much the same kind to other persons to whom they told a story, similar in all essential details down to the name of the proposed lender of the money.—*R. v. YAKUB ALI* (1916), 1 L. R. 39 All. 273.—*IND.*

**4052 xii.** ———.]—At a trial of a charge of obtaining money by false representations, evidence was admitted of similar representations having been made by the accused to other persons on the same day:—*Held*: the evidence had been competently admitted.—*GALLAGHER v. PATON*, [1909] S. C. (J.) 50; 46 Sc. L. R. 654; 1 S. L. T. 399.—*SCOT.*

**4052 xiii.** ———.]—Where accused were charged with theft by means of false pretences in that they represented to one M. that certain pieces of glass were rough & uncut diamonds & thereby induced him to purchase them, & a witness was called who deposed that shortly prior to such representation the accused represented to him that they were selling diamonds:—*Held*: that as evidence of similar transactions was admissible to show guilty knowledge the evidence was rightly admitted.—*R. v. KELLER & PARKER* (1914), C. P. D. 791.—*S. AF.*

c. — *Facts subsequent to false*  
C C

**Sect. 4.—Relevant facts—Admissibility of evidence:**  
**Sub-sect. 2, B. (h) viii. & ix.]**

question prisoner had obtained an advance from a pawnbroker upon a chain which he represented to be a gold chain, but which was not so, & endeavoured to obtain from other pawnbrokers advances upon a ring which he represented to be a diamond ring, but which, in the opinion of the witnesses, was not so. This ring was not produced:—**Held:** the evidence was properly admitted.

(2) The law of evidence is the same in criminal & civil suits (LORD COLERIDGE, C.J.).—*R. v. FRANCIS* (1874), 1 L. R. 2 C. C. R. 128; 43 L. J. M. C. 97; 30 L. T. 503; 38 J. P. 469; 22 W. R. 663; 12 Cox, C. C. 612, C. C. R.

**Annotations:**—As to (1) *Apld. R. v. Rhodes*, [1899] 1 Q. B. 77; *R. v. Ollis*, [1900] 2 Q. B. 758. **Consd. R. v. Bond, [1906] 2 K. B. 389. **Refd. R. v. Cooper (1875), 1 Q. B. D. 19; *Blake v. Albion Life Assce. Soc.* (1876), 45 L. J. Q. B. 663; *R. v. Stephens* (1888), 58 L. T. 776; *R. v. Mean* (1904), 69 J. P. 27; *R. v. Wyatt*, [1904] 1 K. B. 188; *R. v. Charlesworth* (1910), 4 Cr. App. Rep. 167; *R. v. Stone* (1910), 6 Cr. App. Rep. 89; *R. v. Mason* (1914), 111 L. T. 336.****

**4057.** ———.]—(1) The Criminal Evidence Act, 1898 (c. 36), does not enable a deft. to give evidence before the grand jury.

(2) On the trial of an indictment for obtaining goods by false pretences, if the case for the prosecution is that deft. carried on a sham business, evidence of acts by deft. subsequent, as well as anterior, to the act charged in the indictment is admissible.—*R. v. RHODES*, [1899] 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360; 62 J. P. 774; 47 W. R. 121; 15 T. L. R. 37; 43 Sol. Jo. 45; 19 Cox, C. C. 182, C. C. R.

**Annotations:**—As to (2) **Consd. R. v. Ollis**, [1900] 2 Q. B. 758; *R. v. Wyatt*, [1904] 1 K. B. 188; *R. v. Bond*, [1906] 2 K. B. 389. **Refd. R. v. Smith (1905), 92 L. T. 208; *R. v. Charlesworth* (1910), 4 Cr. App. Rep. 167; *R. v. Stone* (1910), 6 Cr. App. Rep. 89; *R. v. Boyle & Merchant*, [1914] 3 K. B. 339; *R. v. Mason* (1914), 111 L. T. 336. **Generally, Mentd. R. v. Saunders (1898), 63 J. P. 24.****

**4058.** ———.]—*R. v. SMITH*, No. 3931, *ante*.

**4059.** ———.]—*R. v. ELLIS*, No. 3819, *ante*.

**4060.** ———.]—Upon the trial of an indictment for obtaining money by false pretences by means of worthless cheques, evidence of other & similar frauds by prisoner, given in support of an indictment for a similar fraud upon another person in respect of which prisoner was acquitted, is relevant & admissible as illustrating a course of conduct showing an intention to defraud.—*R. v. OLLIS*, [1900] 2 Q. B. 758; 69 L. J. Q. B. 918; 83 L. T. 251; 64 J. P. 518; 49 W. R. 76; 16 T. L. R. 477; 44 Sol. Jo. 593; 19 Cox, C. C. 554, C. C. R.

**Annotations:**—**Consd. R. v. Bond**, [1906] 2 K. B. 389. **Apld. R. v. Shellaker, [1914] 1 K. B. 414. **Refd. R. v. Wyatt, [1904] 1 K. B. 188; *R. v. Smith* (1905), 92 L. T. 208; *R. v. Boyle & Merchant*, [1914] 3 K. B. 339; *Perkins v. Jeffery*, [1915] 2 K. B. 702; *R. v. Thompson*, [1917] 2 K. B. 630; *R. v. Lovegrove*, [1920] 3 K. B. 643.****

**4061.** ———.]—On a charge of obtaining by false representations, evidence of other earlier false statements is admissible to negative a defence of belief that the later representations were true.—*R. v. CHARLESWORTH* (1910), 4 Cr. App. Rep. 167, C. C. A.

**4062.** ———.]—*R. v. FISHER*, No. 3925, *ante*.

**4063.** ———.]—On a charge of obtaining by false pretences evidence of exactly similar conduct by deft. on a previous occasion when a similar offence was alleged, though no charge was

made, to that alleged at the trial is admissible.—*R. v. WILKS* (1914), 10 Cr. App. Rep. 16, C. C. A. **4064.** ———.]—*R. v. BURLISON*, No. 3976, *ante*.

— **Obtaining money on forged instrument.]**—*See No. 4089, post*.

**4065.** ———.] **Reiteration of same false pretence.]**

—Evidence is admissible of false pretences distinct from & made prior to those charged. A reiteration by deft. of the false pretence alleged, made subsequently to obtaining the money, & to persons other than prosecutor may be proved in evidence.—*R. v. HAMILTON* (1845), 1 Cox, C. C. 244.

**4066.** ———.] **Same false pretence made to other persons.]**—Prisoner inserted an advertisement in a newspaper offering employment to persons who would transmit him one shilling's worth of postage stamps, & giving an address. The advertisement contained false statements, & upon his being apprehended six envelopes addressed to him & containing a reply to the advertisement, & a shilling's worth of postage stamps were found upon him. 281 other letters contained in a sealed bag were produced on the trial by a clerk from the post office, & on the bag being opened the letters were taken out & read, & appeared to be addressed to prisoner replying to his advertisement, & enclosing each one shilling's worth of postage stamps. These 281 letters had been stopped & opened by the post office authorities before delivery to prisoner, & had never been in his possession, or their contents brought to his knowledge; nor was there any proof as to their authenticity or otherwise:—**Held:** they were admissible against prisoner on an indictment charging him with obtaining, & attempting to obtain, money by false pretences from four persons other than the writers of the letters.—*R. v. COOPER* (1875), 1 Q. B. D. 19; 45 L. J. M. C. 15; 33 L. T. 754; 40 J. P. 150; 24 W. R. 279; 13 Cox, C. C. 123, C. C. R.

**Annotation:**—**Mentd. R. v. Silverlock** (1894), 63 L. J. M. C. 233.

**4067. Obtaining credit by fraud—Other fraudulent obtainings.]**—Upon an indictment for obtaining credit by means of fraud, it was proved that deft. hired furnished apartments from prosecutrix & occupied them for three days, when he left without paying for them or for the food supplied to him. Evidence was admitted that a short time previously to the particular transaction deft. had gone to several houses & hired apartments & left without paying, & that he still owed the money when he went to the house of prosecutrix:—**Held:** the evidence, being evidence of similar acts committed by deft. at a period immediately preceding the commission of the alleged offence, was admissible as tending to establish a systematic course of conduct, & as negating any accident or mistake or the existence of any reasonable or honest motive on his part.—*R. v. WYATT*, [1904] 1 K. B. 188; 73 L. J. K. B. 15; 48 J. P. 31; 52 W. R. 285; 20 T. L. R. 68; 48 Sol. Jo. 85; 20 Cox C. C. 462, C. C. R.

**Annotations:**—**Consd. R. v. Bond**, [1906] 2 K. B. 389. **Foll. R. v. Walford** (1907), 71 J. P. 215. **Refd. R. v. Smith** (1905), 92 L. T. 208; *R. v. Charlesworth* (1910), 4 Cr. App. Rep. 167.

**4068.** ———.]—Deft. was charged that he in incurring a debt & liability to a person who hired apartments, unlawfully did obtain credit for the amount of the debt & liability by means of fraud other than false pretences. Evidence was ad-

**representations—Proof of knowledge of falsity.]**—Evidence is admissible of facts which are subsequent to the false

representation, to prove the insolvency of defts. & a very short time after the false representation had been made, as

an evidence of their knowledge of falsity when they made it.—*R. v. BOYD*, [1896] Q. R. 5 Q. B. 1.—**CAN.**

mitted of other cases in which deft. had shortly before obtained credit from persons letting houses or apartments, & also from a tradesman for goods supplied:—*Held*: the evidence was admissible as tending to establish a system & to negative accident or mistake.—*R. v. WALFORD* (1907), 71 J. P. 215, C. C. R.

**4069.** ———. Must be criminal offences.]—*R. v. BAIRD*, No. 3936, *ante*.

#### ix. Forgery.

**4070. Forgery—Other forgeries.]**—On an indictment under Forgery Act, 1830 (c. 66), s. 19, for engraving or uttering notes of a foreign prince, evidence of a recent engraving or uttering notes of another foreign prince is admissible, in proof of a guilty knowledge.—*R. v. BALLS* (1836), 1 Mood. C. C. 470, C. C. R.

**4071.** ———.]—*R. v. KENNAWAY*, No. 3922, *ante*.

**4072. Uttering forged document—Uttering of other forged documents.]**—*R. v. TATTERSALL* (1801), cited in 1 Bos. & P. N. R. at p. 93; 2 Leach, at p. 984; 127 E. R. 394.

*Annotations*:—*Refd.* *R. v. Wylie* (1804), 1 Bos. & P. N. R. 92; *R. v. Francis* (1874), L. R. 2 C. C. R. 128.

**4073.** ———.]—*R. v. WYLIE*, No. 3892, *ante*.

**4074.** ———.]—Upon an indictment for uttering a forged bank-note knowing it to be forged: to show prisoner's knowledge of the note mentioned in the indictment being a forgery, evidence is admissible of his having a short time before uttered another forged bank-note of the same manufacture & of a number of others likewise of the same manufacture with his handwriting on the back of them, having been in circulation.—*R. v. BALL* (1808), 1 Camp. 324; *Russ. & Ry.* 132.

*Annotations*:—*Consd.* *R. v. Gibson* (1887), 18 Q. B. D. 537. *Refd.* *R. v. Foster* (1855), 24 L. J. M. C. 134; *R. v. Colclough* (1882), 15 Cox, C. C. 91.

#### PART XII. SECT. 4, SUB-SECT. 2.— B. (h) ix.

**4070 i. Forgery—Other forgeries.]**—Prisoner, the cashier in the Registrar General's office, was charged with forging a receipt. It was prisoner's duty to pay daily into the bank the moneys received in the office, & a deposit book was kept showing the amounts paid in & purporting to be receipted by the bank teller. This book was signed by prisoner with a fictitious name, there being no such person in the bank. It was proved by the bank deposit slip that prisoner had paid in less amount than that shown in the book, which was the correct amount received in the office. To prove that the deficiency was not accidental, a number of bank slips & similar forged receipts in the book were put in evidence, showing deficient amounts paid into the bank on the days immediately before & after the date of the forgery charged:—*Held*: the evidence was rightly admitted.—*R. v. HINDLSTON* (1889), 10 N. S. W. L. R. 280.—*AUS.*

**4070 ii.** ———.]—Prisoner was indicted along with W.; the first count charging W. with forging a circular note of the National Bank of Scotland; & the second with uttering it knowing it to be forged. Prisoner was charged as an accessory before the fact. Evidence was admitted showing that two persons named F. & H. had been tried & convicted in M. of uttering similar forged circular notes, printed from the same plate as those uttered by W.; that prisoner was in M. with F., they having arrived & registered their names together at the same hotel, & occupied adjoining rooms; that after F. & H. had been convicted

on one charge, they admitted their guilt on several others; & a number of these circular notes were found on F. & H., which were produced at the trial of prisoner. Before the evidence was tendered, it was proved that prisoner was in company with W., who was proved to have uttered similar notes:—*Held*: the evidence was properly received in proof of the guilty knowledge of prisoner.—*R. v. BENT* (1886), 10 O. R. 557.—*CAN.*

———.]—*Ex p. HOKE*  
L. O. S. 705.—*CAN.*

**4070 iv.** ———.]—*R. v. McLEAN* (1906), 39 N. S. R. 147; 1 E. L. R. 334.—*CAN.*

**4070 v.** ———.]—A series of similar transactions which are not the offence charged can only be used as evidence of the intention of the person who forged the document & not as evidence of forgery.—*KRISHNA GOVINDA PAL v. R.* (1915), 1 L. R. 43 Calc. 783.—*IND.*

**4072 i. Uttering forged document—Uttering of other forged documents.]**—On a prosecution for uttering a forged cheque knowing it to have been forged, evidence of the prisoner having previously uttered a forged bill is admissible.—*R. v. JAMES* (1877), 3 V. L. R. 11.—*AUS.*

**4072 ii.** ———.]—Prisoner, who had been Stamp Distributor of the Q. B. Div., was indicted for uttering three law forms with forged stamps impressed thereon. The forms which were the subject of the indictment were those ordinarily used by the Stamp Distributor of the Exch. Div., & bore his particular mark. It sometimes happens that, in the process of stamping, a second sheet of paper is

**4075.** ———.]—In order to show a guilty knowledge, on an indictment for uttering forged bank-notes, evidence of another uttering, subsequently to the one charged, is not admissible, unless the latter uttering was in some way connected with the principal case, or it can be shown that the notes were of the same manufacture.—*R. v. TAVERNER* (1809), 4 C. & P. 413, n.

**4076.** ———.]—*R. v. HODGSON* (1827), 1 Lew. C. C. 103.

**4077.** ———.]—If a second uttering be made the subject of a distinct indictment, it cannot be given in evidence to show a guilty knowledge in a former uttering.—*R. v. SMITH* (1827), 2 C. & P. 633.

*Annotation*:—*Refd.* *R. v. Furse* (1833), 6 C. & P. 81.

**4078.** ———.]—*Qu.*: if a former uttering of a supposed forged note can be given in evidence to show guilty knowledge, without producing the note, & proving it to be forged.—*R. v. PHILLIPS* (1829), 1 Lew. C. C. 105.

**4079.** ———.]—Forged notes of another bank may be given in evidence to show guilty knowledge, though the subject of another indictment against the same party.—*R. v. KIRKWOOD* (1830), 1 Lew. C. C. 103.

**4080.** ———.]—*R. v. MARTIN* (1830), 1 Lew. C. C. 104.

**4081.** ———.]—*Semble*: on an indictment for uttering a bill of exchange with a forged acceptance, knowing the acceptance to be forged, other forged bills of exchange precisely similar, passed to prosecutor by prisoner, may be given in evidence to show a guilty knowledge in prisoner, though they were not passed till about a month after the uttering for which prisoner is tried.—*R. v. SMITH* (1831), 4 C. & P. 411.

**4082.** ———.]—Prisoner was charged with forging a bill of exchange; & there were also counts for uttering the bill knowing it to be forged. The

inadvertently placed under the sheet which is brought into contact with the die; this second sheet receives an impression, but of a fainter character, & one which can be distinguished from the impression made on the outer sheet. These second sheets are termed "blinds," & are never supposed to be issued by the Stamping Department, or regarded as genuine stamps. The principal defence was that when prisoner sent to purchase genuine stamps at the Custom House, his messenger, either deceived by the guilty party or in collusion with him, brought back these "blinds," which were then innocently sold by prisoner. To meet this defence, counsel for the Crown proposed to give in evidence several documents from the files of the Q. B. Div., which were on forms headed with the printed device used on prisoner's forms, & date-stamps on which were proved by the evidence of an expert to have been made with the same instrument as the forged stamps on the documents the subject of the indictment; & in the prisoner's office implements were found suitable for the forging of such stamps. These documents were submitted by the learned judge to the jury, notwithstanding that prisoner's counsel objected to their reception on the ground that there was not sufficient evidence to connect the prisoner with them:—*Held*: there was sufficient evidence to connect prisoner with these documents, & of their having been uttered by him; & they were rightly submitted to the jury as evidence of guilty knowledge in uttering the stamped instruments which were the subject-matter of the indictment.—*R. v. COLCLOUGH* (1882), 10 L. R. Ir. 241.—*IR.*

*Sect. 4.—Relevant facts—Admissibility of evidence:*  
*Sub-sect. 2, B. (h) ix., x., xi. & xii.]*

bill forged was for £30. Another bill for £20 purporting to be accepted by the same person & uttered by prisoner, was put in evidence to show guilty knowledge. The bill for £20 when uttered by prisoner had on the back of it several indorsements:—*Held*: evidence was admissible to show that the indorsements on the bill for £20 were all forged, for the purpose of showing the guilty knowledge of prisoner at the time he uttered the bill.—*R. v. DUNN CROW* (1843), 8 J. P. 9.

**4083.** ———.]—*R. v. JACKSON* (1848), 3 Cox, C. C. 89, n.

**4084.** ———.]—*R. v. EDWARDS* (1848), 3 Cox, C. C. 89, n.

*Annotation*:—*Refd. R. v. Phillips* (1848), 3 Cox, C. C. 88.

**4085.** ———.]—*Qu.*: on an indictment for uttering a forged acquittance, not being an instrument of ordinary transmission from hand to hand, can similar instruments, uttered by prisoner on other occasions, be given in evidence to prove a guilty knowledge.—*R. v. PHILLIPS* (1848), 3 Cox, C. C. 88.

**4086.** ———.]—On a trial for uttering a forged note, *scienter*, the admissibility of evidence of other utterings is not affected by the case of *R. v. Oddy*, No. 4619, *post*. Such evidence may be given on such a charge.—*R. v. GREEN* (1852), 3 Car. & Kir. 209.

**4087.** ———.]—*R. v. MOORE* (1858), 1 F. & F. 73.

*Annotation*:—*Mentd. R. v. Colclough* (1882), 15 Cox, C. C. 92.

**4088.** ———.]—Upon an indictment for uttering a forged bill, the previous uttering by prisoner of other bills forged in other names may be given in evidence in proof of guilty knowledge.—*R. v. SALT* (1862), 3 F. & F. 834.

**4089.** ———.]—By means of a cut-out-cover letter applt. with three others obtained an envelope with a post-mark upon it of a time before the start of a horse race, & they dispatched this envelope by the agency of one of their number, a postman, to a bookmaker, after the result of the race had been ascertained, enclosing in it a betting-slip purporting to make a bet on the race in question with the intent to defraud the bookmaker:—*Held*: upon this indictment for endeavouring to obtain money from a bookmaker, evidence could be given of a similar attempt made by these men on the same day & in the same way to obtain money from another bookmaker.—*R. v. HOWSE* (1912), 107 L. T. 239; 76 J. P. 151; 28 T. L. R. 186; 56 Sol. Jo. 225; 23 Cox, C. C. 135; 7 Cr. App. Rep. 103, C. C. A.

**4090.** ——— *Possession of other forged documents.*—Evidence of uttering a bill of exchange knowing it to be forged. And other forged bills upon the same house, which were found upon prisoner at the time of his apprehension:—*Held*: admissible as evidence of guilty knowledge.—*R. v. HOUGH* (1806), Russ. & Ry. 120, C. C. R.

**4091.** ———.]—*R. v. MILLARD* (1813), Russ. & Ry. 245, C. C. R.

*Annotation*:—*Refd. R. v. Francis* (1874), 22 W. R. 663.

**4092.** ———.]—*R. v. SUNDERLAND* (1828), 1 Lew. C. C. 102.

**4093.** ———.]—Applt. was convicted of the uttering of a forged deed. Evidence had been

tendered & admitted that two other deeds alleged to be forged were found in the possession of applt. pointing to a systematic course of swindling by the same method. But these deeds were found in the possession of applt. after the date of the offence charged in the indictment:—*Held*: the evidence was admissible, & this was so whether the forgery of these deeds took place before or after the commission of the offence charged.—*R. v. MASON* (1914), 111 L. T. 336; 78 J. P. 389; 24 Cox, C. C. 305; 10 Cr. App. Rep. 169, C. C. A. *Annotation*:—*Refd. R. v. Boyle & Morchant*, [1914] 3 K. B. 339.

**4094. Possession of implements for forgery—Possession of other similar implements.**—(1) Z. was charged with feloniously having in his possession a lithographic stone, on which was engraved a portion of a Dutch coupon. In the presence of an agent of the Dutch consulate, & of the person who signed the coupons, & after Z. had been told that if he had had anything to do with the lithographing it would be better for him to tell it, he made a statement:—*Held*: that statement was admissible in evidence against him.

(2) A second lithographic stone was found in Z.'s lodgings, in respect of which another indictment had been preferred against him:—*Held*: it was competent for the prosecution to add evidence on the trial of the first indictment of what was on the second stone.—*R. v. ZEIGERT* (1867), 31 J. P. 598; 10 Cox, C. C. 555.

**4095.** ———.]—*R. v. ALBRECHT* (1910), 4 Cr. App. Rep. 231, C. C. A.

*x. Coinage Offences.*

**4096. To prove guilty knowledge—Making counterfeit coin—Uttering counterfeit coin.**—On the trial of an indictment for making counterfeit coins, evidence of uttering a counterfeit coin is admissible if it tends to prove *scienter*.—*R. v. ROWLANDS* (1909), 3 Cr. App. Rep. 224, C. C. A.

**4097. ——— Uttering counterfeit coin—Uttering coin of different denomination.**—On an indictment for uttering a counterfeit crown piece knowing it to be counterfeit, proof that prisoner, on a day subsequent to the day of such uttering, uttered a counterfeit shilling, is admissible to prove the guilty knowledge of prisoner.—*R. v. FORSTER* (1855), Dears. C. C. 456; 19 J. P. 280; 3 C. L. R. 681; 6 Cox, C. C. 521; *sub nom. R. v. FOSTER*, 24 L. J. M. C. 134; 25 L. T. O. S. 119; 1 Jur. N. S. 407; 3 W. R. 411, C. C. R.

**4098. ——— Previous conviction for uttering not admitted.**—On an indictment for uttering a counterfeit coin after a previous conviction, such previous conviction for uttering false coin cannot be put in evidence for the purpose of proving guilty knowledge.—*R. v. GOODWIN* (1867), 10 Cox, C. C. 534.

**4099. ——— Unlawful possession of counterfeit coin—Possession of others at subsequent date.**—*R. v. HARRISON* (1834), 2 Lew. C. C. 118.

**4100. ——— Possession of coining implements—Evidence of uttering counterfeit coin.**—Prisoner was indicted for knowingly & without lawful excuse having in his custody & possession a mould on which was impressed the figure & apparent resemblance of the obverse side of a half-crown. The mould was found in the house of prisoner,

**PART XII. SECT. 4, SUB-SECT. 2.—**  
**B. (h) x.**

*d. To prove guilty knowledge—Uttering counterfeit coin—Possession & attempted disposal—Coins of an unusual kind.*—Evidence of the possession & attempted disposal of coins

of an unusual kind is relevant on a charge of uttering such coins soon afterwards when the *factum* of uttering is denied.—*R. v. NUR MAHOMED* (1883), 1 L. R. 8 Bom. 223.—**IND.**

*e. ——— Unlawful possession of counterfeit coins—Uttering other counter-*

*feit coin.*—Where two panels were charged with having base coin in their possession at the time of uttering other base coin:—*Held*: it was sufficient to establish the offences under the statute against both prisoners, to show that they were acting under a common

who had previously passed a bad half-crown; but there was no evidence to show that the half-crown had been made in the mould:—*Held*: there was sufficient evidence to go to the jury.

Upon a trial for felony, other felonies which have a tendency to establish the *scienter* may be given in evidence for that purpose.—*R. v. WEEKS* (1861), *Le. & Ca.* 18; 30 *L. J. M. C.* 141; 4 *L. T.* 373; 25 *J. P.* 357; 7 *Jur. N. S.* 472; 9 *W. R.* 553; 8 *Cox, C. C.* 455, *C. C. R.*

*Annotation*:—*Refd.* *R. v. Bond*, [1906] 2 *K. B.* 389.

#### xi. Malicious Damage to Property.

**4101. Administering poison to horses—Administration of poison on another occasion.**—On an indictment for administering sulphuric acid to eight horses, with intent to kill them. Prosecutor may give evidence of administering, at different times, to show the intent.—*R. v. MOGG* (1830), 4 *C. & P.* 364.

**4102. Arson—Presence at former incendiary fire.**—A. was indicted for wilfully setting fire to a rick, by firing a gun, close to it, on Mar. 29:—*Held*: evidence that the rick was also on fire on Mar. 28, & that prisoner was then close to it, having a gun in his hand, is receivable to show that the fire on the 29th was not accidental.—*R. v. DOSSETT* (1846), 2 *Car. & Kir.* 306; 2 *Cox, C. C.* 243.

*Annotation*:—*Consd.* *Makin v. A.-G. for New South Wales*, [1894] *A. C.* 57. *Refd.* *R. v. Harris* (1864), 4 *F. & F.* 342; *R. v. Bond*, [1906] 2 *K. B.* 389.

**4103.** ————*R. v. TAYLOR*, No. 3928, *ante*.

**4104.** ————*R. v. HARRIS*, No. 3975, *ante*.

**4105. ————Intent to defraud insurance company—Previous claims.**—Upon a trial for arson with intent to defraud an insurance company, evidence that prisoner had made claims on two other insurance companies in respect of fires, which had occurred in two other houses, which he had occupied previously & in succession, was admitted for the purpose of showing that the fire which formed the subject of the trial was the result of design & not of accident.—*R. v. GRAY* (1866), 4 *F. & F.* 1102.

*Annotations*:—*Consd.* *R. v. Flannagan & Higgins* (1884), 15 *Cox, C. C.* 403; *Makin v. A.-G. for New South Wales*, [1894] *A. C.* 57. *Refd.* *R. v. Francis* (1874), *L. R.* 2 *C. C. R.* 128; *R. v. Bond*, [1906] 2 *K. B.* 389.

design in uttering, although one of them only had possession of the base coin.—*H.M. ADVOCATE v. SUTHERLAND* (GIBSON) (1848), 1 *J. Shaw, Just.* 135. — *SCOT.*

#### PART XII. SECT. 4, SUB-SECT. 2.— B. (h) xi.

**1. Arson—Intent to defraud insurance co.—Conspiracy—Previous suggestion.**—Deft. was tried & convicted upon a charge of conspiring with G. to commit an indictable offence, namely, with intent to defraud, to set fire to a store belonging to deft.:—*Held*: there was legal evidence to support the conviction. At the trial L. swore that nearly a year before the fire in question, deft. suggested to him (L.) that he (L.) should burn down a building belonging to deft., which deft. told L. was insured for \$600:—*Held*: the evidence of L. was of a similar act to that charged, whether it were looked at as an attempt to form a conspiracy with L., which failed, or an attempt to commit the crime of arson itself, the intent of arson being the intent of a conspiracy to commit it.—*R. v. WILSON* (1911), 19 *W. L. R.* 657; 1 *W. W. R.* 272.—*CAN.*

**g. Destroying trees—Similar acts—Subject of another indictment.**—Two indictments were preferred against defts. for feloniously destroying the

fruit trees respectively of M. & C. The offences charged were proved to have been committed on the same night, & the injury complained of was done in the same manner in both cases. Defts. were put on their trial on the charge of destroying M.'s trees; & evidence relating to the offence charged in the other indictment was admitted as showing that the offences had been committed by the same person:—*Held*: the evidence was properly received.—*R. v. McDONALD* (1886), 10 *O. R.* 553.—*CAN.*

#### PART XII. SECT. 4, SUB-SECT. 2.— B. (h) xii.

**h. Bribery—Attempt to bribe police officer—Evidence of previous attempts.**—The applt. was informed against on a charge of attempting to bribe a detective officer on Feb. 21, 1903. At the trial the officer gave evidence of a previous attempt to bribe him on Feb. 4:—*Held*: evidence might be given of a similar offence upon prior date.—*R. v. SMALL* (1903), 5 *W. A. L. R.* 85.—*AUS.*

**k. Conspiracy to defraud municipality—Evidence of other attempts.**—Applt. was indicted & convicted of conspiring with S. & others to defraud a municipality by fraudulent means. The municipality had been defrauded at three different places, & accused

#### xii. Other Cases.

**4106. Making false declaration—Evidence of contemporaneous forgeries to support declaration.**—

Where a person is indicted for having made a false declaration as to a fire having taken place at his house, evidence may be given, that, with the declaration, he sent a certificate, which stated the fire to have occurred, & that the signatures to that certificate are all forgeries, as this evidence may go to show that the declaration was wilfully false.—*R. v. BOYNES* (1843), 1 *Car. & Kir.* 65.

**4107. ————Evidence of previous false declaration.**—Applt. was convicted of suborning J. to make a false statement for insertion in a register of births. At the trial evidence was admitted that applt. had made a false entry in a register of births on a previous occasion:—*Held*: the evidence, being relevant to the issue in this case, was properly admitted.—*R. v. SALDANHA* (1920), 90 *L. J. K. B.* 97; 123 *L. T.* 624; 85 *J. P.* 47; 26 *Cox, C. C.* 630, *C. C. A.*

**4108. Living on earnings of prostitution—Charge made as to one day—Evidence as to other days.**—*R. v. HILL, R. v. CHURCHMAN*, No. 3910, *ante*.

**4109. Betting on licensed premises—Betting slips found—Evidence of similar slips in use on premises at previous dates.**—Deft. was indicted for offences against the Betting Act, 1853 (c. 119), committed on Nov. 13. He had been arrested in a public-house, & upon him were found betting slips containing the names of horses, the amounts for which they were to be backed, & the names of the persons backing them. In the parlour of the public-house were found a large number of betting slips of the same character as those found on deft. Evidence was admitted to show that betting slips similar to those found on deft. & to those found on the premises on Nov. 13 had previously to that date been frequently received from customers at the public-house by the licensee, & had been forwarded on by him to deft.:—*Held*: such evidence was admissible.—*R. v. MEAN* (1904), 69 *J. P.* 27; 21 *T. L. R.* 172, *Annotation*:—*Refd.* *R. v. Rodley*, [1913] 3 *K. B.* 468.

**4110. Permitting persons of disorderly character to assemble on licensed premises—Assembly of prostitutes—Evidence of previous attendances of**

could have been convicted of conspiracy with a different person in each place. There was no evidence to show that these persons were connected in any way or even knew one another:—*Held*: evidence regarding the further offence was admissible.—*RAPLEY v. R.*, [1914] 17 *W. A. L. R.* 36.—*AUS.*

**1. Conspiracy to defraud—Other attempts.**—*R. v. SHEPPARD* (1893), *Q. R.* 4 *Q. B.* 470.—*CAN.*

**m. Secret commission—Evidence of previous payments of secret commission.**—Accused, a conductor in the employ of C. N. R., whose duty it was to spot cars for the use of farmers under the Grain Act, was convicted for having accepted certain sums of money from farmers for spotting cars at a railway station on the railway, where there was no agent:—*Held*: evidence of other farmers, whose names were not mentioned in the charge, that they had paid the accused for spotting cars, although not admissible to prove the main facts of the case, was admissible to rebut by anticipation the defence of innocent motive & want of design, & to show the state of mind of the parties with regard to the facts proved.—*R. v. HOWES* (1914), 30 *W. L. R.* 60; 7 *W. W. R.* 683; 20 *D. L. R.* 283.—*CAN.*

**n. "Wrongfully & without legal authority besetting."**—Previous acts of

**Sect. 4.—Relevant facts—Admissibility of evidence:**  
*Sub-sect. 2, B. (h) xii. & C.; sub-sects. 3, 4 & 5, A.]*

**same prostitutes.]**—On the hearing of an information before two justices of the peace, preferred under the 9 Geo. 4, c. 61, against a person licensed to sell excisable liquors by retail, for that he did "unlawfully & knowingly permit & suffer persons of notoriously bad character to assemble & meet together in his house & premises":—*Held*: it having been proved that on the occasion in question a number of prostitutes assembled & met together at the house of deft., it was admissible evidence against him that on a previous occasion several of the same prostitutes assembled & met together at his house.—*PARKER v. GREEN* (1862), 2 B. & S. 299; 31 L. J. M. C. 133; 6 L. T. 46; 26 J. P. 247; 8 Jur. N. S. 409; 10 W. R. 316; 9 Cox, C. C. 169; 121 E. R. 1084.

**4111. Libel—Evidence of other similar libels.]**—To prove deft. author of a libel, evidence of other libels written by the same person & concerning the same subject may be received.—*R. v. PEARCE* (1791), Peake, 106.

*See, further, LIBEL & SLANDER.*

**4112. Aiding & abetting bankruptcy offence—Purchase at undervalue—Evidence of previous purchase at undervalue.]**—When buying at an undervalue is charged as aiding & abetting a bankruptcy offence, evidence of a previous pur-

*accused.]*—In a prosecution for "wrongfully & without legal authority be-setting," where the intention of defts. is in question, evidence of previous acts of the accused is admissible.—*TOPPIN v. FERON* (1907), 43 I. L. T. 190.—*IR.*

**o. Perjury & subornation of perjury**  
*—Previous attempts to suborn other persons not connected with charge.]*  
*—Where accused was charged with perjury & subornation of perjury, & evidence was admitted, though not objected to at the trial, to the effect that accused had also attempted to suborn other persons not connected with the charge:—Held*: its admission must necessarily have, & had, in fact, prejudiced the accused, & that the conviction should therefore be quashed.—*R. v. ALI AHMED* (1913), T. P. D. 500.—*S. AF.*

**p. Sedition—Previous designs evidenced by subsequeat overt acts.]**—It is not objectionable in an indictment under 11 & 12 Vict. c. 12, to libel a previous design as evidenced by subsequent overt acts.—*H.M. ADVOCATE v. CUMMING* (1848), J. Shaw, Just. 17.—*SCOT.*

**q. Poaching—Previous convictions for poaching offences.]**—In a case of poaching, previous convictions are relevant articles in evidence for the jury in determining whether the purpose for which a panel unlawfully entered land was to take or destroy game.—*H.M. ADVOCATE v. GRANGER* (1863), 4 Irv. 432; 36 Sc. Jur. 3.—*SCOT.*

**r. Riotous mob acting of common purpose—Meeting held previous to date charged—Events at meeting—Subsequent action by authorities.]**—Upon a charge that the panels did form part of a riotous mob acting of common purpose, proof allowed that a meeting was held previous to the date in the indictment of the alleged mobbing & rioting, what took place at the meeting, & the action of the authorities subsequent to it.—*H.M. ADVOCATE v. MACLEOD* (1888), 1 White, 554.—*SCOT.*

**s. Keeping bawdy house—Evidence of bad reputation.]**—On a charge of keeping a bawdy house, evidence of the bad reputation of the house is inadmissible.—*R. v. PINDER*, [1923] 2 W. W. R.

chase by the accused at an undervalue is admissible against him.—*R. v. FINEGOLD* (1923), 17 Cr. App. Rep. 75.

**C. Criminal Acts of Accused subsequent to Charge.**

**4113. General rule.]**—*R. v. SMITH*, No. 4081, ante.

**4114. Abortion.]**—*R. v. CALDER*, No. 3993, ante.

**4115. —.]**—*R. v. DALE*, No. 3998, ante.

**4116. —.]**—*R. v. PALM*, No. 3995, ante.

**4117. —.]**—*R. v. THOMSON*, No. 3997, ante.

**4118. Wounding.]**—*R. v. MAHONY*, No. 4019, ante.

**4119. Poisoning.]**—*R. v. GEERING*, No. 3937, ante.

**4120. —.]**—*R. v. HEESON*, No. 3882, ante.

**4121. —.]**—*R. v. ARMSTRONG*, No. 3988, ante.

**4122. Rape.]**—*R. v. REARDEN*, No. 3914, ante.

**4123. Stabbing.]**—*R. v. CRICKMER*, No. 3920, ante.

**4124. Incest.]**—*R. v. STONE*, No. 4012, ante.

**SUB-SECT. 3.—ACTS OF KNOWN THIRD PARTY.**

**4125. Betting on licensed premises—Conviction of bookmaker—Using same premises.]**—On a summons against the holder of a justices' licence for suffering his premises to be used in contravention of the Betting Act, 1853 (c. 119), the conviction of a bookmaker for using the premises on the

997; [1923] 3 D. L. R. 707; 40 Can. Crim. Cas. 272.—*CAN.*

**PART XII. SECT. 4, SUB-SECT. 2.—C.**

**4113 i. General rule.]**—The conduct of an accused subsequent to the commission of the act charged is highly important & relevant whenever it tends to throw light upon that act, & the motive with which it was committed, & the fact that the evidence bringing out such conduct shows incidentally the commission of acts of dishonesty or crime other than the one with which the accused is charged does not affect its admissibility.—*R. v. LETAIN*, [1918] 1 W. W. R. 505; 29 Can. Crim. Cas. 389.—*CAN.*

**t. False pretences.]**—The prisoner was charged on an indictment containing two counts: (1) obtaining money partly by a false pretence & partly by a wilfully false promise, & (2) obtaining money by false pretences. He gave a cheque on a bank where he had no account in part payment of a buggy. Evidence was given of several similar transactions at short intervals after the commission of the offence charged:—*Held*: evidence of the subsequent similar transactions was admissible.—*R. v. ROWE* (1909), 9 S. R. N. S. W. 747.—*AUS.*

**a. Indecent assault.]**—Upon the trial of prisoner, a school teacher, for an indecent assault upon one of his scholars, he forbade the prosecutrix telling her parents what had happened. After the prosecutrix had given evidence of the assault, evidence was tendered of the conduct of the prisoner towards her subsequent to the assault:—*Held*: the evidence was admissible as tending to show the indecent quality of the same transaction as that with which prisoner was charged.—*R. v. CHUTE* (1882), 46 U. C. R. 555.—*CAN.*

**b. Inducing witness to give false evidence.]**—*DOE d. CRAIG v. ANGLESEA* (KARL) (1743), 17 State Tr. 1139.—*IR.*

**PART XII. SECT. 4, SUB-SECT. 3.**

**c. Murder—Presence of witness at riot—Evidence of alibi.]**—Prisoner being indicted for the murder of H., the principal witness for the Crown stated that the crime was committed

on Dec. 1, 1859, on a bridge over the river D., & that prisoner & S., who had been previously tried & acquitted, threw H. over the parapet of the bridge into the river. Counsel for the prisoner then proposed to prove by D. that S. was at his place, fifty miles off, on that evening, but the judge rejected the evidence, saying that S. might be called, & if contradicted might be confirmed by other testimony. S. was called, & swore that he was not present at the time, but he not being contradicted D. was not examined:—*Held*: the presence of S. was a fact material to the inquiry, & D. should have been admitted when tendered.—*R. v. BROWN* (1861), 21 U. C. R. 330.—*CAN.*

**d. Presence of a witness at particular place at particular time.]**—The statement of a witness for the defence, that a witness for the prosecution was at a particular place at a particular time & consequently could not then have been at another place where the latter states he was & saw the accused persons, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross-examined on the point.—*R. v. SAKHARAM MUKUNDJI* (1874), 11 Bom. 166.—*IND.*

**e. —.]**—Upon a trial for stabbing with intent to kill, evidence having been given that the offence was committed by the prisoner A., & B. being present, proof was admitted of an alibi of A. & B.—*R. v. NASH* (1832), 1 Craw. & D. 178.—*IR.*

**f. —.]**—Prisoners were indicted with one M., who was not on his trial, as principals in the first & second degrees, & some of the Crown witnesses stated that he was present at the commission of the crime:—*Held*: the prisoners might examine witnesses for the purpose of proving that M. was not present.—*R. v. M'KENNA* (1838), Craw. & D., Abr. C. 579.—*IR.*

**g. Riot—Presence of witness at riot—Evidence of others as to his presence.]**—Prisoners, with C., who was not on his trial, were indicted for a riot, & one of the witnesses for the Crown deposed that he saw C. at the riot:—*Held*: prisoners were entitled to examine witnesses to prove that C.



occasion in question for the purpose of betting with persons resorting thereto is not admissible in evidence for the purpose of proving that betting took place on the premises.—*TAYLOR v. WILSON* (1911), 106 L. T. 44; 76 J. P. 69; 28 T. L. R. 97; 22 Cox, C. C. 647, D. C.

#### SUB-SECT. 4.—ACTS OF UNKNOWN PERSON.

**4126. Forgery—In same handwriting.]**—Upon an indictment charging one prisoner with having uttered a forged order, & charging another with having incited the former to the commission of such felony, evidence of other orders of the same character & in the same handwriting having been previously uttered by some person unknown, is not admissible against either of the prisoners, although the handwriting was proved to be that of the accessory.—*R. v. SULLIVAN & PEARCE* (1846), 2 Cox, C. C. 80.

**4127. Arson—Previous attempts.]**—Under an indictment for arson, where the prisoner was charged with wilfully setting fire to her master's house:—*Held*: two previous & abortive attempts to set fire to different portions of the same premises were admissible, though there was no evidence to connect the prisoner with either of them.

This evidence may be used for the purpose of showing that the present fire could not have been the result of accident (*SIR F. POLLOCK, C.B.*)—*R. v. BAILEY* (1847), 9 L. T. O. S. 271; 2 Cox, C. C. 311.

**4128. Three card trick—Return of money to**

was not at the riot.—*R. v. CAMPBELL* (1831), *Craw. & D. Abr.* C. 581, n.—*IR.*

**h. Forgery—Finding papers bearing counterfeit marks—In house of witness for defence—Accused having similar papers in his possession.]**—During the course of a police investigation into a complaint of theft, the house of accused was searched, & a bundle of papers, about 58 in number, were found, which were alleged to be forgeries, or preparations for forgeries. Accused was thereupon committed to the Ct. of Session on a charge under sect. 475 of the Penal Code. A few days before the trial of accused the police searched the house of S., who was a witness for the defence, & there discovered a batch of suspicious papers which were produced at the trial, & put in as evidence against accused:—*Held*: the suspicious papers found in S.'s house were not admissible in evidence against the accused.—*R. v. ABAJI RAMCHANDRA* (1890), 1 L. R. 15 Bom. 189.—*IND.*

**k. Brothel keeping—Evidence of female frequenting.]**—A woman was charged in Scotland with keeping & managing as a brothel the house occupied by her. At the trial a police constable in his evidence stated that during the period in question he had observed a woman known to him as G. enter the house. He was then asked what he knew of the character of G., who was not tendered as a witness. The police magistrate sustained an objection to the question, & found the charge not proven:—*Held*: the evidence was competent as to the character of persons frequenting the house, & should have been admitted.—*MACPHERSON v. CRISP*, [1919] S. C. (J.) 1.—*SCOT.*

**l. Murder by poisoning—Evidence of person tasting same draught as deceased took.]**—In an indictment against B., for the murder of D. by having administered to her a potion containing poison, F., who had tasted a portion of the same draught as the deceased had taken, was called as a

witness, to describe her symptoms. G., a medical witness, was asked as to the symptoms of F.:—*Held*: such evidence was admissible, the medical witness, G., having heard the witness, F., give her evidence as to the symptoms, might be asked whether in his opinion as a medical man, such symptoms were those of a person under the influence of poison.—*R. v. THOMPSON* (1849), 1 Ir. Jur. 207.—*IR.*

**m. Reset—Evidence as to character of person from whom accused received goods.]**—In a suspension of a conviction of the crime of reset:—*Held*: it was competent for prosecutor to lead evidence as to the character of the person from whom the accused in his declaration stated that he had received the goods alleged to have been resetted, & who was not in the Crown list of witnesses, & though cited for the panel, did not appear.—*GRACIE v. STUART* (1884), 11 R. (Ct. of Sess.) 22; 21 Sc. L. R. 526.—*SCOT.*

**n. Incest—Evidence of mother as to paternity of daughter.]**—Accused pleaded not guilty to a charge of incest alleged to have been committed with his natural daughter. The mother of the girl was called as a witness for the Crown, stated that she had had intercourse with R. resulting in the birth of the girl, & in cross-examination denied having been found under compromising circumstances with a man other than the prisoner. For the defence, a witness was called & asked about the conduct of the mother with this other man. This evidence was objected to, & was held to be inadmissible, on the ground that the defence was bound by the negative answer given by the witness for the Crown:—*Held*: the evidence should have been admitted as being relevant to the issue as to who was the father of the girl, & not going only to the character of the witness.—*R. v. RICHARDS* (1908), 3 Buch. A. C. 285.—*S. AF.*

**prosecutor.]**—Whether a particular incident in the play of the three card trick is “a fraud or unlawful device or ill practice” within Gaming Act, 1845 (c. 109), s. 17, is a question for the jury, provided that the cheating alleged must take place during the play. Evidence that immediately after prosecutor complained of being defrauded a stranger gave him money is admissible as part of the *res gestæ*.—*R. v. MOORE* (1914), 10 Cr. App. Rep. 54.

#### SUB-SECT. 5.—STATEMENTS OF PERSONS OTHER THAN ACCUSED.

##### A. In General.

**4129. False denial by wife—In absence of husband.]**—The false denial of the husband by the wife, though not directly proved to have been by his authority, or in his hearing, to custom-house officers coming to his house to search for uncustomed goods, immediately after discovered by them on his premises, is admissible evidence, as a part of the *res gestæ*, on the trial of an information for penalties against the husband, for possessing the goods with a guilty knowledge.—*A.-G. v. GOOD* (1825), *M'Cle. & Yo.* 286; 148 E. R. 421. *Annotations*:—*Reid. Re Disputed Adjudication* (1850), 15 L. T. O. S. 8. *Mentd. Simpson v. Clayton* (1836), 2 Bing. N. C. 467.

**4130. Evidence of convicted persons—To establish their alibi—Admissible on trial of prisoner for same offence.]**—Where evidence is given that persons previously convicted of an offence, which is now charged to have been committed by prisoner

#### PART XII. SECT. 4, SUB-SECT. 5.—A.

**a. Statement as to eleven sheep—Charge only as to theft of two.]**—If a conversation arise between two persons relating to a large quantity of goods or a great number of animals, some only of which a prisoner is charged with stealing or feloniously receiving, the conversation is admissible in evidence.—*R. v. KING* (1871), 10 N. S. W. S. C. R. 308.—*AUS.*

**p. Murder by poisoning—Statements of deceased—Whilst suffering pain.]**—*R. v. BERUBE* (1852), 3 L. C. L. 212.—*CAN.*

**q. Statement of constable—Made when searching accused's house.]**—Where accused was charged with attempting to murder her child, the chief constable's statement, he having gone to search the house of accused, that he had information that the accused was about to kill the child, was most improperly admitted as evidence against the accused.—*R. v. CHIMA* (1871), 8 Bom. 164.—*IND.*

**r. Statement as to declarations of prosecutor.]**—Declarations of prosecutor may be given in evidence by another person, although prosecutor himself has been examined.—*R. v. SHORR* (1842), *Arm. M. & O.* 322.—*IR.*

**s. Statement by resetter—When arrested—To identify him as party whose house other prisoners frequented.]**—Two panels were charged with theft of two £50 notes & a third was charged in the same indictment with reset & fugitated for non-appearance:—*Held*: a letter written & statements made by the alleged resetter when taken into custody in consequence of uttering one of the notes were receivable as evidence on the trial of the other panels to the effect of identifying him as a party whose house they frequented.—*H.M. ADVOCATE v. BURNET* (1851), 24 Sc. Jur. 12.—*SCOT.*

**t. Contradictory statements.]**—On a trial for theft the Crown, anticipating that a witness would make an adverse statement, presented in evidence,



*Sect. 4.—Relevant facts—Admissibility of evidence: Sub-sect. 5, A., B. & C.]*

at the bar, were in fact the guilty parties, the evidence of such convicted persons, though establishing only their own alibi, is admissible.—*R. v. DYTCHÉ* (1890), 17 Cox, C. C. 39.

*B. Statements made in Absence of Accused.*

**4131. To explain material facts.]**—In a case of manslaughter it was proved that deceased was at an inn for three days, & that the innkeeper asked him what his name was, & that, while there, letters arrived at the inn directed in that name, which letters were delivered to deceased, & received by him:—*Held*: the innkeeper might be asked what name deceased gave.—*R. v. TIMMINS* (1836), 7 C. & P. 499.

**4132. To fix time of conversation with accused.]**—Where it was material to ascertain the time when a certain conversation took place between prisoner & a witness, a remark made subsequently by the witness to another person, in prisoner's absence, was admitted as evidence, for the purpose of establishing the period of such conversation.—*R. v. RICHARDSON* (1846), 1 Cox, C. C. 361.

**4133. To rebut case for defence.]**—In an indictment for perjury, the perjury was alleged to have been committed on the trial of an indictment against B., for setting fire to a certain barn

against objection, before calling him, a written record of a statement he had made contradictory to his expected adverse statement:—*Held*: the evidence was inadmissible & its admission was a good ground for setting aside the conviction.—*R. v. MARCENIUK*, [1923] 3 W. W. R. 758.—**CAN.**

**PART XII. SECT. 4, SUB-SECT. 5.—B.**

*General rule.]*—statements made in the absence of the accused by persons engaged in an unlawful act are not evidence against the accused who had given directions for such act, unless it appear that all the parties were engaged on such act with a common unlawful object.—*R. v. FETTERINI* (1855), 7 Cox, C. C. 79.—**IR.**

**4131 i. To explain material facts.]**—Crown tendered in evidence a conversation between a detective officer & prisoner in which the officer told prisoner that Mrs. P. had made a statement regarding prisoner's whereabouts at a certain time. Prisoner denied Mrs. P.'s statement. After objection the conversation was admitted.

In his summing up judge cautioned the jury that as prisoner had denied the truth of what Mrs. P. was alleged to have said it was no evidence against him of the fact:—*Held*: the evidence was admissible.—*R. v. EYLES* (1917), 17 S. R. N. S. W. 377.—**AUS.**

**b. — Keeping brothel—Conversation of persons not called as witnesses—Overheard by policemen.]**—Accused was charged with keeping a brothel, contrary to Criminal Law Amendment Act, 1885, s. 3. Two policemen, who had been stationed outside the house to watch the premises, spoke to conversations tending to incriminate accused which they had overheard passing between inmates of the house outwith the presence of accused. None of these persons were called as witnesses:—*Held*: that the evidence was competent to explain the character of the house.—*M'LAREN v. MACLEOD* (1913), 7 Adam, 110.—**SCOT.**

**c. Extra-judicial confessions of accused's sister.]**—*R. v. GUAY* (1874), 18 L. C. J. 306.—**CAN.**

**d. Complaint of injured person—**

*Rape.]*—While the injured person should make her complaint as soon as possible after the commission of the offence, yet no specific time being fixed therefore by law, evidence may be admitted of a complaint made to her mother seven days after the offence; but the jury may & should weigh the interval which elapsed before complaint was made, when considering the probability of his truth.

On a trial for rape that fact that the injured person made a complaint & the particulars or detail of the complaint are admissible as evidence in chief for the prosecution to confirm the testimony of the injured person & disprove consent on her part.—*R. v. RIENDEAU* (1900), Q. R. 9 Q. B. 147; Q. R. 10 Q. B. 584.—**CAN.**

**e. Keeping gaming house—Confession by person found by police in house.]**—Upon the trial of accused on a charge of unlawfully keeping a common gaming house:—*Held*: evidence of a confession made by one of the persons found by the police in the house, implicating accused, was not receivable as evidence against the accused.—*R. v. SEE WOO* (1910), 13 W. L. R. 625.—**CAN.**

**f. Lottery—Representations by agents to customers that lots were drawn.]**—*R. v. LUMGATE* (1911), 20 O. W. R. 563; 3 O. W. N. 309; 19 Can. Crim. Cas. 123.—**CAN.**

**g. Sworn information as to assailant—Feloniously shooting with intent to murder.]**—Indictment for feloniously shooting at M., with intent to murder him. It appeared that M., after the offence was committed, & shortly before his death, swore informations, in which he stated that he believed one P. was the person who fired at & wounded him; & on the following day, M. swore a further information in the presence of P. in which he positively identified P. as the person who fired the shot. Prisoner was not present when any of the informations were taken:—*Held*: the latter information might be proved, & read in evidence in favour of prisoner.—*R. v. M'TEAGUE* (1841), 2 Craw. & D. 252.—**IR.**

**h. Statement by first wife as to her religious belief—Bigamy.]**—On a trial for bigamy, statements made by the

of one P. A witness for the prosecution, called to prove that B. was not at the barn at the time it was set on fire, & consequently that the evidence of deft., who swore at the trial that he had seen B. set it on fire, was false, admitted on cross-examination that he had given a different account on the former trial, & had on that occasion corroborated the testimony of the present deft., but now alleged that he was persuaded by W., who had left England, to forswear himself on the former trial:—*Held*: on re-examination the witness might be asked whether he had made a statement to C., immediately after the trial respecting his evidence & respecting W., & C. might be called to corroborate him as to the general fact; but the particulars of the statement to C. were inadmissible, & a person who was present at the interview between the witness & W. might be called to prove the fact of the conversation, but not the particulars.—*R. v. NEVILLE* (1852), 6 Cox, C. C. 69.

**4134. —.]**—*R. v. HORSFORD* (1898), cited in 62 J. P. at p. 459.

*C. Statements made in Presence of Accused.*

**4135. When admitted by accused—Receivable in evidence.]**—Upon the trial of a prisoner for feloniously receiving stolen property, a list of the stolen articles which prisoner had bought, was received in evidence in order to show that he had bought at an under value. The circumstances

woman to whom, it appeared, prisoner had first been married, but which was not made in his presence, as to the religious persuasion to which she belonged are not admissible in evidence.—*R. v. MILLS* (1842), 2 Craw. & D. 391.—**IR.**

**k. Admission of publican's assistant at inquest—Publican charged in criminal proceedings.]**—The admissions of a publican's assistant at a coroner's inquest, when a past & gone transaction on the publican's premises is being investigated, will not affect the publican with criminal liability on being proved in criminal proceedings subsequently instituted.—*DWYER v. LARKIN* (1904), 39 J. L. T. 40.—**IR.**

**l. Statement as to murder—Made by child present at the crime—Within 48 hours of crime being committed.]**—In a trial for murder a child of about 7 years of age, who was present at the time of the alleged murder having been examined as a witness:—*Held*: it was competent to ask the witnesses subsequently examined what the child said in reference to the murder, the question referring to a period immediately subsequent to or within 48 hours of the commission of the crime.—*H.M. ADVOCATE v. STEWART* (1855), 2 Irv. 166; 27 Sc. Jur. 408.—**SCOT.**

**m. Statement by absent person to witness.]**—Statements made by an absent person to a witness outwith the presence of an accused:—*Held*: not admissible in evidence, although it was impossible to adduce the absent person who had fled to America, forfeited his bail-bond & refused to return.—*H.M. ADVOCATE v. MCCONNELL* (1887), 1 White, 412.—**SCOT.**

**n. Sworn statement of witness—Who denied all knowledge of crime at trial.]**—An accused person was convicted of cattle stealing, mainly upon the evidence of a little boy. Other witnesses for the prosecution denied all knowledge of the matter, but a sworn statement made by one such witness to the police was admitted in evidence against the accused though not made in his presence:—*Held*: proceedings were irregular.—*R. v. BAUGWEZA HLANGUZA* (1922), 43 N. L. R. 398.—**S. AF.**

under which the list was written were as follows: A police constable asked prisoner to consider when he had bought the stolen property, to which prisoner replied that his wife should make out a list of it, & on the next day prisoner's wife in her husband's presence handed to another constable the list tendered in evidence, saying in her husband's hearing, "This is a list of what we bought, & what we gave for them":—*Held*: the list was clearly admissible in evidence.—*R. v. MALLORY* (1884), 13 Q. B. D. 33; 53 L. J. M. C. 134; 50 L. T. 429; 48 J. P. 487; 32 W. R. 721; 15 Cox, C. C. 457, C. C. R.

**4136.** ———.]—Where one of two prisoners in custody on a charge against them jointly has voluntarily made & signed a statement implicating the other, & such statement is read over to prisoner implicated, & the latter, after being cautioned, makes a confession which is taken down in writing, & signs it when so written, the statement of the one prisoner & the admission of the other may be given in evidence on the trial of the latter.—*R. v. HIRST* (1896), 18 Cox, C. C. 374; *sub nom.* *R. v. GODDARD & HURST*, 60 J. P. 491.

*Annotations*:—*Refd.* *Ibrahim v. R.*, [1914] A. C. 599; *R. v. Gardner & Hancox* (1915), 85 L. J. K. B. 206.

**4137.** ———.]—The contents of a statement alleged to have been made in the presence of a prisoner cannot be given in evidence unless & until the judge has satisfied himself, from the evidence contained in the depositions or given at the trial, that there is evidence, fit to be submitted to the jury, that prisoner by his answer to the statement, whether given in words or by conduct, acknowledged the truth of the statement.

If the contents of the statement are admissible in evidence in accordance with the above rule, the jury should be directed that they are entitled to take the statement into consideration as evidence

in the case, not because the statement is evidence of the matters contained in it, but solely because of prisoner's acknowledgment of its truth.—*R. v. NORTON*, [1910] 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 26 T. L. R. 550; 54 Sol. Jo. 602; 5 Cr. App. Rep. 65, C. C. A.

*Annotations*:—*Apld.* *R. v. Hickey* (1911), 27 T. L. R. 441. *Refd.* *R. v. Atherton* (1910), 5 Cr. App. Rep. 233; *R. v. Stroud* (1911), 7 Cr. App. Rep. 38; *R. v. Christie*, [1914] A. C. 545; *R. v. Adams* (1922), 17 Cr. App. Rep. 77. *Mentd.* *Ibrahim v. R.*, [1914] A. C. 599; *R. v. Altschuler* (1915), 11 Cr. App. Rep. 243; *R. v. Tonks* (1915), 114 L. T. 81.

**4138.** ———.]—Two persons accused of the same offence were placed in adjoining cells, a communication opening being left open between them, & police evidence was given of their conversation:—*Held*: the evidence of the conversation was admissible.

A practice under which the police read over a statement by an accused person, made after he had been arrested & separately charged, incriminating another person arrested & charged separately with the same offence, to the latter, after both had been jointly charged, with the object of making that statement & the reply thereto of the person incriminated evidence against him, is a practice which ought not to be followed, although evidence of the statement & reply cannot be said to be inadmissible; & the judge ought in his discretion to exclude such evidence.—*R. v. GARDNER & HANCOX* (1915), 85 L. J. K. B. 206; 114 L. T. 78; 80 J. P. 135; 32 T. L. R. 97; 25 Cox, C. C. 221; 11 Cr. App. Rep. 265; *sub nom.* *R. v. HANCOX*, 60 Sol. Jo. 76, C. C. A.

*Annotation*:—*Mentd.* *R. v. Pilley* (1922), 127 L. T. 220.

**4139. When not denied by accused—Receivable as evidence of admission by conduct or demeanour.]**

—Observations made by a wife to her husband, upon a subject which afterwards becomes matter

#### PART XII. SECT. 4, SUB-SECT. 5.—C.

**4139 i. When not denied by accused—Receivable as evidence of admission by conduct or demeanour.]**—Statements made in a prisoner's hearing are admissible in evidence against him although the witness could not see the prisoner & had no opportunity of observing his demeanour.—*R. v. BURNS & MACK* (1877), Knox, 183.—*AUS.*

**4139 ii.** ———.]—At the trial of a prisoner for stealing boots evidence was given by L., subject to the objection of its admissibility, that he had heard P. say in prisoner's presence in another ct. that prisoner had brought to him certain boots like samples then produced by P., that prisoner thereupon requested a comparison of these samples with samples of the stolen boots produced by L., that P., L. & the prisoner made the comparison, that P. said he was confident that both samples belonged to the same lot of boots, & that to this prisoner said nothing:—*Held*: none of the evidence objected to was properly admitted except prisoner's request for a comparison, & the fact of comparison, which by themselves were of no weight.—*R. v. ROONEY* (1884), 10 V. L. R. 227.—*AUS.*

**4139 iii.** ———.]—On the trial of a prisoner for an assault on a child under the age of ten years with intent carnally to know her, the child gave evidence not upon oath. The evidence of the child was conclusive as to the prisoner's guilt, but it was contended that her evidence was not corroborated by some material evidence. The evidence given by the Crown was as follows:—The child immediately after she had been assaulted made a complaint to her mother. Shortly afterwards Mrs. G., the mother, said to prisoner, "How dare you assault my

little girl?" Prisoner said, "It was not me, it was my cousin." The little girl said, "Yes, mummy, it was this man." This was written half an hour after the offence, & there was no suggestion that prisoner had been told by any one that his cousin had assaulted the child. When arrested the constable took him to Mrs. G.'s house, & the child seeing him said, "That him." The prisoner said nothing. When asked by the constable about the conversation with Mrs. G. he said he had not seen Mrs. G. on the day the offence was committed, though when giving evidence at the trial he admitted having seen Mrs. G. that day:—*Held*: this was sufficient corroborative evidence to support conviction.—*R. v. PUCKERIDGE* (1893), 14 N. S. W. L. R. 61; 9 N. S. W. W. N. 61.—*AUS.*

**4139 iv.** ———.]—On a trial of W. on a charge of having wilfully murdered M. oral evidence of statements made by M. in W.'s presence & taken down in writing, was tendered & objection taken. The evidence was admitted, & prisoner convicted:—*Held*: when such evidence is tendered, it is for the ct. to decide whether the surrounding circumstances are such that an inference that the prisoner, after hearing the statements, substantially admitted the truth, of the whole, or some part thereof, could be drawn by the jury from the silence, conduct or demeanour of the prisoner, or from the character of any observations or explanations he thought fit to make; & that unless there is some evidence to justify such an inference, the statements should not be allowed to be given. The surrounding circumstances showed that the evidence objected to was properly admitted against W.—*R. v. WARTON*, [1905] S. R. Q. 167.—*AUS.*

**4139 v.** ———.]—A statement by the man that was assaulted, made immediately after the assault & in the presence of the accused, is admissible in evidence.—*R. v. DRAIN* (1892), 8 Man. L. R. 535.—*CAN.*

**4139 vi.** ———.]—On a trial for rape, the evidence of the prosecution was that prisoner knocked her down, got on her, pulled up her clothes, & committed a rape on her. A witness proved that prisoner stated that he did no more than her husband would have done. Evidence was admitted of a statement made by prisoner's counsel at a previous trial on behalf of prisoner, that prisoner had had connection with the woman with her consent, & that he had paid her \$1.00:—*Held*: there was sufficient evidence of the commission of the offence; & the statement of the prisoner's counsel was properly admitted.—*R. v. BEDERE* (1891), 21 O. R. 189.—*CAN.*

**4139 vii.** ———.]—The fact of the silence of a person accused of receiving stolen property, upon hearing statements made as to his alleged guilt by the person who stole the property, is admissible in evidence as leading to the inference of his guilty knowledge.—*Re COHEN* (1904), 8 O. L. R. 143; 24 C. L. T. 359; 4 O. W. R. 103; 8 Can. Crim. Cas. 251.—*CAN.*

**4139 viii.** ———.]—Statements not coincident, in point of time, with the occurrence of the assault, but uttered in the presence & hearing of accused, & in such circumstances that he might reasonably have been expected to have made some explanatory reply to remarks in reference to them, are admissible as evidence.—*GILBERT v. R.* (1907), 38 S. C. R. 284.—*CAN.*

**4139 ix.** ———.]—B., who died before the trial, was sworn to have been

**Sect. 4.—Relevant facts—Admissibility of evidence:**  
**Sub-sect. 5, C.]**

of a criminal charge against him, & to which he gave no direct reply, may be opened to the jury by counsel for the prosecution.—*R. v. SMITHIES* (1832), 5 C. & P. 332.

**4140.** ———. **Statement of wife.]—***R. v. BARTLETT* (1837), 7 C. & P. 832.

—The only principle of admitting what A. says in the presence of B. in evidence against B. is founded upon the supposition that B. would say, "It is not true," if it was not true, & his silence goes to the jury as evidence from which an assent may be inferred.—*R. v. DUFFIELD* (1851), 5 Cox, C. C. 404; *subsequent proceedings, sub nom. R. v. ROWLANDS*, 17 Q. B. 671.

**4142.** ———. **—.]—**An admission of his guilt, made by the thief while in custody, in the presence of the receiver, is evidence against the receiver.—*R. v. Cox* (1858), 1 F. & F. 90.

**4143.** ———. **—.]—**There being no other evidence but the woman's that prisoner incited her to take the excessive doses except that her father accused him of giving his daughter such things to produce abortion & that he did not deny it:—*Held*: this was some corroborative evidence, even assuming the woman to be in the position of an accomplice requiring corroboration.—*R. v. CRAMP* (1880), 14 Cox, C. C. 390; *affd.*, 5 Q. B. D. 307, C. C. R.

**Annotations:—***Consd. R. v. Tate*, [1908] 2 K. B. 680. *Mentd. R. v. Brown* (1899), 63 J. P. 790; *R. v. Bickley* (1909), 2 Cr. App. Rep. 53; *R. v. Turner* (1910), 4 Cr. App. Rep. 203.

**4144.** ———. **—.]—**The ct. will not exclude a statement made in prisoner's presence by another party to a third person, merely because some inducement has been held out to that party to make it; but very little weight ought to be attached to the fact of no answer being given to such statement by prisoner, as he would not know whether it would be better for him to be silent or not.—*R. v. JANKOWSKI* (1886), 10 Cox, C. C. 365.

**4145.** ———. **—.]—**Prisoner was indicted for the murder of her infant child. She had made a statement to her husband, who took her to a police station, & in her presence, repeated her statement to a police officer. Prisoner, on hearing what her husband said, made no reply, but burst into tears:—*Held*: the statement made by the

husband was admissible.—*R. v. BEXLEY* (1906), 70 J. P. 263.

**4146.** ———. **—.]—**Prisoner was indicted for stealing & receiving larc. Evidence was given that prisoner & C. were charged together with stealing & receiving the larc. In reply to the charge C. said, "Yes, it's quite right; I sold them for H." (prisoner). Prisoner said nothing. The police then read over to prisoner a statement previously made by C. Prisoner again made no reply, though he had an opportunity of denying the allegations contained in the statement or of making any explanation:—*Held*: the evidence of C.'s statement was admissible as to show prisoner's conduct & demeanour on hearing it.—*R. v. BROMHEAD* (1906), 71 J. P. 103, C. C. R. *Annotation:—**Refd. R. v. Thompson*, [1910] 1 K. B. 640.

**4147.** ———. **—.]—**Should be excluded unless some evidence of admission by accused.]—*R. v. NORTON*, No. 4137, *ante*.

**4148.** ———. **—.]—**The statement signed by the two accomplices was wrongly admitted by the recorder as evidence against applt. In accordance with the principle laid down in *R. v. Norton*, No. 4137, *ante*, the judge at the trial should satisfy himself that such statements are admissible on the ground that prisoner has assented to them, before he allows them to be given in evidence (*BANKES, J.*).—*R. v. STROUD* (1911), 7 Cr. App. Rep. 38, C. C. A.

**4149.** ———. **—.]—**Applt. was charged with A. At the police station A. was taken into a private room where he made a statement to the effect that applt. had said to him: "You are a stranger here & nobody knows you; will you try & fence these for me?" Applt. was then brought in, & the statement was read over to him in the presence of A. When it had been read, A. said, "I will stand the lot myself; I will deny every word I said in that statement concerning you when I get before the magistrate. There is no need for both of us to go to prison." Applt. said nothing until he was charged, but after being charged he said, "I will say what I have to say later on":—*Held*: what A. was alleged to have said became evidence against applt. in this way & to this extent, that when it was repeated his conduct became evidence either against him or for him, & if he said nothing, although the statement implicated him directly, it would be evidence against him, & the statements became evidence when read over, not of

on the scene of the robbery, & afterwards to have identified two of the prisoners, & to have said to one prisoner that it was he who ran the car & to another that it was he who ran out with the bag; & it was also sworn that prisoners did not deny the allegations.—*R. v. KAPLANSKY, SACHUK, & SENILOFF* (1922), 69 D. L. L. 625; 38 Can. Crim. Cas. 258; 51 O. L. R. 587.—*CAN.*

**4139 x.** ———. **—.]—**When a question is put by an officer to one of two persons at the time of apprehending them on a joint charge the answer to such question may competently be put in evidence against the other, when made in his hearing & without contradiction by him.—*LEWIS v. BLAIR* (1858), 3 Irv. 16; 30 Sc. Jur. 508.—*SCOT.*

**4139 xi.** ———. **—.]—**In answer to a question addressed to five accused persons, one of them in the presence of all made a confession implicating all, & none of them attempted to make any denial, but understanding the question & answer remained silent:—*Held*: the confession was admissible against all.—*NARASIMMAN v. R.* (1914), 35 N. L. R. 458.—*S. AF.*

**4139 xii.** ———. **—.]—**The rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement so as to make it in effect his own. If he accepts the statement in part only, then to that extent alone it becomes his statement.—*R. v. BOTHA*, [1917] T. P. D. 380.—*S. AF.*

**4139 xiii.** ———. **—.]—**Where one accused, in the presence of another, makes a statement implicating the latter, the statement is no evidence of the facts contained in it. It is only admissible as leading up to evidence against the second accused consisting of an admission by the latter of the truth of the statement or of such conduct as would indicate guilt. Where the statement made by the first accused is at once denied by the second, it affords no evidence against the latter.—*R. v. HUGHES & KOGANIK* (1916), C. P. D. 737.—*S. AF.*

**4139 xiv.** ———. **—.]—**Accused was charged with supplying liquor to H., a

coloured woman, in contravention of Transvaal Ordinance, 32 of 1902. At the trial evidence was led for the Crown that H. when found in possession of liquor had pointed out accused, who was present but who did not assent, as the person from whom she had obtained it. H. was called as a witness, & gave exactly the same testimony on this point as was given by the Crown. No question of disputed identity arose nor was there anything to indicate that the presiding magistrate accepted the evidence as proof of the truth of the statement:—*Held*: that the evidence was admissible.—*R. v. JACKELSON* (1917), App. D. 556.—*S. AF.*

**4139 xv.** ———. **—.]—**The only evidence against a prisoner charged with having voluntarily caused grievous hurt was a statement made in the presence of prisoner by the person injured to a third person immediately after the commission of the offence. Prisoner did not, when the statement was made, deny that he had done the act complained of:—*Held*: the evidence was admissible.—*Re SURAT DHOBNI* (1884), 1 L. R. 10 Calc. 302.—*IND.*

**Sect. 4.—Relevant facts—Admissibility of evidence :  
Sub-sect. 5, C., D. & E.]**

over the above-mentioned statement to both prisoners, & applts. denied the truth of the whole of it. At the trial applt.'s fellow prisoner pleaded guilty to the indictment, & the trial proceeded against applt. The prosecution tendered in evidence the statement which had been read over in applt.'s presence. The statement was admitted, & applt. was found guilty:—*Held*: notwithstanding applt.'s denial of the truth of the allegations contained therein, the statement was admissible against him.—*R. v. THOMPSON*, [1910] 1 K. B. 640; 79 L. J. K. B. 321; 102 L. T. 257; 74 J. P. 176; 26 T. L. R. 252; 22 Cox, C. C. 299; 4 Cr. App. Rep. 45, C. C. A.

*Annotation*:—*Reid*, *R. v. Christie*, [1914] A. C. 545.

**4163. — Should not be received in practice though in law receivable.]—***R. v. CHRISTIE*, No. 3811, *ante*.

**4164. — —.]—**The jury should be directed that, a statement made by one prisoner implicating another & immediately denied, although strictly admissible as evidence, must not be accepted as evidence of the facts contained in such statement.—*R. v. CURNOCK* (1914), 111 L. T. 816; 24 Cox, C. C. 440; 10 Cr. App. Rep. 207, C. C. A.

**D. Statements explaining Acts.**

**4165. Admissible when explanatory of an act otherwise unintelligible.]—***R. v. GORDON* (LORD

(1781), 21 State Tr. 485; 2 Doug. K. B. 590; 99 E. R. 372.

*Annotations*:—*Reid*, *Redford v. Birley* (1822), 3 Stark. 110, n.; *R. v. Frost* (1840), 4 State Tr. N. S. 85; *R. v. Petcherini* (1855), 7 Cox, C. C. 79. *Mentd.* *R. v. Melville* (1806), 29 State Tr. 549; *Mortimer v. M'Callan* (1840), 6 M. & W. 58.

**4166. —.]—***R. v. SMYTH* (1832), 5 C. & P. 201, N. P.

**4167. —.]—**An indictment for perjury charged that in a suit in Chancery it became material to ascertain whether an annuity granted by G. to deft., or by G. to B., as trustee for deft. had been paid up to the year 1828, & that deft. falsely swore that it had not been paid, whereas, in truth, the annuity had been paid by G. to B., & B. had paid it to deft. With a view of showing that B., who had been abroad since 1832, had paid the money to deft., it was proved that B. had sent money to his bankers by his clerk, & it was proposed to ask the clerk the following question:—"At the time you received this money from Mr. B. to pay in at the bankers, what did he say about the money?"—*Held*: the question might be put, & the answer was receivable in evidence against deft.—*R. v. HALL* (1838), 8 C. & P. 358, N. P.

**4168. —.]—**Where certain directions were given by the witness to a third party, not in the presence of prisoner, which directions were necessary to explain the conduct of such third party:—*Held*: the terms of these directions were admissible in evidence both from the party giving

harm. On Oct. 13, the day after the wounding took place, prisoner not being present a constable took down M.'s statement in writing before a J.P., & she signed & swore to it. On Oct. 18, prisoner then being present with others, the statement was read over to M., & accused was told he might ask questions, but he was not shown the contents of the document. He asked one question. M. was then sworn & said that the statement was true. M. died on Nov. 4. At the trial the statement was, after objection, put in & read, not as a deposition, but as a verbal statement made in prisoner's presence & reduced to writing. *Held*: inadmissible.—*R. v. SOLARI* (1891), 12 N. S. W. L. R. 18.—**AUS.**

**p. Proof—Necessity for.]—**Evidence was also admitted of a conversation between the interpreter & another Chinaman, Ah Duk, as to the intention of the police to arrest accused & others, & in which Ah Duk suggested that the police should "give them a chance," & admitted that they had "only been here three weeks," & that "if deft. is sent back to China he will starve." The only positive evidence to establish that accused heard the conversation was that of a police officer who could not understand Chinese, in which language the conversation took place. There was nothing to show that accused, if he heard the conversation, made any reply:—*Held*: the statement, not being shown to have been made in the presence of accused, or to have been heard by him, was not admissible, nor was any inference of guilt to be drawn from his silence under the circumstances.—*AH HOY v. HOUGH* (1912), 14 W. A. L. R. 214.—**AUS.**

**q. Statement by prosecutor before arrest of accused.]—**In a case of larceny where the question turned on the identification of bank-notes the jury after retiring returned into ct. & were allowed to ask the arresting constable if the prosecutor who at the trial identified one of several notes found on accused had stated before the arrest that he could identify the

notes:—*Held*: the evidence was inadmissible.—*R. v. KING* (1916), 16 S. R. N. S. W. 120.—**AUS.**

**r. Statement made by deceased—Before arrest of accused—Murder.]—***R. v. MILLOY* (1883), 6 L. N. 95.—**CAN.**

**s. Not admissible to prove charge made against accused or nature of it.]—**Statements made in prisoner's presence after his arrest, are not admissible to prove that a charge was made against him, & what it was.—*R. v. MORRISSEY* (1851), 5 Cox, C. C. 321.—**IR.**

**t. Conversation—Not unless accused took part in it.]—**Evidence of a conversation:—*Held*: not to be admissible, unless it appear that prisoner took part in the conversation, although he was in such a position as that he might have heard the conversation.—*GRAY'S CASE* (1841), 1r. Cir. Rep. 76.—**IR.**

**a. Statement by deceased to two magistrates—In the hearing of the accused—Murder.]—**Indictment for the murder of A. Subsequently to the assault on, but previously to the death of A., & by the direction of two magistrates, prisoners were brought into the presence of A.:—*Held*: a relevant statement, not being a dying declaration, made by A. to magistrates, in the hearing of the prisoners, was not admissible in evidence, although the same was not contradicted by the prisoners.—*R. v. GILLIGAN* (1844), 3 *Craw. & D.* 175.—**IR.**

**b. Statement made shortly after occurrence—Part of res gestæ.]—**The statement made of the transaction shortly afterwards in the presence of the panel was a part of *res gestæ*, & in a totally different situation from an account given after an interval of some hours.—*Re MORAN* (1836), 1 *Swin.* 231.—**SCOT.**

**c. Warning by wife of accused—As to presence of police.]—**When an accused was charged with illicit sale of liquor & the evidence showed the detectives entered a room where the alleged sale took place under circumstances which were highly suspicious

with reference to the accused: *Held*: evidence of the fact of a warning by the wife of accused in the hearing of the detectives was admissible against the accused.—*R. v. ALEXANDER* (1913), T. P. D. 561.—**S. AF.**

**d. Statement of deceased—Murder—Receivable in favorem vitæ.]—**A. was charged with the murder of B. by pouring kerosene over her, & setting it on fire. C. was called by A. after the occurrence, & found B. lying on the bank of a creek, & assisted in carrying her to the house, where she made a statement to C. in A.'s presence, as to how the accident had happened:—*Held*: the statement was receivable in evidence in *favorem vitæ*.—*R. v. DYER*, 2 J. R. 21.—**N.Z.**

**PART XII. SECT. 4, SUB-SECT. 5.—D.**

**4165 i. Admissible when explanatory of an act otherwise unintelligible.]—**A prisoner was convicted of sodomy. The offence was clearly proved by the evidence of the boy assaulted, which was corroborated by the medical testimony. During the Crown case, the mother of the boy was called & gave evidence that she had examined the boy shortly after the offence was committed.

In cross-examination, she said, "My husband came home that night. I did not tell him of the boy's condition." She was then asked by the judge how it was she did not inform her husband of the boy's condition; to which she replied that she had never heard of such a thing before & did not know that a crime had been committed. Objection was taken on behalf of the prisoner that the judge was not entitled to ask the witness her reason for not informing her husband of the boy's condition:—*Held*: the evidence was admissible.—*R. v. KELLY* (1907), 7 S. R. N. S. W. 518.—**AUS.**

**4165 ii. —.]—**On a charge of sedition contained in a speech evidence of the concurrent circumstances necessary for understanding of the speech can be proved.—*R. v. YOUNG* (1914), 33 N. Z. L. R. 1191.—**N.Z.**

& the party receiving them.—*R. v. GANDFIELD* (1846), 2 Cox, C. C. 43.

**4169.** —.]—On the trial of a prisoner for the murder of his wife a neighbour swore that a week before the alleged crime was committed deceased visited her house, bringing an axe & carving knife, & gave them to her to take care of:—*Held*: the evidence of what was said by deceased to the witness on handing her the instruments was admissible.—*R. v. EDWARDS* (1872), 12 Cox, C. C. 230.

**4170. Mere declaration of intention not admissible.**—*R. v. POOK* (1871), 13 Cox, C. C. 172, n. *Annotation*:—*Refd.* *R. v. Christie*, [1914] A. C. 545.

**4171.** —.]—*R. v. WAINWRIGHT* (1875), 13 Cox, C. C. 171.

*Annotation*:—*Refd.* *R. v. Christie*, [1914] A. C. 545.

#### *E. Statements forming Part of the res gestæ.*

**4172. Statement by person injured immediately after hurt received.**—In indictments for wounding what was said immediately upon the hurt received by the person wounded may be given in evidence as part of the *res gestæ*.—*THOMPSON v. TREVANION* (1693), Holt, K. B. 286; *Skin.* 402; 90 E. R. 1057, N. P.

*Annotations*:—*Refd.* *Aveson v. Kinnaird* (1805), 6 East, 188; *R. v. Christie*, [1914] A. C. 545.

**4173.** —.]—A. was charged with manslaughter in killing B., by driving a cabriolet over him. C. saw the cabriolet drive by, but did not see the accident, & immediately afterwards, on hearing B. groan, went up to him, when B. made a statement as to how the accident had happened:—*Held*: this statement was receivable in evidence on the trial of A. for the manslaughter of B.—*R. v. FOSTER* (1834), 6 C. & P. 325.

*Annotations*:—*Consd.* *R. v. Brown* (1840), 4 J. P. 445. *Refd.* *Gilbey v. G. W. Ry.* (1910), 102 L. T. 202; *R. v. Christie*, [1914] A. C. 545.

#### PART XII. SECT. 4, SUB-SECT. 5.—E.

**4172 i. Statement by person injured immediately after hurt received.**—The words "I have a wound in my throat; M. has settled me," uttered by a deceased person during an attack on him by prisoner & others, are admissible in evidence against prisoner, on a charge of murdering deceased, as part of the *res gestæ*.—*R. v. MOGAR* (1850), 1 Legge, 655.—*AUS.*

**4172 ii.** —.]—Evidence of statements made immediately after an assault of a person, since deceased, under apprehension of further danger & requesting assistance & protection, is admissible as part of the *res gestæ* even though the person accused of the offence was absent at the time when such statements were made.—*GILBERT v. R.* (1907), 38 S. C. R. 284; 27 L. T. 240; 12 Can. Crim. Cas. 127.—*CAN.*

**4172 iii.** —.]—Statements made by deceased to the first person who comes up after he had been wounded, are admissible as part of the *res gestæ*.—*R. v. LUNNY* (1854), 6 Cox, C. C. 477.—*IR.*

**4172 iv.** —.]—The whole of a statement made to the police by an injured man, immediately after the injuries were inflicted, can be given in evidence.—*R. v. HERLIHY* (1898), 32 L. T. Jo. 38.—*IR.*

**4172 v.** —.]—K., a public-house keeper, was charged with robbery & murder. The mother of deceased in giving evidence said deceased came home at 7 p.m. & when he opened the door exclaimed, "Mother, I am murdered & robbed of my money." Witness asked him where he had been. He said, "In the house of K." Counsel for defence objected:—*Held*: the objection would be repelled.—*H.M.*

*ADVOCATE v. M'KENZIE* (1827), Syme, 158.—*SCOT.*

**4172 vi.** —.]—A statement made by an injured person shortly before his death is admissible, on a trial for murder or culpable homicide, as part of the *res gestæ*, if the presiding judge, in the exercise of a sound discretion, is of opinion that the statement was made so shortly after the infliction of the injury as to form part of the same transaction, & that the deceased had no time or opportunity to devise a story to the disadvantage of accused.—*It. v. LE ROUX* (1897), 14 S. C. 424; 7 C. T. R. 434.—*S. AF.*

**4175 i.** — *No interval of time must have elapsed.*—At a trial of prisoner upon an indictment for murder, a witness for the Crown swore upon direct examination that deceased lived about thirty rods from him, & that one night, about half an hour after he had heard shots in the direction of deceased's house, deceased came to the witness's house, & asked the witness to take him in, for he was shot. The witness did so, & deceased died there some hours afterwards. Evidence of statements made by deceased after being taken into the witness's house was rejected. Upon a case reserved:—*Held*: the statements made by deceased after he was taken into the house were not admissible as part of the *res gestæ*, being made after all action on the part of the wrongdoer had ceased through the completion of the principal act, & after all pursuit or danger had ceased.—*R. v. McMAHON* (1889), 18 O. R. 502.—*CAN.*

**e. Statement made by wife of accused.**—It is incompetent to examine the sister of the wife of accused as to statements made to her by the wife, in reference to the alleged

**4174.** —.]—On a trial for murder, the death had been caused by cutting the throat, all the vessels & arteries having been severed, & death was therefore certain to ensue, & in fact ensued almost immediately afterwards, & a declaration had been made by deceased in writing, he having no power to speak, about five minutes before death, when he was actually dying:—*Held*: the declaration might be admissible.—*R. v. MORGAN* (1875), 14 Cox, C. C. 337.

**4175.** — *No interval of time must have elapsed.*—On an indictment for murder, it appearing that deceased, with her throat cut through, came suddenly out of a room, in which she left prisoner, who also had his throat cut, & was speechless, & that she said something immediately after coming out of the room, & a few minutes before she died, the question being murder or suicide:—*Held*: her statement was not admissible as part of the *res gestæ*. *Qu.*: whether in such a case the act is complete until death takes place.

Anything uttered by deceased at the time the act was being done would be admissible. But here it was something stated by her when it was all over, whatever it was, & after the act was completed (*COCKBURN, C.J.*).—*R. v. BEDINGFIELD* (1879), 14 Cox, C. C. 341.

*Annotation*:—*Consd.* *R. v. Christie*, [1914] A. C. 545.

**4176.** —.]—*R. v. GODDARD* (1882), 15 Cox, C. C. 7.

*Annotation*:—*Mentd.* *R. v. Abbott* (1903), 67 J. P. 151.

**4177.** —.]—*R. v. HORSFORD*, No. 4134, *ante.*

**4178.** —.]—*R. v. CHRISTIE*, No. 3811, *ante.*

**4179. Statement made by witness of an occurrence.**—*R. v. FOWKES*, No. 3876, *ante.*

**4180. Cry of mob in riot.**—*R. v. DAMMAREE*, No. 3830, *ante.*

commission of the crime of incest upon the panel's daughters, unless the statements were made on the day of the occurrences labelled, or as part of the *res gestæ*.—*H.M. ADVOCATE v. SIMPSON* (1870), 1 Couper, 437.—*SCOT.*

**f.** —.]—*H.M. ADVOCATE v. KEMP* (1891), 3 White, 17.—*SCOT.*

**g. Cry of mob in riot—Witness accused not engaged in unlawful act with common object.**—It was proposed to give in evidence a statement, not in prisoner's hearing, made by a boy who was one of a crowd round a fire, & was engaged in throwing books into the blaze. There was no evidence of this boy having been retained by the traverser, or of his having received any directions on the subject:—*Held*: such statement was not admissible, as part of the *res gestæ*, & did not come within those classes of cases, as riots & conspiracies, in which such statements would be evidence, as it did not appear that accused & the person whose statement was offered in evidence were engaged in an unlawful act with a common unlawful object.—*R. v. PETCHERINI* (1855), 7 Cox, C. C. 79.—*IR.*

**h. Statement in prisoner's hearing—Prisoner not visible—Statement not explaining act done.**—*Qu.*: whether statements made in a prisoner's hearing, although the witness could not see prisoner & had no opportunity of observing his demeanour, an admissible as part of *res gestæ* when they do not tend to explain the acts.—*R. v. BURNS & MACK* (1877), Knox, 183.—*AUS.*

**k. Statement of word used to murdered man & his reply—Where contemporaneous with injury.**—On a trial for murder what was said to the murdered man & his reply by word or

*Sect. 4.—Relevant facts—Admissibility of evidence: Sub-sect. 5, E. & F.; sub-sect. 6, A. & B.]*

**4181.** ———.]—*R. v. GORDON* (LORD), No. 4165, *ante*.

*F. Dying Declarations.*

See Part XXXIII., Sect. 1, sub-sect. 1, Q (b), *post*.

SUB-SECT. 6.—COMPLAINTS.

*A. In General.*

**4182. Existence of fact of complaint admissible—Whether details admissible.]**—If a party robbed go within a few hours after the robbery to a constable, & mention the name of the person who robbed him, the party robbed may be asked at the trial whether he named any person to the constable; but ought not to be asked what name he mentioned; & the constable may be asked, whether, in consequence of the party robbed mentioning a name to him, he went in search of any person, & if so, who that person was.—*R. v. WINK* (1834), 6 C. & P. 397, N. P.

*Annotations:—Consd. R. v. Osborne* (1842), Car. & M. 622; *R. v. Lillyman*, [1896] 2 Q. B. 167.

**4183.** ———.]—*R. v. RIDSDALE* (1837), *Starkie on Evidence*, 4th ed., p. 469.

**4184.** ———.]—*R. v. FOLLEY* (1896), 60 J. P. 569.

**4185.** ———.]—*BEATTY v. CULLINGWORTH* (1896), 60 J. P. 740.  
*Annotation:—Refd. R. v. Camelleri*, [1922] 2 K. B. 122.

*B. In Sexual Offences against Females.*

**4186. Fact of complaint admissible—Details inadmissible.]**—*R. v. CLARKE*, No. 3859, *ante*.

**4187.** ———.]—On a trial for rape, or attempt to commit a rape, the female assaulted may be confirmed by proof that she recently after the alleged outrage made a complaint, but the particulars of what she said cannot be asked in chief of the confirming witness, but may in cross-examination.—*R. v. WALKER* (1839), 2 Mood. & R. 212, N. P.

*Annotations:—Consd. R. v. Lillyman*, [1896] 2 Q. B. 167.  
*Mentd. Hancock v. Somes* (1859), 1 E. & E. 795.

gesture shortly after the infliction of the mortal wound & in the absence of accused may not be given in evidence unless what was said & the reply followed so soon after the infliction of the wound as to be substantially contemporaneous with it.—*BROWN v. R.* (1913), 17 C. L. R. 570.—AUS.

PART XII. SECT. 4, SUB-SECT. 6.—A.

**4182 i. Existence of fact of complaint admissible—Whether details admissible.]**—On a charge of public indecency the mother of A., a witness for the Crown, was called at the trial & stated that A. had made a report to her & had told her that accused had exposed his person to him & a domestic servant in whose company he was. The magistrate convicted accused, & from the reasons submitted by him in support of the conviction it appeared that he had been influenced by the report:—*Held: accused was prejudiced through the admission of illegal evidence & the conviction must be quashed.*—*R. v. ERICKSON* (1917), C. P. D. 329.—S. AF.

**1.** ———. *Depends on circumstances of each case.*—Where evidence was admitted of a complaint, which was not made immediately after the alleged assault:—*Held: it is not always necessary that the complaint should be made immediately or spontaneously. Evidence of the complaint*

is not really relevant against accused, but is admitted to the jury as evidence of complainant, & the question of admissibility must be decided in each case upon the special circumstances.—*R. v. SIDEROPOULOS* (1910), C. P. D. 15; 20 C. T. R. 397.—S. AF.

PART XII. SECT. 4, SUB-SECT. 6.—B.

**4186 i. Fact of complaint admissible—Details inadmissible.]**—On an information for rape, witnesses called to corroborate the statement of prosecutrix that she complained can only be examined by counsel for the prosecution as to whether complaint was made, & cannot be asked to state any detail of the complaint, & where a witness stated the terms of the complaint & in the complaint prisoner was spoken of by name as the offender, a conviction following on such evidence was quashed.—*R. v. COOPER* (1864), 1 W. W. & A.B. 123.—AUS.

**4186 ii.** ———.]—On the trial of a prisoner for carnally knowing a girl under the age of sixteen the girl herself gave evidence that she said to prisoner that she had told a police constable everything. She was not cross-examined upon this evidence. The constable was afterwards called, & said she had made a statement to him. The jury asked what the statement was. The judge allowed the question, but upon conviction of prisoner stated a

**4188.** ———.]—In a case of rape, a person to whom prosecutrix made a complaint very recently after the offence, as she was on her way home, may be asked whether she named a person as having committed the offence, but not whose name she mentioned.—*R. v. OSBORNE* (1842), Car. & M. 622.

*Annotation:—Distd. R. v. Lillyman*, [1896] 2 Q. B. 167.

**4189.** ———.]—Evidence of complaint made by prosecutrix alleging a sexual offence is not properly called corroboration. In such cases the true rule for the direction of the jury is laid down in *R. v. Lillyman*, No. 4194, *post*.—*R. v. LOVELL* (1923), 129 L. T. 638; 17 Cr. App. Rep. 163, C. C. A.

**4190.** ———. *Details admissible only to confirm evidence given by prosecutrix—Prosecutrix dead.]*

—On the trial of an indictment for a rape, it appeared that the person alleged to have been ravished, but who was since dead, had come home evidently suffering from recent violence. It was proved, that on her return home she made a statement as to the injury she had received, & named the persons who had committed it:—*Held: the particulars of this statement could not be given in evidence as independent evidence, to show who were the persons who committed the offence, & statements of this kind were only admissible to confirm the evidence of prosecutrix, by showing that she made a recent complaint of the injury she had received.*—*R. v. MEGSON, BATTYE & ELLIS* (1840), 9 C. & P. 420.

*Annotation:—Consd. R. v. Lillyman*, [1896] 2 Q. B. 167.

**Prosecutrix kept out of way by accused.]**—In a case of rape, if it were proved on the part of the prosecution that the party alleged to have been ravished has been kept out of the way by the prisoners, the judge would allow her deposition before the magistrate to be given in evidence; but where that was not proved, & prosecutrix was not at the trial, evidence of complaints made by her recently after the outrage was rejected, as such evidence is received as confirmatory evidence only.—*R. v. GUTTRIDGE* (1840), 9 C. & P. 471.

*Annotations:—Consd. R. v. Lillyman*, [1896] 2 Q. B. 167.  
*Mentd. R. v. St. George* (1840), 9 C. & P. 483; *R. v. Bird* (1851), 5 Cox, C. C. 20.

case for the opinion of the ct. —*Held: the evidence was not admissible.*—*R. v. COLEMAN* (1901), 27 V. L. R. 153.—AUS.

**4186 iii.** ———.]—On a trial for rape, counsel for the prosecution was allowed to examine a witness as to whether or not prosecutrix made speedy complaint of the ill-treatment in question, but was not permitted to examine as to the particulars of such complaint, or the person complained of.—*R. v. ALEXANDER*, [1841] 2 Craw. & D. 126.—IR.

**4186 iv.** ———.]—In rape, prosecutrix may be questioned as to her having promptly complained of the injury, but cannot be interrogated as to the particulars of such complaint.—*R. v. MACLEAN*, [1841] 2 Craw. & D. 350.—IR.

**4186 v.** ———.]—On an indictment for a rape, evidence cannot be given by the Crown of the particulars detailed by prosecutrix to a policeman shortly after the commission of the offence.—*QUIGLEY'S CASE* (1842), Ir. Cr. Rep. 677.—IR.

**m.** ———. *Complainant an imbecile.]*—Where at the trial of a prisoner for indecent assault the female alleged to have been assaulted is not examined, on account of her imbecility, the substance of a statement made by her to her mother shortly after the



**4192.** — **Details of complaint admitted.**—*R. v. EYRE* (1860), 2 F. & F. 579.

*Annotation* :—*Reid. R. v. Lillyman*, [1896] 2 Q. B. 167.

**4193.** — **—**—Where a man is charged with committing a rape upon a female the full particulars of the complaint she made against him to other persons in his absence some time after the alleged offence may be given in evidence.—*R. v. WOOD* (1877), 14 Cox, C. C. 46.

*Annotations* :—*Consd. R. v. Lillyman*, [1896] 2 Q. B. 167. *Mentd. R. v. Christie*, [1914] A. C. 545.

**4194.** — **As evidence of consistency of conduct of prosecutrix.**—Upon the trial of an indictment for rape, or other kindred offences against women or girls, the fact that a complaint was made by prosecutrix shortly after the alleged occurrence, & the particulars of such complaint, may, so far as they relate to the charge against prisoner, be given in evidence on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of prosecutrix with the story told by her in the witness-box, & as negating consent on her part.—*R. v. LILLYMAN*, [1896] 2 Q. B. 167; 65 L. J. M. C. 195; 74 L. T. 730; 60 J. P. 536; 44 W. R. 654; 12 T. L. R. 473; 40 Sol. Jo. 584; 18 Cox, C. C. 348, C. C. R.

*Annotations* :—*Apld. R. v. Folley* (1896), 60 J. P. 569. *Consd. Beatty v. Cullingworth* (1896), 60 J. P. 740; 11 R. v. Rowland (1898), 62 J. P. 459. *Apld. R. v. Merry* (1900), 19 Cox, C. C. 442. *Distd. R. v. Kingham* (1902), 66 J. P. 393. *Consd. R. v. Osborne*, [1905] 1 K. B. 551. *Apld. Chesney v. Newsholme, Newsholme v. Chesney* (2), [1908] P. 301. *Distd. R. v. Christie*, [1914] A. C. 545. *Apld. R. v. Camelleri*, [1922] 2 K. B. 122. *Consd. R. v. Lovell* (1923), 129 L. T. 638. *Reid. R. v. Smith* (1897), 18 Cox, C. C. 470; *R. v. Wannell* (1922), 87 J. P. 48. *Mentd. Jones v. S. E. & C. Rys. Managing Committee* (1918), 87 L. J. K. B. 775.

**4195.** **Application of rule where consent is immaterial—Indecent assault on child.**—All that *R. v. Lillyman*, No. 4194, *ante*, decided was that the terms of a complaint were only admissible as evidence of a want of consent by prosecutrix, & not as evidence of the truth of the charge against the person named in the complaint (HAWKINS, J.).—*R. v. ROWLAND* (1898), 62 J. P. 459.

*Annotation* :—*Reid. R. v. Christie*, [1914] A. C. 545.

**4196.** — **Prosecutrix unsworn.**—In a case of carnally knowing & abusing a girl under ten years old, it appeared that the girl was only six years old, & by reason of her age quite incompetent to take an oath :—*Held* : the trial ought not to be postponed in order that the child might be instructed as to the nature of an oath, but there might be cases of children of more matured intellect, e.g. of ten or twelve years old, who might

be from neglected education incapable of being sworn, in which such a postponement might be proper. Where, in such a case, the child, from her tender age, was incompetent to be sworn, the judge would not receive evidence of what the child stated to her mother shortly after the alleged offence took place, nor allow the mother to prove that the child mentioned to her the name of any particular person.—*R. v. NICHOLAS* (1846), 2 Car. & Kir. 246; 2 Cox, C. C. 136.

**4197.** — **—**—(1) The decision in *R. v. Lillyman*, No. 4194, *ante*, applies to cases where the girl on whom the offence is alleged to have been committed is of such tender years that the ct. directs her evidence to be taken, but not upon oath, & where the question of her consent to the assault is immaterial. (2) Such a complaint may be admissible, although not made at the earliest opportunity.—*R. v. KIDDLE* (1898), 19 Cox, C. C. 77.

*Annotation* :—*Reid. R. v. Osborne*, [1905] 1 K. B. 551.

**4198.** — **—**—The decision in *R. v. Lillyman*, No. 4194, *ante*, applies only to cases where the question of consent is material, & should not be extended to cases where that question is immaterial.—*R. v. KINGHAM* (1902), 66 J. P. 393.

*Annotation* :—*Reid. R. v. Osborne*, [1905] 1 K. B. 551.

**4199.** — **—**—In support of a charge of rape or an offence of a similar class, but only in such cases, a statement in the nature of a complaint made by prosecutrix to a third person, not in the presence of accused, may be given in evidence, whether proof of non-consent is or is not a material element in the charge under investigation, provided such statement is shown to have been made at the first opportunity which reasonably offered itself after the commission of the offence, & has not been elicited by questions of a leading & inducing or intimidating character. The judge ought, however, to inform the jury that the statement is not evidence of the facts complained of, & must not be regarded by them, if believed, as other than corroboration of prosecutrix's credibility, & where consent is in issue, of the absence of consent.

Where the statement has been made in answer to a question, & the fact that it has been so made does not, of itself, render it inadmissible as a complaint, it is for the judge in each case to determine whether the character of the question put, as well as the other circumstances, such as the relationship of the questioner to prosecutrix, is such as to render the statement inadmissible.—*R. v. OSBORNE*, [1905] 1 K. B. 551; 74 L. J. K. B.

assault cannot be given in evidence by her mother, although the fact that she made a statement may be given in evidence.—*R. v. BURKE* (1912), 47 L. T. 111.—*IR.*

**n.** — **Except to support sworn testimony.**—Evidence relating to an unsworn oral statement, not part of the *res gestæ*, but alleged to have been made by a woman or girl at the first reasonable opportunity after the occurrence of an alleged sexual offence against her, is not admissible to prove the facts complained of. It is admissible only where it supports the sworn testimony of some person.—*R. v. LAMBERT*, [1919] V. L. R. 205.—*AUS.*

**4192 i.** — **Details of complaint admitted.**—In an action for damages by a husband & wife for assaults alleged to have been committed on the wife, under circumstances which made them the criminal offence of an attempt to commit rape or an indecent assault :—*Held* : evidence of statement & complaints made by the wife to the husband after the alleged assaults took place was

properly received.—*HOPKINSON v. PERDUE* (1904), 8 O. L. R. 228; 24 C. L. T. 339; 3 O. W. R. 934.—*CAN.*

**4192 ii.** — **—**—Deft. was convicted of the offence of attempting to commit incest with his daughter aged 7 years, upon the evidence of said daughter & another girl aged 4 years :—*Held* : a statement made by the daughter to one B., shortly after the attempt, was admissible.—*R. v. PAILLEUR* (1909), 15 O. W. R. 73; 20 O. L. R. 207; 15 Can. Crim. Cas. 339.—*CAN.*

**4192 iii.** — **—**—On trial of prisoner for rape, conversations between complainant & her mother shortly after commission of offence, admitted as evidence.—*R. v. CASSIDY* (1909), 7 E. L. R. 216.—*CAN.*

**4192 iv.** — **—**—In a trial for rape, it having appeared that the girl assaulted was of weak intellect & incapable of understanding the nature & obligation of an oath objection sustained to her being examined as a

witness, but :—*Held* : a statement made by her to her mother, immediately after the alleged assault, was admissible as part of *res gestæ*.—*H.M. ADVOCATE v. MURRAY* (1866), 5 Irv. 232; 38 Sc. Jur. 377.—*SCOT.*

**4192 v.** — **—**—Statements made by a complainant shortly after the alleged commission of an offence to a person to whom he or she would naturally complain are only admissible in evidence in cases where the charge is one of rape, indecent assault, or of a similar nature.—*GUTTENBERG v. R.*, [1906] T. S. 207.—*S. AF.*

**o.** — **To confirm testimony & disprove consent.**—On a trial for rape, the fact that the injured person made a complaint, & the particulars or details of the complaint, are admissible as evidence in chief for the prosecution to confirm the testimony of the injured person & disprove consent on her part, & among the particulars the name of the person whom she accused of the offence may





the girl to tell her unassisted & unvarnished story :—*Held*: the evidence was rightly admitted.—*R. v. NORCOTT*, [1917] 1 K. B. 347; 86 L. J. K. B. 78; 116 L. T. 576; 81 J. P. 123; 25 Cox, C. C. 698; 12 Cr. App. Rep. 166, C. C. A.

4211. —[*J*].—*R. v. WILBOURNE*, No. 4207, *ante*.

*C. In Sexual Offences against Males.*

4212. *Details of complaint not admitted—Act of gross indecency.*—*R. v. HOODLESS* (1900), 64 J. P. 282.

4213. *Details admitted—Offence under Clergy Discipline Act, 1892 (c. 32).*—*CHESNEY v. NEWSHOLME*, *NEWSHOLME v. CHESNEY*, [1908] P. 301.

4214. — *Indecent assault & act of gross indecency.*—On the trial of an indictment against a prisoner for committing an act of gross indecency with a boy of the age of fifteen, the judge admitted particulars of a complaint made by the boy to his parents shortly after the commission of the offence, not as evidence of the facts complained of, but to show consistency of conduct on the part of the boy, & as tending to corroborate his evidence :—*Held*: the evidence was rightly admitted.—*R. v. CAMELLERI*, [1922] 2 K. B. 122; 91 L. J. K. B. 671; 127 L. T. 228; 86 J. P. 135; 66 Sol. Jo. 667; 27 Cox, C. C. 246; 16 Cr. App. Rep. 162, C. C. A.

*Annotation*:—*Folld. R. v. Wannell* (1922), 87 J. P. 48.

4215. — *Sodomy.*—*R. v. WANNELL* (1922), 87 J. P. 48; 17 Cr. App. Rep. 53, C. C. A.

SUB-SECT. 7.—PROPERTY AND DOCUMENTS FOUND IN POSSESSION OF THE ACCUSED.

4216. *Property found on his person—General rule.*—Prisoner's counsel contended that the revolver & other instruments found upon him at the time of his arrest should not have been produced in evidence against him. But surely for years it has been the custom for police witnesses who arrest prisoners to say what they find upon them. Such evidence is admissible but its weight is another matter & that is for the jury (*BUCKNELL, J.*).—*R. v. FROGGATT* (1910), 4 Cr. App. Rep. 115, C. C. A.

4217. — *Not evidence of truth of contents of*

*Held*: the evidence was properly admitted.—*R. v. MANNING* (1910), 13 W. A. L. R. 6.—*AUS.*

*s. Complaint must be spontaneous.*—On a charge of rape it was sought to give in evidence statements made by prosecutrix on the day following the alleged assault to a police inspector who called upon her with reference to the matter:—*Held*: the evidence was inadmissible. The statements were not made as the unstudied outcome of the feelings of the woman.—*R. v. GRAHAM* (1899), 31 O. R. 77.—*CAN.*

*t. Admissibility question for judge.*—Upon a trial for rape it is a question for the judge to decide whether the first complaint made by the woman after the alleged offence is one which having regard to prosecutrix & prisoner's safety should be admitted in

such complaint, are admissible.—*R. v. A. B.* (1911), 31 N. Z. L. R. 29.—*N.Z.*

4214 i. *Details admitted—Indecent assault or act of gross indecency.*—Prisoner was convicted of an attempt to commit an unnatural offence on a boy, who complained to a police constable about two hours after the alleged offence. Evidence that a complaint had been made was admitted at the trial but not evidence of its nature:—*Held*: in the absence of any decisive authority on the point, the principles established with regard to the sexual offences against females were equally applicable to sexual offences against males & therefore evidence both of the fact that a complaint had been made & of the particulars of such complaint was admissible.—*R. v. McNAMARA*, [1917] N. Z. L. R. 382.—*N.Z.*

PART XII. SECT. 4, SUB-SECT. 7.

4216 i. *Property found on his person—General rule.*—On a charge of seditious conspiracy, comments found in the hands of accused are admissible in evidence & are *prima facie* evidence against him. It will be inferred that he knows their contents. If they refer to the conspiracy they will be important

document so found.]—Though a letter found upon prisoner may be read, it is no evidence of the facts it states. They must be proved by other evidence. *R. v. PLUMER* (1814), Russ. & Ry. 264, C. C. R.

4218. — *To show guilty knowledge.*—*R. v. HOUNSFIELD* (1849), 13 J. P. 460.

4219. — *Letter from wife of accused.*—On his apprehension prisoner was searched & in his pocket was found a letter addressed to him, which letter was asserted by his counsel to be in the handwriting of his wife. It was objected that, if this letter was written by prisoner's wife, its contents could not be read in evidence against him, inasmuch as a wife cannot be witness against her husband. The contents of the letter were admitted, but with an intimation that a case would be reserved upon it.—*R. v. HILDITCH* (1871), 12 Cox, C. C. 131.

4220. *Property found at his residence—Subsequent discovery of articles secreted.*—A witness in high treason was described in the list delivered to prisoner under Treason Act, 1708 (c. 21), s. 14, as lately abiding at a specified place. Upon examination of the witness upon the *voir dire*, it appeared that he had had a different & later place of residence:—*Held*: the description was not sufficient.

A great number of placards announcing a public meeting having been printed, prisoner took 25 of them away from the printer's:—*Held*: one of the remaining placards might be read without any preparatory evidence as to the original manuscript, & without notice to prisoner to produce the 25 copies.

Papers found in the lodgings of a co-conspirator at a period subsequent to the apprehension of prisoner may be read in evidence, although no absolute proof be given of their previous existence, where strong presumption exists that the lodgings had not been entered by any one in the interval between the apprehension & the finding, & where the papers are intimately connected with the objects of the conspiracy as detailed in evidence.

In treason & felony evidence may be given of finding articles secreted although they were found at a time subsequent to prisoner's apprehension.

Evidence was admitted of a seditious speech spoken by prisoner, although not set out in substance as an overt act.

to show complicity & intention.—*R. v. RUSSELL*, [1920] 1 W. W. R. 624: 51 D. L. R. 1.—*CAN.*

4216 ii. —[*J*].—Where a person is arrested for committing a felony or misdemeanour, any property in his possession believed to have been used by him for the purpose of committing the offence may be seized & detained as evidence in support of the charge.—*DILON v. O'BRIEN & DAVIS* (1887), 16 Cox, C. C. 245.—*IR.*

*b. — Proving criminal intent.*—Letters written to a person charged with obtaining money by false pretences, showing that he had been engaged in a long-continued scheme of fraud of the same character were found in his possession & were tendered in evidence against him to prove criminal intent:—*Held*: they were rightly admitted.—*R. v. HULL*, [1902] S. R. Q. 1.—*AUS.*

*c. — Letter from accused to his wife—Husband & wife charged.*—A husband & wife were tried together for stealing & receiving. On the husband when arrested was found a letter addressed to his wife making damaging admissions:—*Held*: the letter was properly admitted as evidence against male accused.—*R. v.*

PART XII. SECT. 4, SUB-SECT. 6.—C.

*a. Fact of complaint not admitted.*—Upon the trial of an indictment for committing an unnatural offence upon a boy, neither the fact that a complaint was made by the latter, in the absence of accused, shortly after the commission of the alleged offence, nor the particulars of

**Sect. 4.—Relevant facts—Admissibility of evidence:**  
**Sub-sect. 7. Sect. 5: Sub-sect. 1.]**

There is no difference as to the rules of evidence between criminal & civil cases (ABBOT, J.).—*R. v. WATSON* (1817), 2 Stark. 116; 32 State Tr. 1.

**Annotations:—***Consd. R. v. Blake* (1841), 6 Q. B. 126. *Refd. R. v. Duffy* (1849), 7 State Tr. N. S. 795; *R. v. McCafferty* (1867), 15 W. R. 1022. **Mentd.** *Redford v. Birley* (1822), 1 State Tr. N. S. 1071; *Tooth v. Bagwell* (1825), 2 C. & P. 187; *A.-G. v. Briant* (1846), 15 M. & W. 169; *Mulcahy v. R.* (1867), 15 W. R. 446; *R. v. Twopenny* (1867), 17 L. T. 266; *Marks v. Beyfus* (1890), 63 L. T. 733.

**4221. —.**—[In a period of the trial when it had been proved that the grenades by which the death in question had been caused had been ordered by A.; but when there was no evidence to connect A. with prisoner, it was proved that a letter in A.'s handwriting bearing a memorandum in the hand of prisoner was found at his residence after his arrest upon the present charge:—**Held:** such a letter was admissible against him upon the ground that it was found in possession of prisoner & was relevant to this inquiry.—*R. v. BERNARD* (1858), 8 State Tr. N. S. 887; 1 F. & F. 240.

**Annotations:—***Mentd. R. v. Kohn* (1864), 4 F. & F. 68; *R. v. Lomas* (1913), 110 L. T. 239.

**4222. —.**—[Applt. was convicted of shop-breaking. The evidence for the prosecution was that applt. & another man forced open the door of a shop & ran away when the police appeared, applt. being subsequently arrested. It was found that the lock of the shop door was broken, but that nothing had been stolen from the shop, & there were no marks of any instrument having been used in obtaining an entrance, & no housebreaking tools were found in possession of applt. when he was arrested. The defence was that in "sky-larking" applt. & the other man collided & fell against the door, breaking it in. At the trial evidence was admitted that an instrument described as a jemmy had been found at applt.'s lodgings, & that eight days after he was asked by the police how he came into possession of it & that he replied that he did not wish to say anything about it. The judge also put questions to applt. while he was in the dock & before he was sworn, & made comment which was disparaging to applt.:—**Held:** the evidence of the finding of the alleged jemmy at applt.'s lodgings was inadmissible, since, there being no marks of the use of an instrument on the shop door, there was no probative *nexus* between the article found & the crime charged; the police should have questioned applt. while the latter was in custody & the evidence of such questioning & of applt.'s answer thereto was inadmissible & the judge should not have questioned applt. while he was in the dock.—

*PIERCE* (1917), 17 S. R. N. S. W. 135.—**AUS.**

**d. —** *Notes for defence made by prisoner—Inadmissible.*—[Notes found upon a prisoner which he had made for his defence when awaiting his trial are inadmissible in evidence against him.—*R. v. MCNAIR* (1895), 13 N. Z. L. R. 717.—**N.Z.**

**4221 i. Property found at his residence.**—[In a conspiracy a letter evidently relating to the business of the conspiracy, addressed to one of the panels & found in his house three or four days after his apprehension, although there is not sufficient proof that it was written by a co-conspirator, is an admissible article of evidence.—*H.M. ADVOCATE v. HUNTER* (1838), 2 Swin. 1.—**SCOT.**

**4221 ii. —.**—[Letters, etc., found in a man's house after his arrest are admissible in evidence, if their previous

existence has been proved.—*R. v. AMIR KHAN* (1872), 9 B. L. R. 36 17 W. R. Cr. 15.—**IND.**

**e. Property found elsewhere.**—[On a charge of seditious conspiracy, documents found in the hands of parties other than those charged with being parties to the conspiracy are admissible against accused if they relate to the actions & conduct of the persons charged with the conspiracy or to the spread of seditious propaganda as one of the purposes of the conspiracy & can be traced as coming from a party to the conspiracy.—*R. v. RUSSELL*, [1920] 1 W. W. R. 624; 51 D. L. R. 1.—**CAN.**

**f. —** *Letter from accused to wife—Found at wife's house.*—[On a trial for the offence of breach of trust by a public servant, a letter was tendered in evidence for the prosecution which had been sent by accused to his

*R. v. TAYLOR* (1923), 87 J. P. 104; 17 Cr. App. Rep. 109, C. O. A.

**4223. Property found elsewhere—Proved to be knowingly in his possession.**—[Where a party was charged with having chartered a vessel & loaded goods on board for the purposes of slave-trading:—**Held:** slave trading papers found on board the vessel when she was seized in foreign parts, but not traced in any way to the knowledge of such party, were not admissible in evidence against him.—*R. v. ZULUETA* (1843), 1 Car. & Kir. 215.

**Annotation:—***Mentd. Santos v. Illidge* (1859), 6 C. B. N. S. 841.

**4224. —.**—[In a portmanteau not proved to belong to prisoner was found a paper folded like a letter, & containing in the inside what purported to be an inventory of goods pawned at different times. The inventory was not in his handwriting; but on the outside of the paper his name, & the word "private," both in his handwriting, were indorsed:—**Held:** the contents of the paper were not admissible against him.—*R. v. HARE & REHDEN* (1848), 12 J. P. 727; 3 Cox, C. C. 247.

**4225. —.**—[*R. v. SIMINGTON*, [1921] 1 K. B. 451; 90 L. J. K. B. 471; 125 L. T. 128; 85 J. P. 179; 37 T. L. R. 114; 26 Cox, C. C. 736; 15 Cr. App. Rep. 97, C. C. A.

**4226. —** *Letters addressed to accused but not delivered to him.*—[Letters which have never been in the custody of prisoner cannot be read in evidence against him.—*R. v. HEVEY, BEATTY & M'CARTY* (1782), 1 Leach. 232.

**Annotation:—***Refd. R. v. Cooper* (1875), 1 Q. B. D. 19.

**4227. —.**—[A letter, purporting to come from prisoner's brother, & left by the postman pursuant to its direction, at prisoner's lodgings, after he was apprehended & during his confinement but never actually in his custody, cannot be read in evidence against him on his trial.—*R. v. HUET* (1798), 2 Leach, 820.

**4228. —.**—[*R. v. COOPER*, No. 4066, ante.

**4229. —** *Property of murdered person—Found in place visited by accused.*—[A woman was found strangled on the morning of Jan. 25; many articles were stolen from her cottage, including a gold watch, chain & money. Applt. was seen on Jan. 25 going to the lavatory of the Central Hotel, Rugby, & some months after in the cistern of that lavatory were discovered some articles stolen from the murdered woman:—**Held:** the evidence as to the discovery in the cistern of the articles stolen from the murdered woman was properly admitted.—*R. v. PALMER* (1911), 6 Cr. App. Rep. 237, C. C. A.

**4230. Must be material—Charge of publishing obscene book—Evidence of possession of other**

wife at P. & had been found on a search of her house made there by the police:—**Held:** the letter was admissible in evidence against accused.—*R. v. DONAGHUE* (1898), 1 L. R. 22 Mad. 1.—**IND.**

**g. Conspiracy—Letter to one accused—Found in possession of another.**—[When letter relating to an alleged common design has been directed to one of the panels & found in possession of another it is competent evidence against both, although it is not shown that the writer was a conspirator or that the contents were true or that it was ever seen by the party to whom it was addressed.—*H.M. ADVOCATE v. CUMMING* (1848), J. Shaw, Just. 17.—**SCOT.**

**h. Must be material—Charge of false pretences—Letters showing accused's bad character.**—[Letters written to a person charged with obtaining

**similar books.**—In a prosecution for publishing & selling an obscene book with a view to corrupt the public morals, the jury must decide whether the book was put out & published in such a way as to be lewd, lascivious, & to tend manifestly to corrupt the public morals. In considering this question they must take into their consideration the persons to whom, & the time & the circumstances under which it was put forth. The titles & contents of other books found on the premises where the book in question was sold may be relevant as tending to show that the one in question was sold with a view to corrupt the public morals.—*R. v. THOMSON* (1900), 64 J. P. 456.

*Annotation:—Refd. R. v. Barraclough*, [1906] 1 K. B. 201.

**4231. — Charge of acts of gross indecency—Evidence of possession of lewd pictures—Admitted on issue of identity.**—*THOMPSON v. R.*, No. 3810, ante.

**4232. — — — — Admitted on general issue.**—On the trial of a man on a charge of committing an act of gross indecency with a boy, prisoner pleaded not guilty, his defence being that there was no truth in the boy's statements:—*Held*: upon the authority of *Thompson v. R.*, No. 3810, ante, evidence that photographs of nude boys were found in prisoner's lodgings was admissible for the purpose of showing what the practice of the prisoner was, just as the possession of the tools of a burglar or the apparatus of an abortionist is evidence as showing the possession of appliances & implements used by persons carrying on that particular kind of business in crime.—*R. v. TWISS*, [1918] 2 K. B. 853; 88 L. J. K. B. 20; 119 L. T. 680; 83 J. P. 23; 35 T. L. R. 3; 62 Sol. Jo. 752; 26 Cox, C. C. 325; 13 Cr. App. Rep. 177, C. C. A.

**4233. — Charge of attempted murder by poison—Evidence of possession of similar poison at time of arrest.**—*R. v. ARMSTRONG*, No. 3988, ante.

## SECT. 5.—CONFESSIONS AND STATEMENTS BY ACCUSED.

### SUB-SECT. 1.—IN GENERAL.

**4234. General rule.**—(1) If a prisoner in gaol on a charge of felony ask the turnkey of the gaol to put a letter into the post for him, & after his promising to do so, prisoner give him a letter addressed to his father, & the turnkey, instead of putting it into the post, transmit it to prosecutor, this letter is admissible in evidence against prisoner, notwithstanding the manner in which it was obtained.

(2) The only cases in which what a prisoner says or writes is not evidence are where prisoner is induced to make any confession in consequence of prosecutor, etc., holding out any threat or promise to induce him to confess; & where the communication is privileged, as being made to his counsel or attorney (*GARROW, B.*).—*R. v. DERRINGTON* (1826), 2 C. & P. 418.

money by false pretences, & found in his possession, tending to show he was of bad character which do not connect prisoner with any such scheme are not admissible.—*R. v. HULL*, [1902] S. R. Q. 1.—*AUS.*

**k. Indictment of master of ship—Letter found on board.**—On an indictment against the master of a ship for receiving part of the cargo entrusted to him by the owner, & converting it to his own use:—*Held*: a letter in the handwriting of the consignee of the cargo, directed to the master, & found

in the ship, could not be read as evidence against him.—*R. v. HARTNELL* (1841), 2 Leg. Rep. 214.—*IR.*

### PART XII. SECT. 5, SUB-SECT. 1.

**4239 i. Letter written by accused.**—A husband & wife were tried together for stealing & receiving. On the husband when arrested was found a letter addressed to his wife making damaging admissions:—*Held*: the letter was properly admitted as evidence against male accused.—*R. v. PIERCE* (1917),

**4235. Letter written by accused—After arrest.**—*R. v. DERRINGTON*, No. 4234, ante.

**4236. — — — —**—Prisoner was taken into custody for stealing from a dwelling-house, & when in the police-station wrote two letters, one to his wife & the other to a friend. Prisoner was told that all letters would be read before being despatched, & the letter in question was detained & a copy sent to its destination:—*Held*: the original addressed to prisoner's wife was not admissible.—*R. v. PAMENTER* (1872), 12 Cox, C. C. 177.

**4237. — — — —**—Prisoner, being then in custody for having wounded G. some days previously, wrote a letter to G. There was no evidence that he was warned that any letter he wrote might be given in evidence against him:—*Held*: the letter was admissible.—*R. v. HEAL* (1905), 69 J. P. 224.

**4238. — — — —**—An accused person cannot put in evidence documents referring to the charge written by him after his arrest merely because they are in his own favour. But, *semble*: the prosecution may.—*R. v. SHEPPARD* (1923), 17 Cr. App. Rep. 171, C. C. A.

**4239. — — — —**—On the trial of A. for burglary & larceny, it appeared that his footsteps had been traced in a certain locality. Shortly afterwards a policeman in plain clothes called at prisoner's house, for the purpose of making some inquiries about the matter; but not finding him at home, he left word why he had called, with his address, & the assumed name of Russell. In the course of a few days afterwards the policeman received a letter, directed to him in the name of Russell, & in consequence of a communication contained in that letter, he found the greater part of the stolen goods concealed in a spot near where prisoner's track had been observed. The handwriting of the letter was not proved:—*Held*: this letter could not be read against prisoner.—*R. v. LOCK* (1846), 10 J. P. 204.

**4240. Statements as to other transactions.**—*R. v. COLE*, No. 3848, ante.

**4241. — — — —**—(1) On the trial of an indictment for forgery of the acceptance of a bill of exchange, evidence of what prisoner said respecting other bills of exchange which are not in evidence, is not admissible.

(2) If a person knowingly pays away a forgery as a good bill, it is a consequence, & almost a consequence of law, that he must intend to defraud the person to whom he pays the bill, & also the person whose name is used, as everything which is the natural consequence of the act must be taken to be the intention of prisoner.

(3) *Semble*: a prisoner, who is a shareholder in a joint-stock bank, & who knowingly utters a forged acceptance to that bank, cannot be convicted on counts laying an intent to defraud "R. B.," another of the shareholders, " & others."—*R. v. COOKE* (1838), 8 C. & P. 586.

*Annotations:—As to (1) Dbtd. R. v. Brown* (1861), 2 F. & F. 559. *Generally, Mntd. R. v. Francis* (1874), 22 W. R. 663.

17 S. R. N. S. W. 135.—*AUS.*

**l. Parol evidence of letter dictated by accused.**—In a trial for child-murder, one of the Crown witnesses having stated that on one occasion she had written a letter to the dictation of the paternity of her child the Advocate Depute proposed without leading evidence that the letter was irrecoverable, to ask the witness what the panel had told her to write:—*Held*: the question was competent.—

**Sect. 5.—Confessions and statements by accused:**  
*Sub-sects. 1 & 2.]*

**4242.** —.]—*R. v. BUTLER*, No. 3927, *ante*.

**4243.** —.]—*Qu.*: whether, upon the trial of an indictment for forging a bank note, evidence of what prisoner has said respecting other bank notes is admissible.—*R. v. BROWN* (1861), 2 F. & F. 559.

**4244.** —.]—At the time of his arrest there were two charges against applt., & he made a statement to the detective which referred to both charges. Upon his trial on one of the charges the detective endeavoured to split up the statement & to give in evidence only that part which he considered applied to the charge upon which applt. was tried:—*Held*: the evidence so given was not satisfactory, as the effect of what applt. said was not correctly reproduced.—*R. v. POSNETT* (1913), 9 Cr. App. Rep. 64, C. C. A.

**4245. Statements as to same transaction.**—*R. MANSFIELD*, No. 3907, *ante*.

**Showing guilty knowledge.**—*See* Nos. 3950—

**SUB-SECT. 2.—STATEMENTS AT PRELIMINARY EXAMINATION BEFORE JUSTICES.**

**4246. Cases prior to Indictable Offences Act, 1848 (c. 42).**—*R. v. REASON & TRANTER* (1722), 1 *Stara*. 499; *R. v. LAYER* (1722), 16 *State Tr.* 93, 215; *R. v. FEARSHIRE* (1779), 1 *Leach*, 202; *R. v. BRADBURY* (1782), 2 *Leach*, 639, n.; *R. v. FISHER* (1785), 1 *Leach*, 311, n.; *R. v. HINXMAN* (1784), 1 *Leach*, 310, n.; *R. v. JACOBS* (1784), 1

*Leach*, 309; *R. v. LAMBE* (1791), 2 *Leach*, 552; *R. v. BENNET* (1793), 2 *Leach*, 553, n.; *R. v. THOMAS* (1794), 2 *Leach*, 637; *R. v. HUET* (1798), 2 *Leach*, 821; *R. v. SMITH & HORNAME* (1810), 1 *Stark*. 242; *R. v. TELICOTE* (1819), 2 *Stark*. 483; *R. v. DEWHURST* (1825), 1 *Lew. C. C.* 47; *R. v. ELLIS* (1826), *Ry. & M.* 432; *R. v. FOSTER* (1827), 1 *Lew. C. C.* 46; *R. v. JONES* (1828), *Car. C. L.* 13; *R. v. REED* (1829), *Mood. & M.* 403; *PHILLIPS v. WIMBURN* (1830), 4 *C. & P.* 273; *R. v.*

*HEAD* (1830), 4 *C. & P.* 242; *R. v. B* 5 *C. & P.* 162; *ANON.* (1831), 5 *C. & P.* 164, n.; *R. v. WEBB* (1831), 4 *C. & P.* 564; *R. v. HARRIS, EVANS & BUTLER* (1832), 1 *Mood. C. C.* 338; *R. v. LEWIS* (1833), 6 *C. & P.* 161; *R. v. PRESLEY* (1833), 6 *C. & P.* 183; *R. v. BENTLEY* (1833), 6 *C. & P.* 148; *R. v. TARRANT* (1833), 6 *C. & P.* 182; *R. v. CHAPPEL* (1834), 1 *Mood. & R.* 395; *R. v. HOPES* (1835), 7 *C. & P.* 136; *R. v. FOSTER* (1835), 7 *C. & P.* 148; *R. v. RIVERS* (1835), 7 *C. & P.* 177; *R. v. JOHN* (1835), 7 *C. & P.* 324; *R. v. JONES* (1838), 7 *C. & P.* 833; *R. v. REES* (1836), 7 *C. & P.* 568; *R. v. WALTER* (1836), 7 *C. & P.* 267; *R. v. READING* (1836), 7 *C. & P.* 649; *R. v. WELLER* (1846), 2 *Car. & Kir.* 223; *HIRST'S CASE* (1828), 1 *Lew. C. C.* 46; *R. v. HOLMES* (1843), 1 *Car. & Kir.* 248; *SMITH & BERRY'S CASE* (1836), 2 *Lew. C. C.* 139; *R. v. MORSE, SMART & TANDY* (1838), 8 *C. & P.* 605; *R. v. WILKINSON* (1838), 8 *C. & P.* 662; *R. v. WHEELLEY* (1838), 8 *C. & P.* 250; *R. v. PIKESLEY* (1839), 9 *C. & P.* 124; *R. v. OWEN* (1839), 9 *C. & P.* 83; *JEANS v. WHEEDON* (1843), 2 *Mood. & R.* 486; *R. v. POMEROY* (1845), 1 *Cox, C. C.* 231; *R. v. CARPENTER* (1847), 8 *L. T. O. S.* 558; *R. v. WHITE* (1847), 2 *Cox, C. C.* 192.

*H.M. ADVOCATE v. DOWNIE* (1865), 5 *Irv.* 202; 38 *Sc. Jur.* 9.—**SCOT.**

*m. Statements as to other transactions—Evidence of previous conspiracy—Charge of riot.*—Statement of law regarding mobbing & rioting:—*Held*: incompetent to prove previous conspiracy to commit an offence by leading evidence of what the panel said several weeks before it was committed, there being no notice given in the indictment that such evidence was intended to be led by prosecutor.—*H.M. ADVOCATE v. ROBERTSON* (1842), 1 *Broun*, 152.—**SCOT.**

**4245 i. Statements as to same transaction.**—Averments made by a man at not too remote a period from the date of the transactions impeached may be given in evidence against him.—*R. v. STREET* (1888), 3 *Q. L. J.* 88.—**AUS.**

**4245 ii.** —.]—*R. v. JONES* (1868), 28 *U. C. R.* 416, 424.—**CAN.**

**4245 iii.** —.]—A declaration made by a prisoner, tried on an indictment for larceny, before he was charged with the crime, in answer to a question asked him, where he got the property, is evidence on his behalf.—*R. v. FERGUSON* (1876), 3 *Pug.* 612.—**CAN.**

**4245 iv.** —.]—In the course of a conversation between prisoner & a detective relative to the purchase of counterfeit money, prisoner asked the detective whether he had received a letter written by the former stating his desire to purchase counterfeit money, & upon the detective showing prisoner the letter he admitted it was his:—*Held*: the letter was admissible as in a sense forming part of the subject-matter of the conversation.—*R. v. ATTWOOD* (1891), 20 *O. R.* 574.—**CAN.**

**4245 v.** —.]—*R. v. KANGAL MALL* (1905), 1 *L. R.* 41 *Calc.* 601.—**IND.**

**4245 vi.** —.]—*LYALL v. RAMSAY* (1853), 1 *Irv.* 189.—**SCOT.**

**4245 vii.** —.]—In a trial for murder it was proposed to ask a police-surgeon questions as to statements made to

him by accused, while he was in accused's house to see the body of the child alleged to have been murdered in order to certify the cause of death:—*Held*: the evidence was competent.—*H.M. ADVOCATE v. DUFF* (1910), 6 *Adam*, 248.—**SCOT.**

*n. — Whether admissible for defence—As showing consistent story.*—Though a panel cannot in the ordinary case found his defence on statements made by himself, it is competent to prove that his account of the matter has been the same throughout.—*H.M. ADVOCATE v. FORREST* (1837), 1 *Swin.* 404.—**SCOT.**

*oral evidence.*—No oral evidence can be received to prove the fact of a confession if the confession itself be inadmissible.—*R. v. SHIVYA* (1876), 1 *L. R.* 1 *Bom.* 219.—**IND.**

*p. Confession subsequently retracted—No less admissible—Duty of court.*—It does not necessarily follow, because a confession made by an accused person is subsequently retracted & there is little or no evidence on the record to support the confession, that therefore the confession is to be rejected. The credibility of such a confession is in such case a matter to be decided by the ct. according to the circumstances of each particular case, & if the ct. is of opinion that such a confession is true, the ct. is bound to act, as far as the person making it is concerned, upon such belief.—*R. v. MAIKU LAL* (1897), 1 *L. R.* 20 *All.* 133.—**IND.**

*q. Statement taken immediately before arrest.*—Where there is evidence in the hands of a police officer upon which he is bound to arrest a person, it is improper for him to obtain a statement from that person & reduce it to writing. Such statement is inadmissible in evidence.—*R. v. JADUB DAS* (1899), 1 *L. R.* 27 *Calc.* 295; 4 *C. W. N.* 129.—**IND.**

*r. Statement obtained without authority & without caution.*—Where a person is charged with arson statements made by him to an officer of the Fire Commissioner who was making an inquiry into the cause of the fire, are admissible in evidence against him.—*R. v. SHAPIRO* (1922), 40 *Can. Crim. Cas.* 14; *R. R.* 34 *K. B.* 431.—**CAN.**

*s. —*—.]—Statements obtained from prisoners by unauthorised persons, & without caution or warning, will not be admitted in evidence against such prisoners.—*R. v. HUGHES* (1839), 1 *Craw. & D.* 13.—**IR.**

*t. Identity of person making statement must be proved.*—A conversa-

a house & another person outside, in the hearing of a third person, who did not see the person outside, or recognise his voice, is not admissible in the absence of evidence to show that prisoner was the person who spoke from the outside, even though the person inside may have addressed the person outside by the same name as that of prisoner, & the person outside responded to that name.—*LAVIN'S CASE* (1843), 1 *Ir. Cir. Rep.* 813.—**IR.**

*a. Objection that statement not complete—No ground for rejection.*—An objection to the admissibility of a declaration in respect that it did not contain all the panel had said was repelled.—*H.M. ADVOCATE v. BROWN* (1866), 5 *Irv.* 215.—**SCOT.**

*b. Accused cannot consent to admission of inadmissible evidence.*—Accused cannot by waiver or consent render admissible a statement expressly declared to be inadmissible.—*R. v. PERKINS*, [1920] *App. D.* 307.—**S. AF.**

**PART XII. SECT. 5, SUB-SECT. 2.**

*a. Confession not reduced to writing—Whether parol evidence admissible.*—*Held*: parol evidence of a confession was admissible, it being proved that the confession was not taken down in writing whilst prisoner was

**4247. Statements under Indictable Offences Act, 1848 (c. 42)—Admissible if statutory provisions complied with.]—*Semble*: the statement before the magistrate of an accused person, though taken in the form given in form N. of the above Act, is not admissible without further proof under sect. 18 of that statute, unless the requisites contained in the proviso to that sect. have been inserted in the form, or proved to have been fulfilled.—*R. v. KIMBER* (1849), 13 J. P. 122; 3 Cox, C. C. 223.**

*Annotation*:—*Reid. R. v. Sansome* (1850), 1 Den. 545.

**4248.** ———.]—The examination of prisoner taken by the magistrate in form N, given in the schedule to the above Act, & duly returned to the ct., is admissible without proof of the signature of the magistrate, or of compliance with the proviso in sect. 18 of that statute.—*R. v. STEEL* (1849), 13 J. P. 606.

*Annotation*:—*Reid. R. v. Sansome* (1850), 3 Car. & Kir. 332.

**4249.** ———.]—Where a statement made by a prisoner before the committing magistrates, appears on the face of it, to have been duly taken under sect. 26 of the above Act, & is at the trial produced from the depositions of the witnesses taken at the same time & appears to have been transmitted with them, it is receivable in evidence without further proof.—*R. v. HARRIS* (1849), 13 L. T. O. S. 509; 4 Cox, C. C. 147.

**4250.** ———.]—*Semble*: before a statement made by a prisoner in the presence of, & duly signed by, the committing magistrate, can be received in evidence against him, proof must be given that he was cautioned in the manner provided by sect. 18 of the above Act *dehors* any declaration to that effect, contained in the caption of the statement itself.—*R. v. HIGSON* (1849), 2 Car. & Kir. 769.

**4251.** ———.]—*R. v. HUNT* (1849), 13 L. T. O. S. 509.

**4252.** ———.]—On a second examination of a prisoner for felony, the evidence against him was read over to him, & the first caution in sect. 18 of the above Act was given, & he made a statement which was taken down. Prosecutor applied for a remand, which was granted, & on prisoner being brought up again no further evidence was given against him, but his attorney asked a few questions of the witnesses. Prisoner was then cautioned as before, but declined to make any statement:—*Held*: prisoner's statement made on the second examination was receivable in evidence at the trial, & it was read by the magistrate's clerk who took it down.—*R. v. BOND* (1850), 3 Car. & Kir. 337, n.; 1 Den. 517; T. & M. 242; 4 New Mag. Cas. 133; 4 New Sess. Cas. 143; 19 L. J. M. C.

before the magistrate, although there was no proof that it had not been put in writing within two days.—*R. v. KINSLEY* (1826), Jebb, Cr. & Pr. Cas. 67.—*IR.*

**d.** ———.]—If a prisoner's declaration before a magistrate has not been taken in writing, parole evidence of it is admissible.—*R. v. FARRELL* (1841), Arm. M. & O. 72.—*IR.*

**e.** ———.]—It is not necessary to be clearly shown that statements, made by a prisoner on his examination before a magistrate, were reduced to writing, in order to exclude parole evidence of such statements.—*R. v. MCGOVERN* (1852), 5 Cox, C. C. 506.—*IR.*

**f.** ———.]—It is the duty of the magistrate to take down in writing statements made before him by a prisoner, & even though it should be shown affirmatively that the state-

ments were not reduced to writing, evidence cannot be given of what was said by prisoner on the occasion.—*R. v. M'DERMOTT* (1854), 6 Cox, C. C. 479.—*IR.*

**g.** ———.]—*Held*: Act 31 of 1917, s. 273, did not apply when the confession was made before a magistrate or justice. In every other case in order to be admissible the confession must be both confirmed & reduced to writing in the presence of a magistrate or justice.—*R. v. PIENAAR*, [1918] T. P. D. 288.—*S. AF.*

**h. Admissible after caution.**—The provisions of 32 & 33 Vict. (Can.), c. 30, s. 32, are directory, & a statement in writing not prefaced with the statutory words, made by a prisoner to the committing magistrate, was admitted in evidence, upon evidence by the committing magistrate that he had verbally cautioned prisoner to the effect required by the statute, before

138; 14 J. P. 288; 14 Jur. 399; 4 Cox, C. C. 231, C. C. R.

*Annotations*:—*Reid. R. v. Faderman* (1850), 4 Cox, C. C. 370; *R. v. Thomas* (1850), 14 J. P. 513.

**4253.** ———.]—(1) A statement made by a prisoner before a committing magistrate, & signed by prisoner & the magistrate, if taken in the form prescribed by the schedule to the above Act is admissible in evidence against him at his trial, at common law.

(2) *Semble*: where there is no evidence of any previous threat or inducement having been held out to prisoner, such statement would be admissible under the above statute without proof of the magistrate's signature.

(3) It will be prudent for justices always to give prisoner the second caution as well as the first.—*R. v. SANSOME* (1850), 3 Car. & Kir. 332; 1 Den. 545; T. & M. 260; 4 New Mag. Cas. 80; 4 New Sess. Cas. 152; 19 L. J. M. C. 143; 15 L. T. O. S. 119; 14 J. P. 273; 14 Jur. 406; 4 Cox, C. C. 203, C. C. R.

*Annotation*:—*As to (1) & (3) Reid. R. v. Hertfordshire JJ.* (1910), 80 L. J. K. B. 437.

**4254.** ———.]—(1) A., being questioned by a police constable about the concealment of a birth, gave an answer which caused the officer to say to her, "It might be better for you to tell the truth & not a lie":—*Held*: a further statement made by A. to the policeman after the above inducement was inadmissible in evidence against her, as not being free & voluntary.

(2) A. was taken into custody the same day, placed with two accomplices, B. & C., & charged with concealment of birth. All three then made statements:—*Held*: those made by B. & C. could not be deemed to be affected by the previous inducement to A., & were, therefore, admissible against B. & C. respectively, although that made by A. was not so.

(3) Prisoners were sent for trial, but before their committal they received the formal caution from the magistrate as to anything they might wish to say [as required by sect. 18 of the above Act]. Whereupon A. made a statement which was taken down in writing, as usual, & attached to the depositions:—*Held*: this latter statement of A. might be read at the trial as evidence against herself.—*R. v. BATE* (1871), 11 Cox, C. C. 686.

**4255. Voluntary statement in course of hearing—Admissible without caution.**—On an examination on a charge of felony before a magistrate, prisoner was asked if he wished to put any question to a witness against him. Instead of asking anything, he made a statement, which was written down on the depositions, but not signed by prisoner, who had received no caution:—*Held*:

receiving the statement in question.—*R. v. KALABEEN* (1867), 1 B. C. R. pt. 1, 1.—*CAN.*

**k.** ———.]—Any statement made by an accused person, if voluntary, is admissible in evidence, *a fortiori* if made in open ct. & after being cautioned by the magistrate.—*R. v. JAMES* (1912), 17 B. C. R. 163.—*CAN.*

**l.** ———.]—*R. v. WALABEK* (1913), 23 W. L. R. 931; 10 D. L. R. 522; 4 W. W. R. 501.—*CAN.*

**m.** ———.]—The examinations of prisoners taken before certain magistrates were received in evidence, although it appeared that it was partly elicited by questions put by the magistrates, the questions being of a general nature, & prisoners having been previously duly cautioned.—*R. v. GLEN-NON, TOOLE & MAGRATH* (1840), 1 Craw. & D. 359.—*IR.*

**n. Statements on oath—After caution.]**



**Sect. 5.—Confessions and statements by accused:**  
**Sub-sects. 2 & 3.]**

this statement was not evidence *per se*, but any one who heard prisoner make it might give evidence of it, refreshing his memory from what was thus written down.—*R. v. WATSON* (1851), 3 Car. & Kir. 111.

**4256.** ———.]—A voluntary statement made by a prisoner in the course of an examination before a magistrate, & before all the witnesses have been examined, is admissible in evidence at the trial, although no caution has been previously given.—*R. v. STRIPP* (1856), Dears. C. C. 648; 25 L. J. M. C. 109; 27 L. T. O. S. 128; 20 J. P. 279; 2 Jur. N. S. 452; 4 W. R. 489; 7 Cox, C. C. 97, C. C. R.

**4257.** ———.]—*R. v. TAYLOR*, No. 3812, *ante*.

**4258. Statements in answer to questions by magistrate—Inadmissible without caution.]**—A statement elicited from a prisoner by questions put to him without any previous caution by a magistrate, before whom he is brought in custody upon a criminal charge, is not admissible against him in evidence at his trial.—*R. v. PETTIT* (1850), 4 Cox, C. C. 164.

*Annotation* :—*Refd.* Ibrahim v. R., [1914] A. C. 599.

**4259.** ——— **Inadmissible after caution.]**—(1) Where there is no clear evidence of an offence having been committed, a police officer is not justified, in consequence of mere rumours in a neighbourhood, in putting searching questions to a person for the purpose of eliciting the proof of a crime, as well as of that person's connection with it.

(2) After the investigation before a magistrate on a charge of concealment of birth, & after accused had been cautioned in the usual manner, & had stated that she had nothing to say, but before her actual committal, the presiding magistrate asked her what she had done with the body of the child :—*Held* : her statement in answer was not admissible; nor would the learned judge allow a witness to be asked whether, in consequence of such a statement, he did a particular thing.—*R. v. BERRIMAN* (1854), 6 Cox, C. C. 388.

*Annotation* :—*As to* (1) & (2) *Refd.* Ibrahim v. R., [1914] A. C. 599.

**4260. Evidence under Criminal Law Amendment Act, 1885 (c. 69), ss. 5, 20—May be put in by prosecution at trial.]**—Prisoner was charged under sect. 5 of the above Act with having had unlawful intercourse with a girl under the age of fourteen years. When before the justices he gave evidence on oath :—*Held* : at the trial his statement, as made on oath, might be put in without his consent, & might be used for or against him.—*R. v. ADAMS* (1886), 50 J. P. 136.

**4261. May be put in by prosecution at trial.]**—The statement which a prisoner makes in giving

evidence before the magistrate by whom he is committed for trial, may be used as evidence against him at the trial, & the deposition containing such statement may be put in evidence at the trial, although he then declines to give evidence.—*R. v. BIRD* (1898), 79 L. T. 359; 62 J. P. 760; 47 W. R. 112; 15 T. L. R. 26; 43 Sol. Jo. 30; 19 Cox, C. C. 180, C. C. R.

*Annotation* :—*Refd.* R. v. Boyle (1904), 20 T. L. R. 192.

**4262.** ———.]—Prisoner was indicted under Criminal Law Amendment Act, 1885 (c. 69), s. 4, for the felony of carnally knowing, in Mar. 1911, a girl under the age of thirteen years. He was also indicted under sect. 5 of the same Act for the misdemeanour of carnally knowing the same girl in Apr. 1912, she then being above the age of thirteen years & under the age of sixteen years. When before the justices prisoner, who was then only charged with the misdemeanour under sect. 5, gave evidence, in the course of which he admitted having had intercourse with the girl in Mar. 1911, & at Christmas, 1911, but not at any later date. At the trial the prosecution proceeded with the indictment for the felony under sect. 4 of the Act & tendered in evidence prisoner's deposition before the justices when before them on the misdemeanour charge under sect. 5 :—*Held* : the deposition was admissible in evidence.—*R. v. CHAPMAN* (1912), 29 T. L. R. 117.

**4263.** ——— **Evidence under Criminal Evidence Act, 1898 (c. 36).]**—*R. v. BOYLE* (1904), 20 T. L. R. 192.

**SUB-SECT. 3.—STATEMENTS MADE IN OTHER LEGAL PROCEEDINGS.**

**4264. In bankruptcy proceedings—Balance sheet not admissible.]**—The balance sheet of a bkpt., given on oath under his commission, is not admissible against him on a criminal charge.—*R. v. BRITTON* (1833), 1 Mood. & R. 297, N. P.

*Annotations* :—*Refd.* R. v. Wheeler (1838), 2 Mood. C. C. 45; R. v. Scott (1856), 7 Cox, C. C. 164.

**4265.** ——— **Examination in bankruptcy.]**—*Held* : the examination of a person on oath before comrs. in bkpcy., after he had been cautioned & had elected what questions he would answer, was admissible against him on a charge of forgery.—*R. v. WHEATER* (1838), 2 Lew. C. C. 157; 2 Mood. C. C. 45, C. C. R.

*Annotations* :—*Consd.* R. v. Owen (1840), 9 C. & P. 238. *Distd.* R. v. Swan (1849), 14 J. P. 161. *Refd.* R. v. Scott (1856), Dears. & B. 47.

**4266.** ———.]—*R. v. SWAN*, No. 1952, *ante*.

**4267.** ——— **No caution administered.]**—On an indictment for false pretences it was proposed, for the purpose of showing the falsehood of the representations, to give in evidence the examination of prisoner who had become bkpt. at a meeting held before the comr. for the allowance of his,

—*R. v. SKELTON* (1898), 3 Terr. L. R. 58.—**CAN.**

**o. Confession made in one language—Taken down in another—Evidence Act, 1 of 1872.]**—*R. v. NILMADHUR MITTER* (1868), 1 L. R. 15 Calc. 595.—**IND.**

**p. Accused interrogated twice—No caution before first interrogation.]**—Indictment for receiving stolen goods. Prisoner, being interrogated but not cautioned, by a magistrate, made a parol statement in relation to the charge against him, & being afterwards cautioned, & again interrogated as before, he made the same statement, which was reduced to writing & signed by him :—*Held* : such statement was admissible in evidence.—*R. v. HENSON*

(1844), 3 Craw. & D. 177.—**IR.**

**q. Statement said to have been taken before magistrate—Magistrate absent during hearing.]**—The declaration of an accused person will not be admitted as evidence if it is proved that the magistrate before whom it hears to be omitted was absent during any material part of the examination.—*H.M. ADVOCATE v. MAHLER & BERENHARD* (1857), 2 Irv. 634; 29 Sc. Jur. 562.—**SCOT.**

**r. ———.]**—Objection sustained to the admissibility of a prisoner's declaration in respect it appeared on the proof that the declaration had not been omitted in presence of the magistrate before whom it bore to have been taken.—*H.M. ADVOCATE v. M'MILLAN*

(1858), 3 Irv. 213.—**SCOT.**

**PART XII. SECT. 5, SUB-SECT. 3.**

**4265 i. In bankruptcy proceedings—Examination in bankruptcy.]**—Statements of an insolvent on his examination before assignee at creditors' meeting, are evidence against him on a criminal trial.—*R. v. MCLEAN* (1877), 1 P. & B. 377.—**CAN.**

**s. ——— Meeting of creditors—Questions by chairman.]**—Statements made by a bkpt. in answer to questions put by the chairman at a meeting of creditors are admissible in evidence in a prosecution against him.—*R. v. O'NEILL* (1880), 3 N. Z. L. R. C. A. 298.—**N.Z.**





**Sect. 5.—Confessions and statements by accused:**  
*Sub-sect. 3.]*

Act, 1869 (c. 62), where notes of his public examination had been taken but not read over by or to nor signed by him, parol evidence of the person who took the notes was admissible to prove such admissions.—*R. v. ERDHEIM*, [1896] 2 Q. B. 260; 65 L. J. M. C. 176; 74 L. T. 734; 44 W. R. 607; 12 T. L. R. 445; 40 Sol. Jo. 569; 18 Cox, C. C. 355; 3 Mans. 142, C. C. R.

*Annotations:—Reid. R. v. Bird* (1898), 79 L. T. 359. *Mentd. Re Atherton*, [1912] 2 K. B. 251.

**4278.** ————*]*—Though the notes of the public examination of a bkpt. were not signed by him, the statement then made by him may be admissions by him, & as such admissible in evidence against him.—*R. v. HIRSCHFELD* (1897), 61 J. P. 520.

**4279.** ——— **Statement of affairs.**—*]*—Upon an indictment under Larceny Act, 1861 (c. 96), s. 80, for misappropriation of trust money, the statement of affairs made by accused in the course of his bkpcy. under Bkpcy. Act, 1883 (c. 52), s. 16, & rule 217 of the Bkpcy. Rules, 1886, is admissible in evidence against him for the purpose of proving the receipt of the money by him.—*R. v. PIKE*, [1902] 1 K. B. 552; 71 L. J. K. B. 287; 86 L. T. 205; 66 J. P. 296; 50 W. R. 672; 18 T. L. R. 285; 46 Sol. Jo. 268; 20 Cox, C. C. 164; 9 Mans. 121, C. C. R.

**4280. Answers in chancery.**—*]*—On the trial of an indictment for a conspiracy, the answers in chancery of defts., made on oath by them in a suit instituted against them by prosecutor, are receivable in evidence on the part of the prosecution.—*R. v. GOLDSHEDE* (1844), 1 Car. & Kir. 657.

*Annotation:—Reid. R. v. Coote* (1873), L. R. 4 P. C. 599.

**4281. Before election commissioners—Perjury—Application to indictments.**—*]*—By Corrupt Practices Prevention Act, 1863 (c. 29), s. 7, witnesses before comrs. for inquiring into the existence of corrupt practices at elections shall not be excused from answering questions on the ground that the answers thereto may criminate them & that no statement made by any person in answer to any question put by such comrs. shall, "except in cases of indictments for perjury," be admissible in evidence in any proceeding, civil or criminal:—*Held*: "except in cases of indictments for perjury" applies only to perjury committed before the comrs.—*R. v. BUTTLE* (1870), L. R. 1 C. C. R. 248; 39 L. J. M. C. 115; 22 L. T. 728; 34 J. P. 565; 18 W. R. 956; 11 Cox, C. C. 566, C. C. R.

*Annotation:—Mentd. R. v. Ettridge*, [1909] 2 K. B. 24.

**4282.** ——— **Ex officio information.**—*]*—By Corrupt Practices Prevention Act, 1863 (c. 29),

s. 7, no person summoned as a witness before any comrs. appointed under Corrupt Practices Act, 1852 (c. 57), shall be excused from answering any question relating to corrupt practices forming the subject of inquiry on the ground that the answer would tend to criminate himself, provided that no statement made by any person in answer to any question put by or before such comrs. shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding civil or criminal:—*Held*: the exception in the proviso did not apply to an *ex officio* information by the A.-G. for perjury.—*R. v. SLATOR* (1881), 8 Q. B. D. 267; 51 L. J. Q. B. 246; 46 J. P. 694; 30 W. R. 410.

**4283. Before committee of House of Commons.**—*]*

—The evidence which a person has given before a committee of the House of Commons, is afterwards admissible against him on a criminal charge.—*R. v. MERCERON* (1818), 2 Stark. 366.

*Annotations:—Consd. R. v. Gilham* (1828), 1 Mood. C. C. 186. *Reid. R. v. Britton* (1833), 1 Mood. & R. 297; *R. v. Wheeler* (1838), 2 Lew. C. C. 157; *R. v. Garbett* (1847), 2 Car. & Kir. 474; *R. v. Scott* (1856), 7 Cox, C. C. 164.

**4284. Before military court of inquiry.**—*]*—Rule 124 (L) of the Rules of Procedure made under Army Act, 1881 (c. 58), s. 70, which provides that any confession, statement or answer to a question made or given at a ct. of inquiry shall not be admissible in evidence against an officer or soldier, applies only to military tribunals & does not make a statement made at a ct. of inquiry inadmissible in evidence at a criminal trial in a civil ct.—*R. v. COLPUS & BOORMAN, R. v. WHITE*, [1917] 1 K. B. 574; 86 L. J. K. B. 459; 116 L. T. 703; 81 J. P. 135; 33 T. L. R. 184; 61 Sol. Jo. 268; 25 Cox, C. C. 716; 12 Cr. App. Rep. 193, C. C. A.

**4285. In civil action.**—*]*—A fraudulent trustee who has admitted a misdemeanour previously to disclosing it in the legal proceedings mentioned in Larceny Act, 1861 (c. 96), s. 85, cannot claim the benefit of that sect.—*R. v. OLIVER* (1909), 3 Cr. App. Rep. 246, C. C. A.

**4286. — Compulsory disclosure.**—*]*—When an act done by a person is first disclosed by him without making any objection during cross-examination in a civil action, it is not disclosed by him in consequence of any compulsory process of a ct. of law, within the meaning of Larceny Act, 1861 (c. 96), s. 85, & he is liable to be convicted of an offence under Larceny Act, 1901 (c. 10), in respect of the act so disclosed.—*R. v. NOEL*, [1914] 3 K. B. 848; 84 L. J. K. B. 142; 112 L. T. 47, 24 Cox, C. C. 486; 10 Cr. App. Rep. 255, C. C. A.

**4287. — Plea of infancy not admissible to prove false pretences as to age.**—*]*—On an indictment for obtaining goods by falsely pretending to be of full age, a plea of infancy in an action brought

**4285 i. In civil action.**—*]*—On a trial for conspiracy to defraud by means of the fraudulent & collusive transfer of a pretended promissory note & the institution, maintenance & prosecution in the civil cts. of an oppressive, unfounded, false & malicious suit at law based on the note:—*Held*: a deposition made in such civil suit by pltf. therein, one of the accused, may be received & read to the jury as evidence not only against him but also against his co-deft.—*R. v. MURPHY* (1891), 17 Q. L. R. 305.—**CAN.**

**4285 ii.** ———*]*—The examination of deft. in a civil action arising out of the matters in question, he not having claimed privilege therein, was allowed to be used against him on his trial for criminal conspiracy.—*R. v. CONNOLLY* (1894), 25 O. R. 151.—**CAN.**

**4285 iii.** ———*]*—In a suit on a promissory note, which was alleged to have

been executed jointly by G. & his son V., V. filed an affidavit in order to obtain leave to defend the suit, & having obtained leave to defend, gave evidence at the trial on his own behalf. On a subsequent trial of V. for forgery of his father's signature to the same promissory note, the affidavit & deposition of V. in the suit were admitted as evidence against V.:—*Held*: both the affidavit & the deposition were properly admitted.—*R. v. GOPAL DOSS* (1881), L. L. R. 3 Mad. 271.—**IND.**

**4285 iv.** ———*]*—In a criminal trial statements made by accused as a witness in a previous civil action, relating to the same subject-matter, may be used as evidence against him.—*BANAGHAN v. H.M. ADVOCATE* (1888), 15 R. (Ct. of Sess.) 39; 25 Sc. L. R. 311.—**SCOT.**

*t. Examination for discovery in aid of execution.*—*]*—*R. v. VAN METRE* (1906),

7 Terr. L. R. 297; 3 W. L. R. 416.—**CAN.**

**a. Coroner's inquest — Depositions of accused—Accused in custody—Admissible if caution given.**—*]*—C. & R. were convicted of arson, R. as an accessory. At the trial the depositions of C. & R. before the coroner at an inquest under the Act No. 55 were used against them. At the coroner's inquest, C. was cautioned, R. was not cautioned. The depositions did not anyhow show the caution to C. On a question of law reserved & a case stated to the full ct., the conviction of C. was upheld & that of R. quashed.—*R. v. GOLDWELL* (1863), 2 W. & W. 208.—**AUS.**

**b.** ———*]*—T. having been tried for the murder of an infant & acquitted was tried for aiding the mother of the infant in concealing its birth. His deposition before the

against deft., is not admissible to prove the minority.—*R. v. SIMMONDS* (1850), 14 J. P. 467; 4 Cox, C. C. 277.

**4288. In suit in Doctors' Commons.]—***R. v. WALKER* (1806), cited in 6 C. & P. p. 162.

*Annotation:—Refd. R. v. Lewis* (1833), 6 C. & P. 161.

**4289. In answer to incriminating questions—Inadmissible if witness improperly compelled to answer.]—**If a witness claims the protection of the ct., on the ground that his answer would tend to criminate himself, & there appears reasonable ground to believe that it would do so, he is not compellable to answer; & if obliged to answer notwithstanding, what he says must be considered to have been obtained by compulsion, & cannot be given afterwards in evidence against him.—*R. v. GARBETT* (1847), 2 Car. & Kir. 474; 1 Den. 236; 9 L. T. O. S. 51; 13 J. P. 602; 2 Cox, C. C. 448, Ex. Ch.

*Annotations:—Consd. R. v. Coote* (1873), L. R. 4 P. C. 599. *Refd. R. v. Bickerton* (1847), 11 J. P. 664; *R. v. Darby* (1847), 2 Cox, C. C. 316; *Two Sicilies (King) v. Wilcox* (1851), 1 Sim. N. S. 301; *Fisher v. Ronalds* (1852), 12 C. B. 762; *Osborn v. London Dock Co.* (1855), 10 Exch. 698; *R. v. Scott* (1856), 7 Cox, C. C. 164; *R. v. Robinson* (1867), 36 L. J. M. C. 78; *R. v. Buttle* (1870), 22 L. T. 728. *Mentd. Short v. Mercier* (1851), 3 Mac. & G. 205; *Volant v. Soyer* (1853), 13 C. B. 231; *Phelps v. Prew* (1854), 23 L. J. Q. B. 140; *Bickford v. Darcy* (1866), L. R. 1 Exch. 354.

**4290. ———.]—***R. v. SCOTT*, No. 4268, *ante*.

**4291. ———.]—**According to English law, introduced into Lower Canada at the time of the cession of Canada to England in 1763, the depositions on oath of a witness legally taken are admissible evidence against him, if he is subsequently tried on a criminal charge. The only exception is, in the case of answers to questions which he objected to when his evidence was taken as tending to criminate him, but which he has been improperly compelled to answer.—*R. v. COOTE* (1873), L. R. 4 P. C. 599; 9 Moo. P. C. C. N. S. 463; 42 L. J. P. C. 45; 29 L. T. 111; 37 J. P. 708; 21 W. R. 553; 12 Cox, C. C. 557; 17 E. R. 587, P. C.

**4292. Evidence before magistrate in other proceedings—As accused person.]—**A. gave a mortal

coroner had been given thus: He was brought up in custody; nothing was said to him by way of warning that he was not bound to swear; he made no objection to be sworn; he was sworn; & his evidence was taken down in a deposition. The judge doubted if the deposition was admissible but admitted it, subject to a reserved question & T. was convicted:—*Held: T.'s deposition was inadmissible.*—*R. v. TAYLOR* (1863), 2 W. & W. 153.—**AUS.**

**c. ———.]—**At the trial of prisoner for the murder of M., his own sworn statement made at the coroner's inquest on M.'s body was received in evidence against him. It appeared that he was in custody before, & at the time of such inquest, on suspicion of the murder; & that, being in such custody, he voluntarily, but not spontaneously, gave evidence. Before he was sworn, the coroner told him that if he wished to make any statement, in order to clear himself with the public, he might do so, but that he was not bound to make any, & that he would not be examined unless he himself desired it, & that any such evidence would or might be for or against him. After this he was examined on oath, some of his evidence being in answer to questions put to him by the jury:—*Held: the whole of the examination was rightly received.*—*R. v. MEEHAN* (1869), 8 N. S. W. S. C. R. 289.—**AUS.**

**d. ———.]—**Prisoner was arrested the day before the inquest on a charge of murder. He was present at the inquest, & after

being duly cautioned he gave his evidence voluntarily & without objection:—*Held: the deposition was rightly received in evidence.*—*R. v. MCCOY* (1884), 5 N. S. W. L. R. 429.—**AUS.**

**e. ———.]—**To be proved by coroner.]—At a trial for murder prisoner's counsel proposed to prove by witness his own deposition at the inquest, & to show by other witnesses that it contained a true statement of his evidence, although the witness alleged it to be incorrect. The judge ruled that the coroner must be called to prove the depositions.—*R. v. HAMILTON* (1866), 16 C. P. 340.—**CAN.**

**f. ———.]—**Accused not in custody.]—Statements made on oath by a person at an inquest, touching the cause of a fire, he not being in custody at the time, are admissible in evidence against him on an indictment for arson, in respect of the property burnt.—*R. v. HAYES* (1872), 11 N. S. W. S. C. R. 51.—**AUS.**

**g. ———.]—**During trial, evidence was admitted, subject to objection of certain statements made by accused at the coroner's ct. without being previously warned:—*Held: evidence should not have been admitted.*—*R. v. SMITH* (1898), 1 W. A. L. R. 43.—**AUS.**

**h. ———.]—**The depositions of a witness taken at a coroner's inquest without objection by him that his answers may tend to criminate him, & who is subsequently charged with an offence, are receivable

blow to B., who took out a summons against A. for an assault. The charge of assault was heard under this summons before D., & another magistrate, who summarily convicted A. of the assault. What was said by the parties before the magistrates was not taken down in writing. B. died:—*Held: on the trial of A. for the murder of B., D. might give evidence of what B. said in the presence of A. at the hearing before the magistrates, & of what A. said in answer to it.*—*R. v. EDMUNDS* (1833), 6 C. & P. 164; 2 Nev. & M. M. C. 159.

**4293. ———.]—**A statement made by prisoner which he refused to sign, but which received the magistrate's signature, as proved by a party present, may be given in evidence without calling the magistrate's clerk, & this, although such statement was so made by prisoner in reference to another charge than that for the support of which the statement is sought to be given in evidence.—*R. v. POMEROY* (1845), 5 L. T. O. S. 371; 9 J. P. 682; 1 Cox, C. C. 231.

**4294. ———.]—**On an indictment of A. & B. for murder, it appeared that A. threw deceased down into a wet ditch, called to B. to come & help, which he did, & they both forcibly committed the robbery. The deceased died three weeks afterwards of pneumonia, or inflammation of the lung, which might either be caused by cold or violence:—*Held: the deposition of deceased on a charge of robbery, & statements by prisoners on that charge, were admissible, although the particular deposition was not signed by the magistrate.*—*R. v. LEE* (1864), 4 F. & F. 63.

*Annotations:—Refd. R. v. Parker* (1870), L. R. 1 C. C. R. 225; *R. v. Edmunds* (1909), 2 Cr. App. Rep. 257.

**4295. — As witness.]—**The examination of prisoner before a magistrate, who examines prisoner as a witness, although he holds out no threat or inducement, cannot be used against him.—*R. v. WILSON* (1817), Holt, N. P. 597.

*Annotation:—N.F. R. v. Ellis* (1826), Ry. & M. 432.

**4296. ———.]—**A. was charged with forgery, & B. was examined on oath before the magistrate as a witness against A. After this B.

in evidence against him at the trial.—*R. v. WILLIAMS* (1897), 28 O. R. 583.—**CAN.**

**k. ———.]—**Prisoner was indicted for murder. During the trial the depositions of prisoner taken at the coroner's inquiry were admitted in evidence, subject to objection taken by prisoner's counsel. The jury found prisoner guilty of manslaughter, & the judge reserved the question of the admissibility of the depositions:—*Held: the evidence was rightly admitted.*—*R. v. PRIDMORE* (1899), 2 W. A. L. R. 4.—**AUS.**

**l. ———.]—**Canada Evidence Act, 1893 (c. 31).]—The coroner's ct. is a criminal ct. Sect. 5 of the above Act, which abolishes the privilege of not answering criminating questions, & provides that no evidence so given shall be receivable in evidence in subsequent criminal proceedings against the witness, other than for perjury in respect thereof, applies to any evidence given by a person under oath, though he may not have claimed privilege.—*R. v. HAMMOND* (1898), 29 O. R. 211.—**CAN.**

**m. ———.]—**Under the above Act a deposition given at the coroner's inquest is inadmissible in evidence against the deponent, in a criminal proceeding subsequently instituted against him.—*R. v. VIAU* (1898), Q. R. 7 Q. B. 362.—**CAN.**

**n. At former trial.]—**A statement made by a prisoner on a former trial when the jury disagreed, is admissible in evidence against him at the second

**Sect. 5.—Confessions and statements by accused:**  
*Sub-sects. 3 & 4.]*

was himself charged with a different forgery:—*Held*: the deposition of B. was evidence against him on his trial for the forgery, notwithstanding that it was taken on oath.—*R. v. HAWORTH* (1830), 4 C. & P. 254.

*Annotation*:—*Refd.* *R. v. Coote* (1873), L. R. 4 P. C. 599.

**4297.** ———.]—A statement relating to an offence made upon oath by a person not at the time under suspicion, is admissible in evidence against him, if he be afterwards charged with the commission of it.—*R. v. TUBBY* (1833), 5 C. & P. 530.

*Annotations*:—*Distd.* *R. v. Lewis* (1833), 6 C. & P. 161. *Refd.* *R. v. Wheeler* (1838), 2 Mood. C. C. 45.

**4298.** ———.]—Prisoner was summoned before the committing magistrate touching the poisoning of C. No person was then specifically charged with the offence. Prisoner was sworn & made a statement, & at the conclusion of the examination prisoner was committed for trial:—*Held*: this statement was not receivable in evidence against prisoner.—*R. v. LEWIS* (1833), 6 C. & P. 161.

*Annotations*:—*N.F.* *R. v. Adams* (1886), 50 J. P. 136. *Refd.* *R. v. Gillis* (1866), 14 W. R. 845; *R. v. Laurent, Barrett & Weekes* (1898), 62 J. P. 250. *Mentd.* *R. v. Ryan* (1839), 2 Mood. & R. 213.

**4299.** ———.]—*R. v. DAVIS*, No. 4025, *ante*.

**4300.** ———.]—Prisoners charged prosecutor with an indecent assault, & gave evidence upon oath before the magistrate in support of the charge. It was dismissed, & a counter charge made of accusing with intent to extort money:—*Held*: the depositions were admissible against prisoners.

trial.—*R. v. HUNT* (1887), 8 N. S. W. L. R. 38; 3 N. S. W. W. N. 83.—*AUS.*

*o.* ———.]—On a trial for larceny accused elected to give evidence on his own behalf. The jury having failed to agree a second trial took place at which accused did not give evidence. The Crown then put in against accused through the clerk of arraigns, the record of the previous trial & the evidence given by accused. The presiding judge admitted this, & accused was found guilty:—*Held*: the evidence was admissible.—*R. v. SHARPE* (1903), 5 W. A. L. R. 125.—*AUS.*

*p.* *At previous inquiry.*—A deposition on oath made by one of several accused, as a witness in a previous inquiry was admitted in evidence against him.—*R. v. Moss* (1893), 1 L. R. 16 All. 88.—*IND.*

*q.* *At preliminary investigation.*—*R. v. COOTE* (1873), 18 L. C. J. 103.—*CAN.*

—.]—Trial for murder. Accusatory preliminary hearing on a charge of escape, &c., at the hearing, after the usual statutory caution had been given, gave an account of the homicide, in which he admitted firing the shot, from the effects of which the injured person had died:—*Held*: the statement was admissible.—*R. v. JAMES* (1912), 21 W. L. R. 563; 4 D. L. R. 717; 17 B. C. R. 165.—*CAN.*

*s.* *Statements by prisoner in information against others.*—Statements made by a prisoner in an information with a view to his being examined as a witness for the Crown are not admissible in evidence against prisoner, for the purpose of implicating him in the offence, the subject of the information.—*R. v. M'HUGH* (1857), 7 Cox, C. C. 483.—*IR.*

*t.* ———.]—A constable went to the house of A. to obtain information

about B. & was then told by A. certain facts implicating A. in a treasonable conspiracy. The constable left & returned next morning & asked A. if he was willing to come down & repeat his statement to the superintendent of police. The superintendent asked A. to go before a magistrate & make an information "as a witness." A. consented, made an information, & afterwards reswore it, & made a further information in the presence of B. & others. He was examined & received no caution against criminating himself. Subsequently he refused to give evidence on the trial of B. & the other prisoners; he was arrested & tried for treason felony. His own informations were put in evidence against him, & he was convicted. *Held*: the informations were inadmissible & the conviction was erroneous.—*R. v. GILLIS* (1866), 17 L. C. L. R. 512.—*IR.*

*a.* *Answers tending to criminate witness—Privilege not claimed—Admissible in subsequent trial.*—If a witness when called upon to testify does not object to do so upon the ground that his answers may tend to criminate him, his answers are receivable against him, except in the case provided for by Canada Evidence Act, 1893 (c. 31), s. 5, as amended by 61 Vict. c. 53, in any criminal proceedings against him thereafter, but if he does object he is protected.—*R. v. CLARK* (1902), 22 C. L. T. 90; 3 O. L. R. 176; 5 Can. Crim. Cas. 235.—*CAN.*

*b.* ———.]—Evidence taken under Assignments Act, s. 52, without any objection on the part of the person giving evidence upon the ground that the answer would tend to incriminate or upon any of the grounds stated in Alberta Evidence Act is admissible against him in a criminal trial.—*R. v. GRAHAM* (1915), 31 W. L. R. 117; 8 W. W. R. 460; 21 D. L. R. 513.—*CAN.*

On the examination they were cross-examined to character only:—*Held*: the cross-examination & answers were not admissible.—*R. v. BRAZELL* (1850), 14 J. P. 657.

**4301.** ———.]—Deposition of witness taken before magistrates allowed to be read at trial as evidence against him, although after his evidence was taken the magistrates committed him for trial, his evidence criminating himself.—*R. v. CHIDLEY & CUMMINS* (1860), 8 Cox, C. C. 365.

*Annotations*:—*Consd.* *R. v. Gillis* (1866), 11 Cox, C. C. 69. *Refd.* *R. v. Coote* (1873), L. R. 4 P. C. 599.

**4302.** ———.]—B. & W. were charged by L. with larceny. L., without being cautioned, gave evidence on oath on this charge of larceny at the police ct., & duly signed his deposition. In his deposition he substantially admitted that he had been guilty of committing indecent acts with B., at or immediately before the time of the larceny. L. was subsequently arrested, & charged with committing acts of gross indecency with B. & W.:—*Held*: the deposition on oath of L. on the charge of larceny was evidence against him on the present charge.—*R. v. LAURENT, BARRETT & WEEKES* (1898), 62 J. P. 250.

*In proceedings before coroner.*—*See* CORONERS, Vol. XIII., pp. 232 *et seq.*

**SUB-SECT. 4.—VOLUNTARY CONFESSIONS.**

**4303. Voluntary confession admissible.**—Several prisoners being in custody on a charge of murder, A., who was one of them, said to the chaplain of the prison, that he wished to see a magistrate, & asked if any proclamation had been made, & any offer of pardon. The chaplain said, that there had, but he hoped that A. would understand that

*o.* *Proceedings in foreign court—Affidavit.*—Where, on the trial of an indictment for bigamy, deft. relied on a decree of divorce obtained in a foreign country, a certified copy of an affidavit purporting to have been made by deft. in the cause in which the divorce was granted, is evidence against him, without proof of *via voce* evidence that he had sworn to the original, or had used it in a cause in which he was a party.—*R. v. WRIGHT* (1877), 1 P. & B. 363.—*CAN.*

*d.* *Depositions in counter case.*—The depositions of witnesses given in a counter case may be used as evidence against them on their trial as accused persons, but such depositions could only be so used if the accused had made them.—*MOHER (SHEIKH) v. R.* (1893), 1 L. R. 21 Calc. 392.—*IND.*

*e.* *Charge of murder—Statement in previous trial for assault—Not admissible.*—A panel was tried & convicted of assault. He was thereafter charged with assault to the danger of life on the same species facts & omitted a declaration. He was then tried for murder, the person assaulted having died:—*Held*: the declaration could not be used as evidence against him.—*H.M. ADVOCATE v. STEWART* (1866), 5 Irv. 310.—*SCOT.*

**PART XII. SECT. 5, SUB-SECT. 4.**

**4303 i. Voluntary confession admissible.**—Where a statement by prisoner was not induced by the offer of reward or pardon but was voluntary:—*Held*: it was rightly admitted against prisoner.—*R. v. ARCHIBALD* (1869), 2 Q. S. C. R. 47.—*AUS.*

**4303 ii.** ———.]—A.-G. FOR NEW SOUTH WALES *v. MARTIN*, 9 C. L. R. 713.—*AUS.*

**4303 iii.** ———.]—Prisoner, after his committal for trial, & while in the custody of a constable, made a state-

he could offer him no inducement to make any statement, as it must be his own free & voluntary act. When A. saw the magistrate, he said that no person had held out any inducement to him to confess anything, & that what he was about to say was his own free & voluntary act & desire. A. then made a statement to the magistrate:—*Held*: this statement was receivable against A. on his trial for the murder.—*R. v. DINGLEY* (1845), 1 Car. & Kir. 637.

*Annotation*:—*Distd. R. v. Godinho* (1911), 76 J. P. 16.

**4304.** —.]—Where a prisoner prefaced her confession by saying, "I shall confess, for it will be better for me"; & all that the witness said before or after that statement was, "Well, I know nothing of that":—*Held*: the confession being a voluntary one, was admissible.—*R. v. WARREN* (1848), 11 L. T. O. S. 516; 12 J. P. 571.

**4305.** —.]—A voluntary confession two hours after questions answered, after a proper caution by a detective-inspector, is admissible.—*R. v. JAMES* (1909), 2 Cr. App. Rep. 319, C. C. A.

**4306.** —.]—*R. v. UNSWORTH* (1910), 4 Cr. App. Rep. 1, C. C. A.

**4307.** —.]—A confession made voluntarily by a prisoner when under arrest in the hope or expectation of pardon is not inadmissible unless such hope or expectation has been held out to prisoner by authorised parties.—*R. v. GODINHO* (1911), 76 J. P. 16; 28 T. L. R. 3; 55 Sol. Jo. 807; 7 Cr. App. Rep. 12, C. C. A.

**4308.** —.]—A private in an Indian regiment

ment, upon which the latter took him before a magistrate, when he laid an information on oath charging another person with having suggested the crime, & asked him to join in it, which he accordingly did. Upon the arrest of accused, prisoner made a full deposition against him, at the same time admitting his own guilt. Both information & deposition appeared to have been voluntarily made, uninfluenced by either hope or threat; but it also appeared that prisoner had not been cautioned that his statements as to the other might be given in evidence against himself, though he had been duly cautioned when under examination in his own case:—*Held*: both the information & deposition were properly received in evidence, as being statements voluntarily made, uninfluenced by any promises held out as an inducement to prisoner to make them, & that, too, though made under oath.—*R. v. FIELD* (1865), 16 C. P. 98.—*CAN.*

**4303 iv.** —.]—A statement made by a prisoner may be used in evidence against him, if it appears that prisoner was not induced to make the statement by any promise or threat.—*R. v. SOUCIE* (1878), 1 P. & B. 611.—*CAN.*

**4303 v.** —.]—Any statement made by an accused person, if voluntary, is admissible in evidence.—*R. v. JAMES* (1912), 17 B. C. R. 165.—*CAN.*

**4303 vi.** —.]—Before receiving a confession in evidence, all evidence should have been taken thereon to see that it was made with that degree of freedom which would allow its reception in evidence.—*R. v. GAUTHIER*, [1921] 2 W. W. R. 1.—*CAN.*

**4303 vii.** —.]—The confession of a prisoner is not to be excluded because he was not cautioned by the magistrates that it would be given in evidence against him, provided he was not, in making it, under threat or inducement.—*LAVIN'S CASE* (1843), 1r. Cir. Rep. 813.—*IR.*

**4303 viii.** —.]—A statement made by a prisoner to a police officer on the occasion of his being apprehended without threat or pressure or intention

to entrap is competent evidence.—*GRACIE v. STUART* (1884), 5 Couper, 379; 21 Sc. L. R. 526.—*SCOT.*

**4303 ix.** —.]—Railway policemen found accused, carrying a paper parcel, near a hut where there was a bunker belonging to the railway co. The police asked what was in the paper, & accused replied "old paper." They then asked to see the contents, which when opened was found to contain a piece of coal. They asked accused where he got it from, & he replied that he got it from a miner. A sergeant of the regular police then came up, & he requested accused & the railway police to go with him to the police station that his statements might be verified. On the way to the station accused voluntarily said, "To save trouble I may as well tell the truth; I took the coal from the bunker." Up to that time no charge had been made against accused, & no warning had been given him:—*Held*: the evidence as to the statement made by accused was competently admitted.—*COSTELLO v. McPHERSON*, [1922] S. C. (J.) 9.—*SCOT.*

**i.** — *Even though improperly induced statement added.*—It is not sufficient to render a confession irrelevant that there may have been added to it a statement, which has been improperly induced by threat or promise. In order to make a confession irrelevant it must be shown that the confession itself was improperly induced.—*R. v. NARAYAN RAGHUNATH PATKI* (1907), 1 L. R. 32 Bom. 111.—*IND.*

**g.** — *Even if made in answer to questions by person in authority.*—The fact that a person in authority questions an accused person without cautioning him, does not in itself render a confession voluntarily made in answer by accused inadmissible in evidence against him.—*MARASIMMAN v. R.* (1914), 35 N. L. R. 458.—*S. AF.*

**h.** — *Must be shown to be voluntary.*—Evidence was held not admissible on a trial for theft, of an alleged confession of the accused when virtually under arrest, as there was nothing to show that the statement

murdered one of the officers. Shortly afterwards, while he was in custody, the commanding officer asked him, "Why have you done such a senseless act?" & he replied, "Some three or four days he has been abusing me, & without doubt I killed him." At the trial the judge admitted this statement, which was objected to by counsel for the defence. Prisoner was convicted:—*Held*: even if the evidence was inadmissible, there being ample undisputed evidence *aliunde* of the guilt of prisoner, & it being very improbable that the statement influenced the verdict of the jury, there was no such miscarriage of justice as would justify the Judicial Committee in advising an interference in the matter.

*Semble*: the evidence was not inadmissible.—*IBRAHIM v. R.*, [1914] A. C. 599; 83 L. J. P. C. 185; 111 L. T. 20; 30 T. L. R. 383; 24 Cox, C. C. 174, P. C.

*Annotations*:—*Apld. R. v. Colpus & Boorman, R. v. White*, [1917] 1 K. B. 574; *R. v. Voisin*, [1918] 1 K. B. 531. *Consd. R. v. Cook* (1918), 34 T. L. R. 515. *Refd. R. v. Crowe & Myerscough* (1917), 81 J. P. 288.

**4309.** —.]—A statement by an accused person is not admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The question whether a person has been duly cautioned before making a statement is a circumstance to be taken into account by the judge in exercising his discretion whether

was made voluntarily.—*R. v. HUGHES*, [1921] 1 W. W. R. 119; 55 D. L. R. 697; 35 Can. Crim. Cas. 103.—*CAN.*

**k.** — —.]—Since admissions obtained from accused by the police when accused had not been warned are not admissible even though an inducement had been offered to make a statement, if at another interview, after warning, similar admissions are made they are not admissible unless their presumptive involuntary character is negated.—*R. v. MYLES*, [1923] 2 D. L. R. 880; 40 Can. Crim. Cas. 84; 56 N. S. R. 18.—*CAN.*

**l.** — —.]—Where it was proved that a police constable had cautioned accused & then asked him certain questions, & then counsel for the Crown sought to give in evidence the statements made by accused in answer:—*Held*: under the circumstances there was not sufficient proof of voluntariness before the ct. to render the statement admissible.—*It. v. DEVINE* (1904), 38 I. L. T. 227.—*IR.*

**m.** — —.]—Before any statement made by an accused person can be admitted in evidence against him it must be clear that accused made the statement of his own free will, & not under any feeling that he was legally bound to make a statement.—*R. v. VAN BLERCK*, [1919] C. P. D. 68.—*S. AF.*

**n.** — *Whether prosecution must prove confession voluntary.*—On a prosecution for having in possession forged bank-notes knowing them to be forged, evidence was given of a conversation with prisoner in presence of the chief of police in which prisoner made a statement as to where he got the notes, etc.:—*Held*: the *onus* was upon the prosecution to establish that the statement was free & voluntary, & it was not sufficient for this purpose that the officer should swear to it, but he should have negatived possible inducements which would have made the statement inadmissible.—*R. v. TUTTY* (1905), 38 N. S. R. 136.—*CAN.*

**o.** — —.]—The prosecution need not prove that a confession was free & voluntary before eviden

*Sect. 5.—Confessions and statements by accused:*  
*Sub-sect. 4.]*

to exclude the statement, but the absence of a caution does not as a matter of law make the statement inadmissible.—*R. v. VOISIN*, [1918] 1 K. B. 531; 87 L. J. K. B. 574; 118 L. T. 654; 82 J. P. 96; 34 T. L. R. 263; 62 Sol. Jo. 423; 26 Cox, C. C. 224; 13 Cr. App. Rep. 89, C. C. A. Annotation.—*Consd. R. v. Cook* (1918), 34 T. L. R. 515.

**4310.** —.].—An answer given by an accused person in reply to a question put to him by a police constable, without threat or inducement, may be given in evidence against him.—*ROGERS v. HAWKEN* (1898), 67 L. J. Q. B. 526; 78 L. T. 655; 62 J. P. 279; 42 Sol. Jo. 381; 19 Cox, C. C. 122, D. C.

Annotations:—*Fold. Lewis v. Harris* (1913), 110 L. T. 337. *Refd. Ibrahim v. R.*, [1914] A. C. 599.

**4311. Inadmissible if procured by improper inducement.]**—Confessions obtained in consequence of promises or threats cannot be given in evidence; but any facts, though resulting from such inadmissible confession, may be received.—*R. v. WARICKSHALL* (1783), 1 Leach, 263.

Annotations:—*Refd. R. v. Wheeler* (1838), 2 Mood. C. C. 45; *R. v. Thompson*, [1893] 2 Q. B. 12; *R. v. Booth & Jones* (1910), 74 J. P. 475; *Ibrahim v. R.*, [1914] A. C. 599.

**4312.** —.].—*R. v. BUTCHER* (1798), 1 Leach, 265, n.

**4313.** —.].—In order to render a confession by a prisoner admissible the prosecution must show affirmatively, to the satisfaction of the judge, that it has not been made under the influence of an improper inducement. If this appear doubtful on the evidence the confession ought to be rejected.

On an indictment for stealing the goods of two persons in partnership, a confession made after

an inducement to confess has been held out in their absence by the wife of one of them, who assisted in the management of their business, is inadmissible.—*R. v. WARRINGHAM* (1851), 2 Den. 447, n.; 15 Jur. 318.

Annotations:—*Refd. R. v. Baldry* (1852), 21 L. J. M. C. 130; *R. v. Moore* (1852), 21 L. J. M. C. 199; *R. v. Thompson*, [1893] 2 Q. B. 12.

**4314.** —.].—In order that evidence of a confession by a prisoner may be admissible, it must be affirmatively proved that such confession was free & voluntary, that is, was not preceded by any inducement to prisoner to make a statement held out by a person in authority, or that it was not made until after such inducement had clearly been removed.

Prisoner was tried for embezzling the money of a co. It was proved at the trial that, on being taxed with the crime by the chairman of the co., he said, "Yes, I took the money," & afterwards made out a list of the sums which he had embezzled, & with the assistance of his brother paid to the co. a part of such sums. The chairman stated that at the time of the confession no threat was used & no promise made as regards the prosecution of prisoner, but admitted that, before receiving it, he had said to prisoner's brother, "It will be the right thing for your brother to make a statement," & the ct. drew the inference that prisoner, when he made the confession, knew that the chairman had spoken these words to his brother:—*Held*: the confession of prisoner had not been satisfactorily proved to have been free & voluntary, & therefore evidence of the confession ought not to have been received.—*R. v. THOMPSON*, [1893] 2 Q. B. 12; 62 L. J. M. C. 93; 69 L. T. 22; 57 J. P. 312; 41 W. L. R. 525; 9 T. L. R. 435; 37 Sol. Jo. 457; 17 Cox, C. C. 641; 5 R. 392, C. C. R. Annotations:—*Fold. R. v. Rose* (1898), 67 L. J. Q. B. 289.

thereof admitted.—*R. v. GRAF* (1909), 13 O. W. R. 1133; 19 O. L. R. 238; 15 Can. Crim. Cas. 193.—**CAN.**

**p.** —.].—No statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.—*R. v. JONES*, [1921] 3 W. W. R. 411.—**CAN.**

**q.** —.].—Before admitting evidence of a confession made to a police officer either before or after the arrest it should be made to appear affirmatively that the confession was free & voluntary as having been made without any inducement such as a promise or threat, & the *onus* of proving this is upon the prosecution.—*R. v. READ*, [1921] 3 W. W. R. 402.—**CAN.**

**r.** —.].—A confession by an accused charged with murder excluded where the circumstances surrounding the confession was such as to raise a doubt whether it was entirely voluntary. Where such a doubt exists the *onus* is on the Crown to show that the confession was wholly voluntary.—*R. v. KATOLA*, [1909] T. S. 1019.—**S. AF.**

**s.** —.].—Before a confession can be admitted the Crown must prove affirmatively that it was freely & voluntarily made, & that accused was at the time in his sound & sober senses unless the circumstances surrounding the confession are such as clearly to indicate the existence of such facts.—*R. v. FRANS SELEPI* (1919), T. P. D. 105.—**S. AF.**

**t.** —.].—*Confession made to clergyman.*—The evidence of a clergyman to whom prisoner confessed having

committed a murder was received.—*R. v. GILHAM* (1828), 1 Ir. L. Rec. 1st ser. 346.—**IR.**

**a.** —.].—*In presence of police officers.*—Police witnesses gave evidence of a confession made by accused to his mother in their presence. It was shown that two other persons were present when the liquor in question was sold to the traps, but neither their names or present whereabouts were known to the Crown witnesses:—*Held*: the confession made not to, but merely in the presence of, the police witnesses had been rightly admitted.—*R. v. FOSTER*, [1922] E. D. L. 163.—**S. AF.**

**b.** —.].—*Statement to police officer after caution.*—The apprehending constable cautioned one of the prisoners that "anything he might say would be evidence against him"; upon this prisoner made a statement:—*Held*: the statement was admissible in evidence.—*R. v. RAMSAY & JOHNSON* (1879), 2 N. S. W. S. C. R. N. S. 92.—**AUS.**

**4311 i. Inadmissible if procured by improper inducement.**—A confession to be admissible in evidence must be free & voluntary. It is free & voluntary unless brought about by a threat or false representations.—*R. v. DEAN* (1896), 17 N. S. W. L. R. 224; 12 N. S. W. W. N. 80.—**AUS.**

**4311 ii.** —.].—No confession is deemed to be voluntary if it appears to the judge to have been caused by an inducement, threat or promise proceeding from a person in authority, & having reference to the charge against accused, whether addressed to him directly or brought to his knowledge indirectly, & if, in the opinion of the judge, such inducement, threat or promise gave accused grounds for

supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him.—*KEEFE v. R.* (1919), 21 W. A. L. R. 88.—**AUS.**

**4311 iii.** —.].—It having appeared that prosecutor had offered direct inducements to prisoner to confess:—*Held*: if the judge was satisfied that the promise of favour thus held out had induced the confessions, & continued to act upon prisoner's mind, notwithstanding the warning of the coroner, he was right in directing the jury to reject them.

*Held*: also, that if the judge suspected the confessions had been obtained by undue influence, such suspicion should have been removed before he received the evidence. It is a question for the judge whether or not the prisoner has been induced by undue influence to confess.

*Semble*: that when the names of other prisoners are mentioned in the confession, the proper course is to read the names in full, but to direct the jury not to pay any attention to them.—*R. v. FINKLE* (1865), 15 C. P. 453.—**CAN.**

**4311 iv.** —.].—A confession not free & voluntary should be rejected.—*R. v. DE MESQUITO* (1915), 32 W. L. R. 368; 9 W. W. R. 113.—**CAN.**

**4311 v.** —.].—A confession by prisoner to a person in authority in order to be admissible in evidence against the person making it, must be free & voluntary. The confession is not free & voluntary if it has been obtained by violence, or if it is made in answer to a question by a person in authority which accused believed he was compelled to answer.—*R. v. WONG CHIN KWAI* (1908), 3 Hong Kong L. R. 89.—**HONG KONG.**



**Appl. R. v. Colpus & Boorman, R. v. White, [1917] 1 K. B. 574.** **Beld. Rogers v. Hawken (1898), 78 L. T. 655; R. v. Brailford, [1905] 2 K. B. 730; R. v. Knight (1905), 21 T. L. R. 310; R. v. Booth & Jones (1910), 74 J. P. 475; Ibrahim v. R., [1914] A. C. 599.**

**4315. Confession to police officer—Unnecessary to administer caution.]**—It is not the duty of a police officer to caution a prisoner with regard to the consequences of making to him any statement, when that statement is a perfectly voluntary one.

**4315 i. Confession to police officer—Unnecessary to administer caution.]**—*It. v. Hoo SAM (1912), 20 W. L. R. 571; 1 W. W. R. 1049.—CAN.*

**4315 ii. ———.]**—A voluntary confession made by prisoner to the constable who arrested him upon a warrant to answer the charge of perjury, although the constable did not give prisoner the usual warning, was properly admitted in evidence.—*R. v. BOAGH SINGH (1913), 24 W. L. R. 941.—CAN.*

**4315 iii. ———.]**—It is the duty of the constabulary to caution persons in custody against criminating themselves; but though they should receive admissions without giving such caution, it is matter for observation only, & does not render the admissions inadmissible in evidence, if they were free & voluntary, neither induced by hope nor extorted by fear.—*It. v. MARTIN & DELANY (1841), Arn. M. & O. 197.—IR.*

**4315 iv. ———.]**—A statement voluntarily made to a police officer by a person suspected of a crime, who has not been cautioned that what he says may be used against him, is not open to the same objections with regard to its admissibility as evidence against accused, as is a statement made by him in answer to questions put by the officer.—*HODGSON v. MACPHERSON, [1913] S. C. (J.) 68; 50 So. L. R. 752; 2 S. L. T. 8; 7 Adam, 118.—SCOT.*

**e. ———. While accused on bail.]**—*Held:* a statement voluntarily made by an accused person while out on bail to the policeman who had apprehended him regarding the crime with which he was charged was competent evidence against accused, although the policeman had not cautioned the accused.—*SMITH v. LAMB (1888), 15 R. (Ct. of Sess.) 54; 25 So. L. R. 429.—SCOT.*

**d. ———. After caution—Admissible at trial on different charge.]**—Prisoner was arrested on a charge of burglary. After being given the usual caution he made certain statements to a constable; subsequently he was charged with murder, & on his trial the Crown sought to put his statements in evidence.—*Held:* the statements were admissible.—*R. v. VAN HONST (1914), 20 B. C. R. 81.—CAN.*

**e. ———. Statement made twice—Caution only before second.]**—When a prisoner makes a statement to officers without being cautioned, & subsequently makes the same statement to the same officers after being cautioned:—*Held:* the second statement is inadmissible.—*R. v. KONG (1914), 20 B. C. R. 71.—CAN.*

**f. ———.]**—*Held:* it was competent for prosecutor to ask a police officer who had apprehended the panel two days after the commission of the offence, "What did the panel say on being apprehended & told the charge against him?"—*H. M. ADVOCATE v. (1871), 2*

*Confession to police officer—Admissible.]*—A confession made to a person who holds the dual position of police officer & a justice of the peace is admissible.

*WILSON v. R. (1911), 8 Z. 73.—R. v. PETERSEN, [1918] C. P. D. 487.—S. AF.*

confession

of an offence by a person charged with the commission of that offence made to a peace officer, other than a magistrate or justice freely voluntarily in his sound & sober senses & without having been unduly influenced thereto, is under Act 31 of 1917, s. 273, admissible in evidence against such person at his trial, if it was confirmed & reduced to writing in the presence of a justice of the peace, who at the time was a member of the police force.—*Ex p. MINISTER OF JUSTICE, [1920] App. D. 304.—S. AF.*

**k. ———. Prosecution must prove confession was voluntary.]**—Before admitting evidence of a confession made to a police officer either before or after the arrest it should be made to appear affirmatively that the confession was free & voluntary as having been made without any inducement such as a promise or threat, & the onus of proving this is upon the prosecution.—*It. v. READ, [1921] 3 W. W. R. 402; 62 D. L. R. 363; 36 Can. Crim. Cas. 200; 17 Alta. L. R. 68.—CAN.*

**l. ———.]**—When the prosecution offers evidence of an alleged confession made by an accused to a police officer, it is the duty of the presiding judge to inquire into all the circumstances in order to ascertain whether the confession was made freely, & if he finds that it was not, he must reject the evidence. The onus is upon the prosecution to show that the statement or confession was made voluntarily, & the proper mode of proving that it was so made is by negating the possible inducements by way of hope or fear that would have made the statement inadmissible, & not merely by taking the affirmative answer of the officer under oath that the statement was made voluntarily.—*R. v. SANAVITON, [1917] 3 W. W. R. 568.—CAN.*

**m. ———. Necessity for writing.]**—Act 31 of 1917, s. 273, provides that where a confession is made to a peace officer other than a magistrate or justice it shall not be admissible in evidence unless it was confirmed & reduced to writing in the presence of a magistrate or justice. Where a native accused voluntarily made a relevant statement to his master in the presence of a peace officer:—*Held:* the statement was admissible, & the sect. only applied to a confession of guilt made not in the presence of but directly to a peace officer.—*R. v. VEREN, [1918] T. P. D. 218.—S. AF.*

**n. Confession to magistrate—Without caution.]**—*Qu.*: whether in Ireland a confession made by a prisoner to a magistrate, without any previous caution or warning, is admissible in evidence.—*O'REILLY'S CASE (1842), Ir. Cir. Rep. 718.—IR.*

**o. ———.]**—The confession of a prisoner is not to be excluded because he was not cautioned by the magistrates that it would be given in evidence against him, provided he was not, in making it, under threat or inducement.—*LAVIN'S CASE (1843), Ir. Cir. Rep. 813.—IR.*

**p. ———. Sufficiency of caution.]**—Prisoner having been brought before a magistrate, & being about to make a confession of guilt, was cautioned by the magistrate in the following words: "Take care about what you say, for

—*R. v. DICKINSON (1844), 2 L. T. O. S. 478; 8 J. P. 213; 1 Cox, C. C. 27.*

**4316. ———.]**—When a prisoner is about to make a confession to a constable, he need not be cautioned by the latter as to the consequences of his so doing.—*R. v. WATTS (1844), 3 L. T. O. S. 467; 1 Cox, C. C. 75.*

**4317. ———.]**—A constable ought not to caution a prisoner not to say anything. A

whatever you say will be written down & used for or against you":—*Held:* such a caution was insufficient & the confession of prisoner was not admissible in evidence.—*R. v. SIMPSON (1849), 1 Ir. Jur. 200.—IR.*

**q. Confession subsequently retracted—Whether admissible without corroborative evidence.]**—It cannot be laid down as an absolute rule of law that a confession made & subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. A jury should be asked with reference to such confessions, not whether they were corroborated by independent evidence, but whether having regard to the circumstances under which they were made & retracted & all the circumstances connected with them, it was more probable that the original confession or the statements retracting them were true.—*It. v. RAMAN (1897) 1 L. Ir. 21 Mad. 83.—IND.*

**r. Confession while in custody.]**—Accused, an undertrial prisoner, was sent up by the magistrate in whose lock-up he was, in the custody of two policemen, to a hospital for treatment. The policemen made him over to the doctor & waited in the verandah to take him back. While with the doctor accused made a confession of his guilt. At the trial, the confession was allowed to be proved:—*Held:* the confession was excluded by Indian Evidence Act (I. of 1872, s. 26), because accused who was in police custody up to his arrival at the hospital, remained that custody while the policemen were standing outside on the verandah.—*R. v. MALLANGOWDA (1917), 1 L. R. 42 Bom. 1.—IND.*

**s. Admission not amounting to confession—Admissible even when made after inducement.]**—A statement made by a prisoner after an inducement is admissible in evidence if the statement cannot be regarded as a confession.—*R. v. BATES (1895), 16 N. S. W. L. R. 268; 12 N. S. W. W. N. 30.—AUS.*

**t. ———.]**—Detectives requested accused to go to the police station, & made an explanation to the chief of the police. Accused went there, & was asked by the chief where he got the two notes, & he said he got one from M., but gave no information about the other. Accused was arrested after this. M. stated that he had given accused \$20, but that it was in two \$10 notes:—*Held:* although confessions may be given in evidence only when they have been freely & voluntarily made, that rule was not applicable to the statements of accused, which did not contain any confession or even suggestion of guilt, & the statements were admissible in evidence.—*R. v. HURD (1913), 23 W. L. R. 812; 10 D. L. R. 475; 4 W. W. R. 183; 21 Can. Crim. Cas. 98.—CAN.*

**a. ———.]**—Accused went to the thana & lodged a first information of the murder, narrating the events preceding the commission of the offence, & stating further that he had severely hacked his wife while in bed with a sword, which he left lying on the same, & thereafter he unlocked the door of the room in which they were & came out, dropping the padlock of the door on the half window. In consequence the police went to the place & found



**Sect. 5.—Confessions and statements by accused:**  
**Sub-sects. 4 & 5.]**

constable is not to lead a prisoner to say anything; but if a prisoner chooses to say something, it is the duty of the constable to hear what it is he has to say.—*R. v. PREST* (1847), 10 L. T. O. S. 251; *sub nom. R. v. PRIEST*, 2 Cox, C. C. 378.

**SUB-SECT. 5.—CONFESSIONS ARISING FROM  
 QUESTIONS BY POLICE.**

**4318. Before accused is in custody—Inquiries as to offences may be made—Answers admissible in evidence.]**—A prisoner was in the custody of A., a constable. B., another constable, coming into the room, A. left it, & the prisoner immediately made a confession to B.:—*Held*: if prisoner was in custody as an accused party, A. must be called to prove that he had held out no inducement to prisoner to confess, before the confession made to B. is receivable in evidence; but if it appear that prisoner was not then in custody on any charge, but merely detained as an unwilling witness, it will not be necessary to call A.—*R. v. SWATKINS* (1831), 4 C. & P. 548; 2 Man. & Ry. M. C. 510.

**4319. ———.]**—There is no rule excluding admissions made by a prisoner in answer to questions put by a policeman. *A fortiori*, when the accused has not been actually taken into custody.—*R. v. BRACKENBURY* (1893), 17 Cox, C. C. 628.

*Annotations*:—*Refd. R. v. Best* (1909), 78 L. J. K. B. 658; *Ibrahim v. R.*, [1914] A. C. 599.

**4320. ———.]**—Where a constable has put questions to prisoner, & after he has answered them has taken him into custody & charged him, & has subsequently investigated the truth of the answers, evidence of prisoner's answers, & of their untruthfulness, may be admissible.—*R. v. MILLER* (1895), 18 Cox, C. C. 54.

*Annotation*:—*Refd. Ibrahim v. R.*, [1914] A. C. 599.

**4321. ———.]**—*ROGERS v. HAWKEN*, No. 4310, *ante*.

**4322. ———.]**—Answers to questions put with a proper caution by an official, who has power to order the person interrogated to be arrested or to influence others to cause his arrest,

are admissible in evidence against that person on his trial, provided the interrogation takes place before it is decided to arrest him & he is not in custody.—*R. v. BOOTH & JONES* (1910), 74 J. P. 475; 5 Cr. App. Rep. 177, C. C. A. *Annotation*:—*Refd. Ibrahim v. R.*, [1914] A. C. 599.

**4323. ———.]**—A statement made by a person to a constable in answer to an inquiry by the constable is admissible in evidence on subsequent criminal proceedings against such person although no caution was given by the constable, provided that the person was not at the time in custody on the charge, that the constable on making the inquiry had not formed the intention of instituting proceedings whatever the answer might be, & that no inducement was held out or threat made to induce such person to make the statement.—*LEWIS v. HARRIS* (1913), 110 L. T. 337; 78 J. P. 68; 30 T. L. R. 109; 58 Sol. Jo. 156; 24 Cox, C. C. 66, D. C.

*Annotation*:—*Refd. R. v. Voisin*, [1918] 1 K. B. 531.

**4324. ———.]**—Statements made by an accused person to a police officer before arrest may be admissible in evidence against accused, though made in answer to questions put by the officer. If a police officer has determined to effect an arrest, or if the person is in custody, then he should ask no questions which will in any way tend to prove the guilt of such person from his own mouth.—*R. v. CROWE & MYERSCOUGH* (1917), 81 J. P. 288.

**4325. ———.]**—*R. v. COOK* (1918), 34 T. L. R. 515, C. C. A.

**4326. ———.]**—**Caution not necessary.]**—*R. v. DOUGAL* (1903), 67 J. P. Jo. 325.

**4327. ———.]**—A constable may ask for an explanation as to property found on a person, not yet charged, without cautioning him.—*R. v. LIEBLING* (1909), 2 Cr. App. Rep. 314, C. C. A.

**4328. ———.]**—*R. v. VOISIN*, No. 4309, *ante*.

**4329. ———.]**—**Not to elicit proof of crime.]**—*R. v. BERRIMAN*, No. 4259, *ante*.

**4330. ———.]**—A police officer has no right to try to elicit admissions from persons whom he suspects.—*R. v. MATTHEWS* (1919), 14 Cr. App. Rep. 23, C. C. A.

**4331. ———.]**—**Questions by commanding**

the woman dead on the bed with a number of incised wounds, a blood-stained sword on the same, & the padlock:—*Held*: the narrative of antecedent events was admissible as admissions not amounting to confessions.—*LEGAL REMEMBRANCE v. LALIT MOHAN SINGH ROY* (1921), 1 L. R. 49 Calc. 167.—*IND*.

**PART XII. SECT. 5, SUB-SECT. 5.**

**4318 i. Before accused in custody—Inquiries as to offences may be made—Answers admissible in evidence.]**—Answers given by a prisoner to questions put by the policeman who arrested him are receivable in evidence against prisoner although he was not previously cautioned by the policeman.—*R. v. ROGERSON* (1870), 9 N. S. W. S. C. R. 234.—*AUS*.

**4318 ii. ———.]**—Answers given by a panel to the officer by whom he was apprehended admitted in evidence but an opinion intimated by the ct. that the officer had gone further in asking questions than he ought to have done.—*H.M. ADVOCATE v. THOMSON* (1857), 2 Irv. 747.—*SCOT*.

**4326 i. ———.]**—**Caution not necessary.]**—*Deft.*, being suspected of stealing street-car tickets & money from his employers, a street railway co., was asked by two detectives to go

with them to a police station, which he did; he was there searched, & tickets were found on him. Being asked by the detectives where he got the tickets, he voluntarily made statements which the detectives testified to upon his trial for theft. The detectives did not warn him that what he might say would be used against him. No promises were made or threats used by the detectives. He was convicted:—*Held*: the absence of a caution did not make the statements inadmissible.—*R. v. RODNEY* (1918), 42 O. L. R. 645; 14 O. W. N. 148.—*CAN*.

**b. ———.]**—**Inquiries as to an offence—Accused subsequently charged with different offence.]**—Prisoner was arrested on a charge of stealing S.'s gun, & in answer to questions put to him by a constable, who did not caution him, he made certain statements; he was afterwards charged with the murder of S., & on his trial the Crown sought to put in evidence his answers:—*Held*: not admissible.—*R. v. KAY* (1904), 11 B. C. R. 157.—*CAN*.

**c. ———.]**—Where a prisoner under arrest for assault & robbery was warned that he need not answer, but if he did answer what he said might be used against him in evidence, is sufficient warning although he was not told that he would be

charged with murder, & a confession so obtained is admissible on a charge of murder.—*R. v. ROSSI* (1910), 8 E. L. R. 595.—*CAN*.

**d. ———.]**—**After determination to arrest—Discretion of magistrate.]**—Prisoner, immediately prior to his arrest, made certain statements to a constable in the course of a conversation during which the constable had said, "This looks pretty crook, Tom old man. That weaner ram & broken-winded ewe make things look pretty suspicious":—*Held*: constable had made up his mind to arrest him at the time the conversation took place & it was within the discretion of the judge to admit the statements of accused as evidence against him.—*R. v. LYNCH*, [1919] S. A. L. R. 325.—*AUS*.

**e. ———.]**—*M.*, suspected of having committed felony, was followed & stopped by a constable in plain clothes. The constable having told *M.* what he was, & that she, *M.*, was charged with felony, proceeded to put several questions to her relative to a parcel in her hand, which contained the goods supposed to have been stolen. At the time he asked the questions, the constable had not told *M.* that she was under arrest, "but he would not have let her go." He did not expressly hold out any threat or inducement to

**officer of soldier—Answers admissible in evidence.]**—*R. v. BROWN, DUNBAR & COWDREY* (1903), 68 J. P. 15; 48 Sol. Jo. 102.

**4332. — Not where accused practically in custody.]**—Prisoner, who was an employee at a post office, was interviewed for some hours by a travelling clerk from the General Post Office, & after being cautioned, was questioned in connection with a criminal charge. The travelling clerk had power to initiate criminal proceedings, & he had prisoner practically in custody during the whole of the interview. Upon the trial questions & the statements in answer made by prisoner at the interview were tendered in evidence & objected to. The judge refused to admit the whole interview, but allowed the earlier part to be given in evidence.—*R. v. KNIGHT & THAYRE* (1905), 69 J. P. 108; 21 T. L. R. 310; 20 Cox, C. C. 711.

*Annotations:—Distd. Lewis v. Harris* (1913), 110 L. T. 337. *Consd. Ibrahim v. R.*, [1914] A. C. 599.

**4333. — Not after determination to arrest.]**—The police have no right to put questions tending to convict him to a prisoner in custody even after cautioning him. It is a matter in the discretion of the judge to admit or reject the answers to such questions, & the latter course should be adopted if there is any reason to believe that a trap was being laid for prisoner.

Persons about to be taken into custody should not be cross-examined by the police.—*R. v. HIRSTED* (1898), 19 Cox, C. C. 16.

*Annotations:—Refd. R. v. Knight* (1905), 21 T. L. R. 310; *Ibrahim v. R.*, [1914] A. C. 599.

M., nor did he, before she answered him, give her any caution. M. having answered the questions, the constable then told her she was not bound to say anything that would criminate herself, & said he should bring her to the police-office.—*Held*: the conversation between M. & the constable was receivable in evidence.—*R. v. JOHNSTON* (1864), 15 L. C. L. R. 60.—**IR.**

**1. — Questions as to charge against others—Accused subsequently charged with same offence.]**—A. was recognised by the police with reference to a charge of theft & reset against certain other persons. A. was afterwards charged with reset of the same goods. At the trial the police gave evidence as to what A. had said in recognition. A. having been convicted, the conviction was quashed on the ground that it was incompetent to prove at A.'s trial what he had stated in recognition.—*Cook v. McNeill* (1906), R. (Ct. of Sess.) 57; 43 Sc. L. R. 397; 13 S. L. T. 838.—**SCOT.**

**4336 i. When accused is in custody—Questions should not be asked—Admissibility of answers.]**—*Held*: answers given by a prisoner when in custody, to a constable interrogating him without caution, are admissible in evidence against prisoner.—*R. v. JAGELMAN* (1871), 10 N. S. W. S. C. R. 63.—**AUS.**

**4336 ii. —**—*A* police officer is not justified in questioning an accused person who is in custody, with the object of obtaining incriminating statements, & such statements, if obtained, are not admissible in evidence against accused on his trial.—*AH HOY v. HOUGH* (1912), 14 W. A. L. R. 214.—

**4336 iii. —**—*J* During the trial of prisoner for murder, questions arose as to the admissibility in evidence of statements made by him to certain detectives, in answer to questions put to him by them, he being at the time in their custody.—*Held*: the statements were admissible in evidence.—*R. v. DAY* (1890), 20 O. R. 209.—**CAN.**

**4336 iv. —**—*A* Answers given by a prisoner under arrest in response to the officer in charge, are

**4334. —**—*L*—*Lewis v. Harris*, No. 4323, *ante*.

**4335. —**—*R. v. Crowe & Myer-Scough*, No. 4324, *ante*.

**4336. When accused is in custody—Questions should not be asked—Admissibility of answers.]**—Though there may be cases in which it will be proper, yet as a general rule, it is better that a policeman should not put questions to a prisoner in his custody, without cautioning him that his answers will be evidence against him.—*R. v. KERR* (1837), 8 C. & P. 176.

*Annotations:—Refd. Ibrahim v. R.*, [1914] A. C. 599. *Mentd. Bridges v. Hawkesworth* (1851), 15 Jur. 1079.

**4337. —**—*A* policeman asked prisoner, a boy between eight & nine years old, various questions as to his going to school, knowing the Lord's Prayer, where he would go to if he told a lie, whether God knew everything; & then asked, "Whether he thought God knew who set fire to the haystack?" The boy not answering, & beginning to cry, the policeman asked him if he could give any information about the fire, & receiving no answer, he said he should apprehend him upon the charge of setting fire to the haystack. The boy then made a statement:—*Held*: it was not admissible in evidence.

It is no part of a policeman's duty to put questions to persons accused, but to take them before a magistrate.—*R. v. DAY* (1847), 8 L. T. O. 517; 11 J. P. 245; 2 Cox, C. C. 300.

**4338. —**—*A* policeman ought

receivable in evidence, if the presiding judge is satisfied that they were not unduly or improperly obtained, which depends upon the circumstances of each case.—*R. v. ELLIOTT* (1899), 31 O. R. 14.—**CAN.**

**4336 v. —**—*P* Prisoner, arrested & given the usual caution, was taken by motor to the police station, where he arrived about five minutes after the caution. There he made a statement in answer to questions put by the police:—*Held*: the statement was admissible in evidence.—*R. v. WALLACE* (1914), 20 B. C. R. 97.—**CAN.**

**4336 vi. —**—*A* Accused was arrested for theft from H.M. post. The constable who arrested accused gave him the proper warning, but then said, "You have fallen into a trap which has been set for you." The constable then asked the accused if he had taken anything, & accused admitted taking clothes & selling them:—*Held*: the conviction was right even though no other evidence of the sale was tendered at the trial.—*R. v. UMLAH*, [1923] 1 D. L. R. 330; 38 Can. Crim. Cas. 302; 56 N. S. R. 10.—**CAN.**

**4336 vii. —**—*I* Indictment for infanticide, by administering poison called powder-blue. A statement was made by prisoner to a constable who visited her in the gaol & who, having duly cautioned her, asked her how so much of her blue came into the child's stomach:—*Held*: such statement of prisoner, under the foregoing circumstances, was not admissible in evidence.—*R. v. DOYLE* (1840), 1 Craw. & D. 396.—**IR.**

**4336 viii. —**—*I* Indictment for having copies of passwords used by an unlawful combination. A sub-inspector of police found certain papers in the house where prisoner resided, prisoner being absent from the house. Afterwards, the sub-inspector saw prisoner in custody of the police, & thereupon showed him the papers aforesaid, & asked him whether or not he knew anything of them:—*Held*: the answer of prisoner to the

above question was not, under the circumstances, admissible in evidence.—*R. v. DEVLIN* (1841), 2 Craw. & D. 151.—**IR.**

**4336 ix. —**—*P* Prisoner, in custody, was interrogated with the following caution by an inspector of police: "You are accused of a very serious offence, have you any explanation to give? You are not bound to say anything, but anything you do say will be given as evidence against you":—*Held*: prisoner's answer should not be received in evidence.—*R. v. TOOLE* (1856), 7 Cox, C. C. 244.—**IR.**

**4336 x. —**—*A* Answers of prisoner elicited by the police, even after due caution, ought to be received in evidence with great jealousy.—*R. v. WARRELL* (1861), 13 Ir. Jur. 357.—**IR.**

**4336 xi. —**—*T* The answer made by a prisoner, after his arrest, to a question asked by a police constable, is inadmissible in evidence.

When a constable arrests a party, he ought to abstain from asking questions; he ought to leave that duty to the magistrate, who alone has the power to reduce to writing what is said by prisoner.—*R. v. BODKIN* (1863), 15 Ir. Jur. 340.—**IR.**

**4336 xii. —**—*H. M. Advocate v. Smith & Campbell* (1855), 2 Ir. v. 1.—**SCOT.**

**4336 xiii. —**—*O* Objection to the competency of proving certain statements by a prisoner after his apprehension in answer to questions put to him by a police officer, repelled.—*H. M. Advocate v. Wylie* (1858), 3 Ir. v. 218.—**SCOT.**

**4336 xiv. —**—*H. M. Advocate v. Grant* (1862), 4 Ir. v. 183; 34 Sc. Jur. 469.—**SCOT.**

**4336 xv. —**—*A* Although it is the duty of a constable when arresting a prisoner not to ask questions, yet, if he does so without using any threat or promise, the answers in reply are evidence.—*R. v. POTTER* (1887), 6 N. Z. L. R. 92.—**N.Z.**

**g. —**—*The questioning*

*Sect. 5.—Confessions and statements by accused:*  
*Sub-sects. 5 & 6, A.]*

not, in general, to question prisoners who are in his custody, but if he does, the interrogation ought not to be confined to questions calculated to compromise the party.—*R. v. STOKES* (1853), 17 Jur. 192.

**4339.** ————.]—(1) Although it is necessary, in a case of murder, that there should be evidence that the body found is the body of the murdered person, the circumstances may be sufficient evidence of identity.

(2) Admissions by policeman, elicited by questions of a police officer, with an admonition to tell all she knew, etc., are inadmissible. But a subsequent statement by the prisoner to another police officer is not necessarily so far under the same influence as to exclude it.—*R. v. CHEVERTON* (1862), 2 F. & F. 833.

*Annotation:—As to (2) Refd. Ibrahim v. R., [1914] A. C. 599.*

**4340.** ————.]—The practice of questioning prisoners by policeman, & thus extracting confessions from them, though it does not render the evidence so obtained inadmissible, is one which the judges strongly reprobate, & which ought not to be permitted.—*R. v. MICK* (1863), 3 F. & F. 822.

**4341.** ————.]—*R.* being in custody, & having been charged with setting fire to some bobbins of cotton in a mill, was shown a piece of paper, partially burnt, with writing on it, which had been found among the burnt property. Without receiving any caution whatever, he was then asked by the policeman whose writing it was, & what he had done with the remainder of it:—*Held*: what prisoner said in answer to the questions was receivable in evidence, as the questions did not amount to a threat.—*R. v. REGAN* (1867), 17 L. T. 325.

**4342.** ————.]—The words "I must know more about it," said by a police constable to a prisoner in the course of a conversation between them respecting the subject-matter of the charge, immediately before apprehension, are not a sufficient inducement to exclude an admission.

It is the duty of the police constable to hear what prisoner has voluntarily to say, but after prisoner is taken into custody it is not the duty of the police constable to ask questions. So, when the police constable has reason to suppose that the person will be taken into custody, it is his duty to be very careful & cautious in asking questions (KEATING, J.).—*R. v. REASON* (1872), 12 Cox, C. C. 228.

*Annotations:—Apprvd. R. v. James* (1909), 2 Cr. App. Rep. 319. *Refd. Ibrahim v. R., [1914] A. C. 599.*

**4343.** ————.]—After a prisoner is in custody the police have no right to ask him questions, & an admission or confession obtained in that way is inadmissible in evidence; & where one of several prisoners in custody makes a statement admitting his guilt & also incriminating the other prisoners, & such statement is after-

wards read over to the others by the constable who asks them what they have to say to that, this is in the nature of a cross-examination of the prisoners, & such statement & their answers are not admissible as evidence against them on their trial.

*Secus* where the persons are not in custody.—*R. v. GAVIN* (1885), 15 Cox, C. C. 656.

*Annotations:—Overd. R. v. Brackenbury* (1893), 17 Cox, C. C. 628; *R. v. Best*, [1909] 1 K. B. 692. *Refd. R. v. Firth* (1913), 8 Cr. App. Rep. 162; *Ibrahim v. R., [1914] A. C. 599*; *R. v. Voisin*, [1918] 1 K. B. 531.

**4344.** ————.]—On the arrest of a prisoner, a constable has no right to ask questions, & if prisoner answers, the answers are not admissible in evidence against him.

If a third party make a statement which is taken down in writing, & read over by a constable to a prisoner, neither it, nor the conversation induced by it, is admissible in evidence.—*R. v. MALE & COOPER* (1893), 17 Cox, C. C. 689.

*Annotations:—Consd. Rogers v. Hawken* (1898), 67 L. J. Q. B. 526. *Refd. Ibrahim v. R., [1914] A. C. 599*; *R. v. Gardner & Hancox* (1915), 85 L. J. K. B. 206.

**4345.** ————.]—Prisoners were taken into custody at a certain house:—*Held*: what they said in answer to the charge at the police station could not be given in evidence against them as it was not right when once a prisoner was in custody to charge him again at the police station in the hope of getting something out of him.—*R. v. MORGAN* (1895), 59 J. P. Jo. 827.

*Annotation:—Refd. R. v. Knight* (1905), 21 T. L. R. 310.

**4346.** ————.]—*R. v. HISTED*, No. 4333, *ante*.

**4347.** ————.]—The fact that a prisoner's statement is made by him in reply to a question put to him by a police constable after he is in custody does not of itself render the statement inadmissible in evidence.—*R. v. BEST*, [1909] 1 K. B. 692; 78 L. J. K. B. 658; 100 L. T. 622; 25 T. L. R. 280; 22 Cox, C. C. 97; 2 Cr. App. Rep. 30; 73 J. P. Jo. 77, C. C. A.

*Annotations:—Fold. R. v. Liebling* (1909), 2 Cr. App. Rep. 314. *Consd. R. v. Voisin*, [1918] 1 K. B. 531. *Refd. R. v. Firth* (1913), 8 Cr. App. Rep. 162; *Ibrahim v. R., [1914] A. C. 599*; *R. v. Gardner & Hancox* (1915), 80 J. P. 135.

**4348.** ————.]—No police officer has a right to put any question to a prisoner after he is once in custody. To say: "It is alleged so-&so," stating to prisoner what has been alleged against him, is only a subtle form of cross-examination. The question of the kind of corroboration which is required to corroborate the evidence of an accomplice must always depend upon the nature of the particular charge into which inquiry is being made.—*R. v. WINKEL* (1911), 76 J. P. 191.

**4349.** ————.]—*IBRAHIM v. R.*, No. 4308, *ante*.

**4350.** ————.]—*R. v. VOISIN*, No. 4309, *ante*.

**4351.** ————.]—The police have no right to interrogate arrested persons with reference to any charge against any one of them nor to

of persons in custody by policemen & others, within the scope of whose duty such questioning does not fall, is not to be permitted.—*R. v. GLENNON, TOOLE & MAGRATH* (1840), 1 Craw. & D. 359.—*IR.*

**h.** ————.]—It is not the duty of constables of police to interrogate prisoners in their custody, even though they have first cautioned them not to criminate themselves.—*R. v. HASSETT* (1861), 8 Cox, C. C. 511.—*IR.*

**k.** ————.]—*Prisoner supposed to be insane—Answers inadmissible.*—*Cir-*

cumstances in which it was held that a lieutenant of police & a police surgeon were justified in putting certain questions to a prisoner supposed to be insane, who had been brought to the office on a charge of murder but who had not as yet emitted a judicial declaration:—*Held*: the answers to these questions were inadmissible in evidence.—*H.M. ADVOCATE v. MILNE* (1863), 4 Irv. 301; 35 Sc. Jur. 470.—*SCOT.*

**l.** *At time of apprehension.*—*Held*: incompetent to prove state-

ments made by a panel, in answer to questions put to her by the officer at the time of her apprehension.—*H.M. ADVOCATE v. HAY* (1858), 3 Irv. 181. 31 Sc. Jur. 30.—*SCOT.*

**m.** ————.]—*Held*: an officer at the time of executing a warrant to apprehend for examination a party charged with a crime, was entitled to put to him certain questions as circumstances connected with the commission of the offence & that such question & the answers to them might competently be put in evidence at the

invite from one co-deft. a statement against another.—*R. v. GRAYSON* (1921), 16 Cr. App. Rep. 7, C. C. A.

**4352.** — *Reading to accused statements of third parties.*—*R. v. MALE & COOPER*, No. 4344, *ante*.

**4353.** — *Reading over statements of fellow prisoners.*—*R. v. GAVIN*, No. 4343, *ante*.

**4354.** — —.—*Of 104 brass locomotive tubes, lying in certain works, 50 were found to be missing. On the trial of P., a marine store dealer, with others, for stealing & receiving these tubes, a witness for the prosecution produced a tube which he said was "similar to some of those that were taken." Another witness saw from 16 to 20 brass locomotive tubes put by certain men into a cart with P.'s name on it, & in charge of B., P.'s servant, at a spot some 400 yards from the works, on the morning after the 50 tubes were missed. He said the tubes he saw were "similar" to the tube that had been produced. A third witness saw P.'s cart, in charge of B., drive towards & away from the spot. P. had told the police he had never seen any tubes. No tubes were found on P.'s premises. P. gave evidence at the trial that on this morning a man came to his premises & asked if he would fetch some scrap; that he told B. to go & fetch it; that when B. & certain men returned with brass locomotive tubes, he said he would have nothing to do with them & that they must back the cart out of his yard; that he then went into the house; that he thought there were eight or nine tubes in the cart, & that he never saw them again. P. was convicted:—*Held*: (1) the conviction must be quashed, as there was no sufficient evidence that the tubes in the cart were the stolen tubes, or that they were ever in the possession of P.*

(2) *Semble*: where B. & P. are in custody charged with stealing & receiving certain property,

& B. writes out a statement, which is said to inculcate P., & the police place B. & P. together & read over to them the written statement of B., that statement does not become evidence against P.—*R. v. PEARSON* (1908), 72 J. P. 449; 1 Cr. App. Rep. 77, C. C. A.

*Annotations*:—*As to* (1) *Consd.* *R. v. Fraser* (1911), 76 J. P. 168. *Refd.* *R. v. Howells & Allen* (1908), 1 Cr. App. Rep. 197. *Mentd.* *R. v. Power*, [1919] 1 K. B. 572.

**4355.** — —.—*R. v. GARDNER & HANCOX*, No. 4138, *ante*.

**4356.** — —.—*R. v. GRAYSON*, No. 4351, *ante*.

**4357.** — —.—*If the police confront accused persons under arrest, nothing should be done to invite a reply from one implicated by the statement of another.*—*R. v. PILLEY* (1922), 127 L. T. 220; 86 J. P. 190; 27 Cox, C. C. 230; 16 Cr. App. Rep. 138, C. C. A.

#### SUB-SECT. 6.—CONFESSIONS ARISING FROM INDUCEMENTS.

##### *A. Matters amounting to Inducement.*

**4358. Promise of favour.**—A confession induced by saying, "Unless you give me a more satisfactory account I will take you before a magistrate"; or by saying "Tell me where the things are & I will be favourable to you," cannot be given in evidence.—*R. v. THOMPSON* (1783), 1 Leach, 291.

**4359.** —.—*R. v. CASS* (1784), 1 Leach, 293, n. *Annotation*:—*Refd.* *R. v. Baldry* (1852), 2 Den. 430.

**4360.** —.—*A confession extorted from a person in illegal custody, & on promise of his liberty & a reward, is not admissible.*—*R. v. ACKROYD* (1824), 1 Lew. C. C. 49.

**4361.** —.—*The committing magistrate had told a prisoner he would do all he could for him*

*trial.*—*LEWIS v. BLAIR* (1858), 3 Irv. 16; 30 Sc. Jur. 508.—**SCOT.**

**n.** —.—*Held*: a criminal officer in apprehending a prisoner, was not entitled to question him so as to extract evidence.—*H.M. ADVOCATE v. MILLAR* (1859), 3 Irv. 406.—**SCOT.**

**o.** —.—*In a trial for murder, evidence disallowed of what the panel said at the time of apprehension in answer to question by criminal officer.*—*H.M. ADVOCATE v. SMITH* (1901), 3 Adam, 475.—**SCOT.**

#### PART XII. SECT. 5, SUB-SECT. 6.—A.

**4358 i. Promise of favour.**—At the hearing in a ct. of petty sessions, a confession was admitted in evidence against E. There was some evidence that before E. made the confession, the constable to whom it was made told him that "any statement made would be to his benefit":—*Held*: if the words were used the confession was not freely & voluntarily made & was wrongly admitted.—*McNAMARA v. EDWARDS, Ex p. EDWARDS*, [1907] S. R. Q. 9.—**AUS.**

**4358 ii.** —.—*In a poisoning case one of the prisoners was arrested by a constable, & while in his house, a magistrate came in & said in her presence, "she had better turn Queen's evidence," to which the constable answered, "there are some preliminary proceedings to be adopted first":—*Held*: admissions made subsequently on the same day to the constable & his wife & another constable, were not admissible in evidence, inasmuch as prisoner might be under the influence of the hope held out to her by the magistrate.*—*R. v. BERUBE* (1852), 3 L. C. R. 212.—**CAN.**

**J.—VOL. XIV.**

**4358 iii.** —.—*M. was convicted of stealing goods the property of S. The evidence to connect M. with the crime was his statement to a policeman who had him in charge, that if he went to a particular place he would find the goods. This statement was made in consequence of his being told by the policeman that S. was a good-hearted man, & he, the policeman, thought that if he got his goods back he would not prosecute. The goods were afterwards found in the place described by prisoner:—*Held*: prisoner's statement was improperly received.*—*R. v. McCafferty* (1886), 25 N. B. R. 396.—**CAN.**

**4358 iv.** —.—*Accused confessed to a police constable, on being assured by him that nothing would happen to her, that she had killed her new-born child, & had buried it in the enclosure of her house. This statement led to the discovery of some bones of the head of an infant, a stone stained with blood, & a knife, with which stone & knife she said that she had killed her child. Before the committing magistrate she made the same statement:—*Held*: the confession before the magistrate was irrelevant.*—*R. v. LUCHOO* (1873), 5 N. W. 86.—**IND.**

**4358 v.** —.—*Prisoner was in the employment of the post-office, & having been arrested on the charge of opening & detaining a letter, a superior of prisoner in the same establishment said to prisoner's wife, while prisoner was in custody: "Do not be frightened; I hope nothing will happen to your husband beyond the loss of his situation":—*Held*: it appearing that the wife might have communicated this to prisoner, prisoner's subsequent confession was inadmissible.*—*R. v.*

*HARDING* (1842), Arml. M. & O. 340.—**IR.**

**4358 vi.** —.—*H. was indicted for stealing two sheep. Prosecutor, it appeared, had told prisoner that he would forgive him, & that there would be no litigation about it, if he would tell him about the sheep, & where they were. Prisoner was subsequently taken before a magistrate, who, having first cautioned him that he would probably be obliged hereafter to make use of any statement he might make against him, took down prisoner's examination in writing. It was proposed, by counsel for the Crown, to read these examinations in evidence:—*Held*: these examinations could not safely be received in evidence.*—*R. v. HIGGINS* (1843), 1 L. T. O. S. 459.—**IR.**

**4358 vii.** —.—*Information given to a supt. of police by a prisoner under a promise of safety:—*Held*: inadmissible as evidence against prisoner.*—*H. M. ADVOCATE v. MAHLER & BERRENHARD* (1857), 2 Irv. 634; 29 Sc. Jur. 562.—**SCOT.**

**4358 viii.** —.—*A panel while in custody charged with the commission of a *furtum grave*, & before being remitted to the sheriff, was offered by a town councillor & ex-bailiff of the burgh in which the theft was committed, £100 for such information as would lead to the recovery of the property stolen; & the property was recovered in consequence of information so obtained, & the money paid accordingly. Upon these facts being disclosed at the trial, & evidence of the information so obtained being objected to for the panel, the High Ct. on the motion of prosecutor, deserted the diet *simpliciter*.*—*H. M. ADVOCATE v. GRAHAM* (1876), 3 Couper, 217.—**SCOT**

**E E**

*Sect. 5.—Confessions and statements by accused:*  
*Sub-sect.*

if he would make a disclosure; after this, prisoner made a statement to the turnkey of the prison, who held out no inducement to prisoner to confess:—*Held*: what prisoner said to the turnkey could not be received in evidence, more especially as the turnkey had not given prisoner any caution.—*R. v. COOPER* (1833), 5 C. & P. 535; 1 Nev. & M. M. C. 371.

*Annotation*:—*Mentd.* *R. v. De Marny* (1906), 21 Cox, C. C. 371.

**4362.** —.]—If a prisoner be told, "You had better split, & not suffer for all of them," this is such an inducement to confess as will exclude what prisoner afterwards said.—*R. v. THOMAS* (1834), 6 C. & P. 353.

*Annotations*:—*Refd.* *R. v. Shaw* (1834), 6 C. & P. 372; *R. v. Baldry* (1852), 2 Den. 430.

**4363.** —.]—A prosecutor said to prisoner, "I should be obliged to you if you would tell us what you know about it. If you will not, we of course can do nothing":—*Held*: this was such an inducement to confess as would exclude what prisoner said.—*R. v. PARTRIDGE* (1836), 7 C. & P. 551.

**4364.** —.]—A female servant being suspected of stealing money, her mistress on a Monday told her that she would forgive her if she told the truth. On the Tuesday she was taken before a magistrate & was discharged, no one appearing against her. On the Wednesday the superintendent of police went with her mistress to the Bridewell, & told her in the presence of her mistress that she "was not bound to say anything unless she liked, & that if she had anything to say her mistress would hear her"; but the superintendent not knowing that her mistress had promised to forgive her, did not tell her that if she made a statement it might be given in evidence against her. Prisoner made a statement:—*Held*: this statement was not receivable in evidence, as the promise of the mistress must be considered as still operating on prisoner's mind at the time of the statement, but if the mistress had not been then present, it might have been otherwise.—*R. v. HEWETT* (1842), Car. & M. 534.

*Annotation*:—*Refd.* *R. v. Moore* (1852), 2 Den. 522.

**4365.** —.]—The mere knowledge by a prisoner of a handbill, by which a govt. reward & a promise of a pardon are offered in a case of murder, are not sufficient ground for rejecting a confession of such prisoner, unless it appear that the inducements there held out were those which led prisoner to confess.

Where a prisoner desired that any handbill that might appear concerning a murder with which he stood charged might be shown to him, and a handbill was shown to him by a constable, by which a reward and free pardon was offered to any but the person who struck the blow, & prisoner three days afterwards made a statement, this statement was held to be receivable in evidence.

But where it was afterwards proved by another constable that prisoner, on the night before he made the statement, said to him, that he saw no reason why he should suffer for the crime of another, & that as the govt. had offered a free pardon to any one concerned who had not struck the blow, he would tell all he knew about the matter:—*Held*: the statement that had already been given in evidence was not properly receivable.—*R. v. BOSWELL* (1842), Car. & M. 584.

*Annotations*:—*Refd.* *R. v. Dingley* (1845), 1 Car. & Kir. 637; *R. v. Blackburn* (1853), 6 Cox, C. C. 333.

**4366.** —.]—A constable telling a prisoner "anything you can say in your defence we shall be ready to hear," renders a confession inadmissible.—*R. v. MORTON* (1843), 2 Mood. & R. 514; *sub nom.* *R. v. HORN BROOK*, 1 L. T. O. S. 505; 1 Cox, C. C. 54, N. P.

*Annotation*:—*Dbtd.* *R. v. Baldry* (1852), 5 Cox, C. C. 523.

**4367.** —.]—The prosecutor, in the presence of the constable, said to prisoner, "It will be better for you to tell the truth, as it will save the shame of a search warrant in your house." The statement was rejected. The constable then took prisoner into a loft, & in the absence of the prosecutor, prisoner made a statement. The evidence was rejected. Half an hour after, the constable took prisoner to the station house, & on the way cautioned him not to say anything, after which he made a statement:—*Held*: to be inadmissible, as the inducement was still operating.—*R. v. COLLIER & MORRIS* (1848), 3 Cox, C. C. 57.

**4368.** —.]—A constable, upon apprehending a prisoner on a criminal charge addressed to him these words: "You need not say anything to criminate yourself. What you do say will be taken down, & used in evidence against you":—*Held*: those words did not import any threat or inducement to prisoner; & a statement made by him subsequently was admissible as evidence against him upon his trial.

I deem it important for the protection of innocence, that every man when he is charged with an offence should be distinctly told the nature of it; & that attention should be paid to anything which at that moment he may choose to say with regard to it, as he may be in a situation to make some statement which may ultimately lead to the proof of his innocence; but it is also important that he should be reminded that he is under no obligation to criminate himself, & that if he does state anything to criminate himself it will be given in evidence against him; & it is quite clear to me that no person, addressed as this prisoner was, could have misunderstood the meaning of the words, or have been in any way removed from that steady self-possession which is necessary to render his confession admissible against him (*POLLOCK, C.B.*).—*R. v. BALDRY* (1852), 2 Den. 430; 21 L. J. M. C. 130; 19 L. T. O. S. 146; 16 J. P. 276; 16 Jur. 599; 5 Cox, C. C. 523, C. C. R.

*Annotations*:—*Refd.* *R. v. Gillis* (1866), 11 Cox, C. C. 69; *R. v. Widdop* (1872), 21 W. R. 176; *R. v. Thompson*, [1893] 2 Q. B. 12; *R. v. Rose* (1898), 67 L. J. Q. B. 289; *Ibrahim v. R.*, [1914] A. C. 599.

**4369.** —.]—A printed copy of a reward offered for such private information & evidence as would lead to the detection & conviction of a murderer or murderers, & a statement that the Secretary of State would recommend the of a pardon to any accomplice, not having been the actual perpetrator of the murder, who should give such evidence, was hung up in the magistrates' room in the county gaol. A prisoner, who could read, made a statement to the governor of the gaol in this room, & before that statement inquired whether he could give evidence, but did not say that he made the statement in that expectation, or in the hope of getting the reward, & before making the statement he was told it would be used against him:—*Held*: that such statement was inadmissible.—*R. v. BLACKBURN* (1853), 6 Cox, C. C. 333.

*Annotation*:—*Refd.* *R. v. Godinho* (1911), 76 J. P. 16.

**4370.** —.]—A woman in custody on a charge of murder, was on arriving at the gaol, placed in a room alone with E., in order to be searched.

E. was employed as searcher of female prisoners; but, except in that capacity, had no other duties or authority in the gaol. Whilst the usual search was being made, prisoner said, "I shall be hung, I shall be sure to be hung"; & shortly afterwards, "If I tell the truth, shall I be hung?" E., in order to sooth prisoner, replied, "No, nonsense, you will not be hung. Who told you so?" :—*Held*: that a statement of prisoner made to E. immediately afterwards, was not receivable in evidence.—*R. v. WINDSOR* (1864), 4 F. & F. 360.

**4371.** —.]—Prisoner, a servant girl, was questioned by the mother of a child who had been found dead in a ditch, & she was asked whether she had anything to do with its disappearance, upon which she cried & said, "If you won't sent for the police I will tell the truth," whereupon the mistress replied, "I will not hurt you if you tell the truth"; & she promised not to send for the police; whereupon prisoner made a confession, which upon the trial was rejected as being made under an inducement. It further appeared that shortly after this confession, the mistress sent for a neighbour & informed him of the confession, whereupon he had an interview alone with prisoner, & asked her questions upon the subject, but he held out no inducement, & she then made a similar confession:—*Held*: the second confession was so connected under the circumstances with the first, that it was inadmissible.—*R. v. RUE* (1876), 34 L. T. 400; 13 Cox, C. C. 209.

**4372.** —.]—Prisoner, while in the custody of a policeman on a charge of arson, said to her mistress, "If you forgive me I will tell you the truth." The mistress answered, "Ann, did you do it?" Prisoner thereupon made a statement:—*Held*: the statement so made was inadmissible against prisoner.—*R. v. MANSFIELD* (1881), 14 Cox, C. C. 639.

**4373.** —.]—An admission amounting to a confession, or a statement from which a confession or admission could be implied, if obtained under any inducement held out by a person in authority,

e.g. where a police constable or a witness promises that if prisoner will sign an admission there will be no prosecution, is inadmissible in evidence.—*R. v. BOUGHTON* (1910), 6 Cr. App. Rep. 8, C. C. A.

**4374. Threats.**—*R. v. THOMPSON*, No. 4358, ante.

**4375.** —.]—The captain of a vessel said to one of his sailors suspected of having stolen a watch, "That unfortunate watch has been found, & if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle. You are a damned villain, & the gallows is painted in your face":—*Held*: a confession made by the sailor after this threat was not receivable in evidence on his trial for the felony.—*R. v. PARRATT* (1831), 4 C. & P. 570; 2 Man. & Ry. M. C. 518.

*Annotation*:—*Refd. R. v. Moore* (1852), 5 Cox, C. C. 555.

**4376.** —.]—A constable, who apprehended a prisoner, asked him what he had done with the tap he had stolen from the prosecutor's premises, & said, "You had better not add a lie to the crime of theft":—*Held*: a confession made to the constable was not receivable in evidence.—*R. v. SHEPHERD* (1836), 7 C. & P. 579.

**4377.** —.]—A servant was charged with attempting to set fire to her master's house. It was proved that the furniture in two of the bedrooms was on fire, & a spoon & other articles were found in the sucker of the pump. The master told prisoner, that if she did not tell the truth about the things found in the pump he would send for the constable to take her, but he said nothing to her respecting the fire:—*Held*: this was such an inducement to confess as would render inadmissible any statement that prisoner made respecting the fire, as the whole was to be considered as one transaction.—*R. v. HEARN* (1841), Car. & M. 109.

**4378.** —.]—*R. v. DAY*, No. 4337, ante.

**4379.** —.]—*R. v. BALDRY*, No. 4368, ante.

**4380. Temporal admonition.**—A girl was charged with administering poison, with intent to murder. The surgeon said to her, "You are under suspicion of this, & you had better tell all

**4374 i. Threats.**—Admissions obtained from accused after representations made to her by persons in authority, to the effect that the evidence was very strong against her, that another person, who was her lover, was suspected, & that she knew something about the murder, & would do well to speak, are not inadmissible as not being made voluntarily, or as being procured by threat or inducement.—*R. v. VIAU* (1898), Q. R. 7 Q. B. 362.—*CAN.*

**4374 ii.** —.]—*R. v. McDONALD* (1896), 3 Terr. L. R. 1.—*CAN.*

**4374 iii.** —.]—A prisoner was tried for wounding with intent to murder, & wounding with intent to do grievous bodily harm. The offence was committed on the high seas on board a ship on which prisoner was a seaman. A deposition before the committing magistrate was tendered which contained an admission alleged to have been made to the deponent by prisoner, when in custody. The ct. refused to admit the portion of the deposition containing the admission to be read, as it was stated to have been made immediately after prisoner with others had been threatened by the witness with a loaded rifle; it was immaterial that the threat was not made to extort a confession, but to suppress an attempt at mutiny.—*R. v. HICKS* (1872), 10 B. L. R. App. 1.—*IND.*

**4374 iv.** —.]—Indictment for concealing the birth of a child. An admission obtained from prisoner by a chief constable of police, who, in

interrogating prisoner, said: "I shall search for the child; so you had better tell me where it is," not received in evidence, as having been obtained by something in the nature of a threat.—*R. v. CAIN* (1839), 1 Craw. & D. 36.—*IR.*

**4374 v.** —.]—A constable, having a prisoner in custody, said to him, "I have enough against you," whereupon prisoner made a confession:—*Held*: such confession was not admissible in evidence, as having been made under the influence of a threat.—*R. v. GRAHAM* (1839), 1 Craw. & D. 99.—*IR.*

**4374 vi.** —.]—Prosecutor, who was master of prisoner, threatened her that "he would have her arrested unless she gave back the money." Several hours afterwards, when in custody, having received no previous caution, prisoner admitted the offence:—*Held*: evidence of her admissions could not be received.—*WATSH'S CASE* (1843), Ir. Cir. Rep. 866.—*IR.*

**4374 vii.** —.]—Prisoner, a policeman, was indicted for receiving a watch knowing it to be stolen. A caution was given to prisoner, when in custody, by another policeman, his superior in rank, in these words: "Now be cautious in the answers you give to the questions I am going to put to you about this watch":—*Held*: to be ambiguous & equivocal, & the confession made by prisoner was inadmissible.—*R. v. FLEMING* (1842), Arm. M. & O. 330.—*IR.*

**4380 i. Temporal admonition.**—Prosecutor said to accused, "You had

better made a clean breast of it":—*Held*: this was such an inducement as rendered a subsequent confession inadmissible.—*R. v. O'KEEFE* (1893), 14 N. S. W. L. R. 345.—*AUS.*

**4380 ii.** —.]—On the trial of an indictment it was sought to prove that accused had confessed his guilt in a conversation. Witness admitted having in effect intimated to prisoner that he had better confess:—*Held*: evidence of the confession could not be admitted.—*R. v. WYLLIE* (1880), 3 L. N. 139.—*CAN.*

**4380 iii.** —.]—Where it appeared that a police constable gave the usual caution to prisoner, who was arrested on a charge of obstructing a railway train by placing blocks upon the line, but afterwards said to him: "The truth will go better than a lie. If anyone prompted you to it you had better tell about it," whereupon prisoner said that he did the act charged against him:—*Held*: the admission was not receivable in evidence.—*R. v. ROMP* (1889), 17 O. R. 567.—*CAN.*

**4380 iv.** —.]—A rector of a cathedral held an inquiry into the circumstances of an assault in which several of the choir boys were implicated:—*Held*: the rector was a person in authority, & a statement made to him by one of the boys who was told to speak the truth, & that the statement was for the purpose of that inquiry only, was not voluntary.—*R. v. ROYDS* (1904), 10 B. C. R. 407.—*CAN.*

**4380 v.** —.]—W., a travelling



*Sect. 5.—Confessions and statements by accused:  
Sub-sect. 6, A. & B.]*

you know." After this she made a statement to the surgeon:—*Held*: that statement was not admissible in evidence.—*R. v. KINGSTON* (1830), 4 C. & P. 387; 2 Man. & Ry. M. C. 492.

*Annotation*:—*Refd.* *R. v. Garner* (1848), 18 L. J. M. C. 1.

**4381.** —[—An inducement to confess, in the shape of a threat, was held out to prisoner, who was suspected of an offence, by a person having no authority, & without the nature of the charge being stated, but in the presence & hearing of a person who had authority. Subsequently, the nature of the charge was stated by the same person in the same presence & hearing, & thereupon a confession was made:—*Held*: the confession was not admissible.—*R. v. LUCKHURST* (1853), *Dears.* C. C. 245; 23 L. J. M. C. 18; 22 L. T. O. S. 148; 17 J. P. 776; 17 Jur. 1082; 2 W. R. 97; 6 Cox, C. C. 243; *sub nom.* *R. v. SLEEMAN*, *R. v. LUCKHURST*, 2 C. L. R. 129, C. C. R.

**4382.** —[—Any person's telling a prisoner that it will be better for him to confess, will exclude a confession made to that person, although that person was not in any authority as prosecutor, constable, or the like.—*R. v. DUNN* (1831), 4 C. & P. 543; 2 Man. & Ry. M. C. 507.

**4383.** —[—*R. v. SLAUGHTER* (1831), 4 C. & P. 544, n.

**4384.** —[—A man & woman being apprehended on a charge of murder, another woman, who had the female woman in custody, told her that she "had better tell the truth, or it would lie upon her, & the man would go free":—*Held*: a declaration of the female prisoner, made to this woman afterwards was not receivable in evidence.—*R. v. ENOCH* (1833), 5 C. & P. 539.

*Annotations*:—*Refd.* *R. v. Baldry* (1852), 2 Den. 430. *Mentd.* *R. v. Crutchley* (1837), 7 C. & P. 814; *R. v. Wright* (1841), 9 C. & P. 754.

**4385.** —[—A constable said to a prisoner charged with felony, "It is of no use for you to deny it, for there is the man & boy who will swear they saw you do it":—*Held*: this was such an inducement as would exclude evidence of what prisoner said.—*R. v. MILLS* (1833), 6 C. & P. 146; 2 Nev. & M. M. C. 158.

**4386.** —[—If a prisoner in making a state-

ment mention the name of another prisoner, the witness who gives evidence of the statement must state exactly what prisoner said, without omitting the name of the other prisoner. If the witness said to prisoner, "It would have been better if you had told at first," this is an inducement to confess & will render a statement made thereupon inadmissible.—*R. v. WALKLEY* (1833), 6 C. & P. 175.

**4387.** —[—The confession of a girl fifteen years old, occasioned by many applications by prosecutor's relations, & neighbours, amounting to threats & promises:—*Held*: not receivable.—*R. v. SIMPSON* (1834), 1 Mood. C. C. 410, C. C. R.

**4388.** —[—*R. v. MEYNELL* (1834), 2 Lew.

*Annotation*:—*Refd.* *R. v. Hewett* (1842), Car. & M. 531.

**4389.** —[—The words "I dare say you had a hand in it; you may as well tell me all about it," constitute a sufficient inducement to exclude a subsequent confession.

An attorney engaged in the investigation of a crime, for the purpose of getting up a prosecution, is a person clothed with authority to offer such an inducement.—*R. v. CROYDON* (1846), 7 L. T. O. S. 410; 2 Cox, C. C. 67.

**4390.** —[—Upon the trial of an indictment for attempting to poison, the only evidence of intent was a confession, proved by a medical man, he denying that he had held out to prisoner any inducement to make the statement. It was afterwards proved that before the statement was made he had said to prisoner, in the presence of her mistress, whom she had attempted to poison, "It will be better for you to tell the truth." The learned judge refused to withdraw the confession from the jury, & prisoner was convicted; but the learned judge reported that if the surgeon had in the first instance stated that he had used that expression to prisoner, he should not have received the confession:—*Held*: the conviction was wrong.—*R. v. GARNER* (1848), 2 Car. & Kir. 920; 1 Den. 329; T. & M. 7; 3 New Sess. Cas. 329; 18 L. J. M. C. 1; 12 L. T. O. S. 155; 12 J. P. 758; 12 Jur. 944; 3 Cox, C. C. 175, C. C. R.

*Annotations*:—*Refd.* *R. v. Baldry* (1852), 5 Cox, C. C. 523; *R. v. Moore* (1852), 2 Den. 522; *R. v. Widdop* (1872), 21 W. R. 176.

auditor in the service of a railway co., having discovered defalcations in the account of prisoner, who was a booking clerk of the co., went to him & told him that "he had better pay the money than go to jail," & added that "it would be better for him to tell the truth," after which prisoner was brought before the traffic manager, in whose presence he signed a receipt for, & admitted having received, a sum of R826-8-0. Prisoner was subsequently put on his trial for criminal breach of trust as a servant in respect of this & of other sums:—*Held*: the words used by W. the travelling auditor, constituted an inducement to prisoner to confess, in authority within the meaning of s. 24 of the Evidence Act, & the receipt was not admitted in evidence on his trial.—*R. v. NAVEOJI DABABHAI* (1872), 9 Bom. 358.—*IND.*

**4380 vi.** —[—A deputy magistrate warned accused that what he would say would go as evidence against him: so he had better tell the truth:—*Held*: the use of such language was calculated to hold out an inducement to prisoner to confess, & such a confession was inadmissible in evidence against him.—*R. v. UZZER* (1884), 1 L. R. 10 Calc. 775.—*IND.*

**4380 vii.** —[—When a conversation was alleged to have taken place between a witness for the prosecution,

& prisoner, & a statement made by prisoner in relation to the crime with which he was charged, & it appeared that the conversation took place, & the alleged statement was made by prisoner to the witness in a police barrack, the witness having previously told prisoner, "that if any other person had to do in the case, it was better she should tell":—*Held*: any statement afterwards made by prisoner was not admissible in evidence.—*R. v. MOODY* (1841), 2 Craw. & D. 347.—*IR.*

**4380 viii.** —[—Prosecutor, in whose service prisoner lived, said to him that "it would be better for him to tell the truth":—*Held*: a confession made thereupon was inadmissible.—*Woon's Case* (1842), Ir. Cir. Rep. 597.—*IR.*

**4380 ix.** —[—A woman was indicted for the murder of her infant child, & while under arrest the constable in whose charge she was told her she had better tell the truth. She thereupon made a statement:—*Held*: such statement was not admissible in evidence.—*R. v. MAYORISK* (1898), 32 L. L. T. 56.—*IR.*

**4380 x.** —[—The governor of a prison asked a prisoner under his charge, who was in a state of great mental & bodily excitement, "whether he intended to injure himself," but did not warn prisoner that the answer

might be used in evidence:—*Held*: it was incompetent to receive as evidence any answer to this question.—*H.M. ADVOCATE v. PROUDFOOT* (1882), 9 Ir. (Cl. of Sess.) 19; 19 Sc. L. R. 725.—*SCOT.*

**4380 xi.** —[—An accused, after being arrested & duly cautioned, gave an explanation to the police constable of how he came into possession of certain stolen articles with the theft of which he was charged. The constable, not being satisfied with the explanation, approached accused a few days later & said to him: "You must tell the truth." Accused thereupon made a further statement:—*Held*: under the circumstances the further statement was inadmissible in evidence against accused.—*R. v. KLEINBOOI* (1917), T. P. D. 86.—*S. AF.*

**4380 xii.** —[—A constable warned accused & told him that he need not say anything if he did not wish to do so, but afterwards a field-cornet told accused that he had to find out all about the death & that accused "must tell him all the truth about it." This might affect the previous warning & accused might have felt that he was legally bound to make a statement.—*R. v. VAN BLERCK*, [1919] C. P. D. 68.—*S. AF.*

*p. Wilfully untrue representation.]*



**4391.** —.]—*R. v. CHEVERTON*, No. 4339, *ante*.

**4392.** —.]—Prisoner was called up by his master, & told, "You are in the presence of two police officers; & I should advise you that to any question that may be put to you you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue." The master afterwards added: "Take care; we know more than you think." Prisoner thereupon made a statement:—*Held*: such statement was admissible against him on his trial for larceny.—*R. v. JARVIS* (1867), *L. R. 1 C. C. R. 96*; *37 L. J. M. C. 1*; *17 L. T. 178*; *31 J. P. 804*; *16 W. R. 111*; *10 Cox, C. C. 574, C. C. R.*

*Annotations*:—*Folld. R. v. Reeve* (1872), *L. R. 1 C. C. R. 362*. *Refd. R. v. Widdop* (1872), *21 W. R. 176*; *R. v. Hatts & Culiffe* (1883), *49 L. T. 780*; *R. v. Rose* (1898), *67 L. J. Q. B. 289*.

**4393.** —.]—A police inspector said to a prisoner in his custody, "you must tell me where the child is, or you will get yourself into trouble":—*Held*: this was a threat made by a person in authority, & a statement made in consequence could not be received in evidence.—*R. v. COLEY* (1868), *32 J. P. 168*; *10 Cox, C. C. 536*.

*Annotation*:—*Refd. R. v. Edwards* (1868), *33 J. P. 119*.

**4394.** —.]—*R. v. BATE*, No. 4254, *ante*.

**4395.** —.]—On a trial for larceny, evidence was received of a confession made by prisoner to the prosecutor in the presence of a police inspector, immediately after the prosecutor had said to prisoner, "The inspector tells me you are making housebreaking implements; if that is so, you had better tell the truth, it may be better for you":—*Held*: the confession was not admissible in evidence.—*R. v. FENNEL* (1881), *7 Q. B. D. 147*; *50 L. J. M. C. 126*; *44 L. T. 687*; *45 J. P. 606*; *29 W. R. 742*; *14 Cox, C. C. 607, C. C. R.*

*Annotations*:—*Folld. R. v. Hatts & Culiffe* (1883), *49 L. T. 780*. *Refd. R. v. Thompson*, [1893] *2 Q. B. 12*; *Ibrahim v. R.*, [1914] *A. C. 599*.

**4396.** —.]—The prisoners H. & C. were taken into their master's, the prosecutor's, room where there were two policemen. The prosecutor said, "I presume you know who these gentlemen are." H. said "Yes." The prosecutor then said to H., "I know what has been going on between you & C. for some time. You had better speak the truth." H. then made a confession:—*Held*: the confession was not admissible in evidence.—*R. v. HATTS & CULIFFE* (1883), *49 L. T. 780*; *48 J. P. 248, C. C. R.*

**4397.** —.]—Statement made in the presence of a policeman in answer to an invitation by a relative that he had better tell the truth:—*Held*: inadmissible.—*R. v. JONES* (1885), *49 J. P. 728*.

**4398.** —.]—*R. v. THOMPSON*, No. 4314, *ante*.

**4399.** —.]—Prisoner, who in the presence of a police constable was asked by his master, a farmer, how he accounted for the number of sheep on the farm not being so large as it should be, admitted that he had sold some of them & had not accounted to his master for the money which he had received for them. In answer to further questions as to whether he had let any corn go

off the place, he said he had done so. The master, on cross-examination, admitted that when he asked prisoner about the corn he might have said, "You had better tell me all about the corn that is gone," & further, that he would not swear that he did not induce the prisoner to confess about the corn. A witness who was present also stated on cross-examination that the master asked prisoner to speak the truth, & said it would be better for him if he did so:—*Held*: as the words used contained in themselves an inducement to make a statement, no part of prisoner's confession was admissible against him on his trial for larceny.—*R. v. ROSE* (1898), *67 L. J. Q. B. 289*; *78 L. T. 119*; *14 T. L. R. 213*; *42 Sol. Jo. 255*; *18 Cox, C. C. 717, C. C. R.*

**4400. Confession induced by drink.**—*R. v. SEXTON* (1822), 2 Russell on Crimes & Misdemeanours, 8th ed., p. 2021.

*Annotation*:—*Dbtd. R. v. Godinho* (1911), *76 J. P. 16*.

#### *B. Matters not amounting to Inducement.*

**4401. Spiritual admonitions.**—Where, after interviews with the chaplain of the prison in which the chaplain advised prisoner to make peace with his God & to repent & confess his sins before God, & in consequence & subsequently prisoner made a confession to the mayor & other magistrates whom he had asked to see, & the mayor cautioned him that anything he might say would be evidence against him:—*Held*: the confession was admissible in evidence.—*R. v. GILHAM* (1828), *1 Mood. C. C. 186, C. C. R.*

*Annotations*:—*Consd. R. v. Day* (1847), *11 J. P. 245*. *Refd. A.-G. v. Briant* (1846), *15 L. J. Ex. 265*; *R. v. Gibbs* (1866), *11 Cox, C. C. 69*. *Mentd. R. v. Scott* (1865), *2*

**4402.** —.]—A prisoner charged with murder, being a few days short of fourteen, was told by a man who was present when he was taken up, but not a constable, "Now kneel you down, I am going to ask you a very serious question, & I hope you will tell me the truth, in the presence of the Almighty." Prisoner in consequence made certain statements:—*Held*: strictly admissible, but the ct. much disapproved of the mode in which it was obtained.—*R. v. WILD* (1835), *1 Mood. C. C. 452, C. C. R.*

*Annotation*:—*Refd. Ibrahim v. R.* [1914] *A. C. 599*.

**4403.** —.]—*R. v. DAY*, No. 4337, *ante*.

**4404.** —.]—Where prisoner, a boy of ten years, being enjoined by the clergyman of the parish to "speak the truth in the face of God" denied to him his guilt, but afterwards made a confession to a policeman, in which he alluded to the conversation with the clergyman, & said that he would "now speak the truth":—*Held*: such confession was admissible.—*R. v. RISBOROUGH* (1847), *9 L. T. O. S. 25*; *11 J. P. 280*.

**4405.** —.]—Prisoner, a maid servant, was indicted for setting fire to a farm building of her master's. She was taken into custody by a policeman. She endeavoured to get away, but was told she was a prisoner on the charge of arson. She desired to change her dress & was

—M. was charged with having stolen gold from a co. G., a private detective, who had worked himself into M.'s confidence, gave evidence that he told M. that he came from S. Africa & had done business in diamonds. M. replied, "that money could be made here if one went the right way about it." G. then, by means of false statements, induced M., by promising to participate in gold robberies, to admit he had some gold scraped from the co.'s retorts. The statements were admitted

to be false. Evidence admitted & prisoner was convicted:—*Held*: the representations being untrue, & being made after the subject matter of the charge had been taken, all subsequent confessions of M. were inadmissible in evidence, as being induced by such false statements & the conviction must be annulled.—*R. v. MANGIN* (1894), *6 Q. L. J. 63.—AUS.*

**q.** —.]—An admission or statement made by an accused after an untrue representation has been made

to him is admissible in evidence against him unless the representation was untrue to the knowledge of the person making it, & wilfully made with the object of inducing a confession.—*R. v. DAVIDSON* (1895), *16 N. S. W. L. R. 149*; *12 N. S. W. W. N. 5.—AUS.*

**r. Whether confession improperly induced—Question for judge.**—It is a question for the judge whether or not prisoner has been induced by undue influence to confess.—*R. v. FINKLE* (1865), *15 C. P. 453.—CAN.*

*Sect. 5.—Confessions and statements by accused:*  
*Sub-sect. 6, B. & C. (a).]*

permitted to do so, having first been given into the charge of Mrs. A., a married daughter of the master, but having no control over prisoner by reason of any relationship of master & servant. Whilst alone with Mrs. A., prisoner being in custody, the former said to prisoner, "I am very sorry for you; you ought to have known better. Tell me the truth, whether you did or no." Prisoner said, "I am innocent." Mrs. A. replied, "Don't run your soul into more sin, but tell the truth." Prisoner then made a full confession:—*Held*: there was neither an authority to make any inducement nor any inducement or threat, & the evidence was admissible.—*R. v. SLEEMAN* (1853), *Dears. C. C.* 249; 23 *L. J. M. C.* 19; 22 *L. T. O. S.* 148; 17 *J. P.* 776; 17 *Jur.* 1082; 2 *W. R.* 97; 6 *Cox. C. C.* 245; *sub nom. R. v. SLEEMAN, R. v. LUCKHURST*, 2 *C. L. R.* 129, *C. C. R.*

**4406. Mere questions—Without threat or promise.**—A confession obtained without threat or promise from a boy 14 years old, by questions put by a police officer, in whose custody the boy was on a charge of felony, & when he had had no food for nearly a whole day:—*Held*: rightly received.—*R. v. THORNTON* (1824), 1 *Mood. C. C.* 27, *C. C. R.*  
*Annotations*:—*Refd.* *R. v. Gillis* (1866), 14 *W. R.* 845; *Ibrahim v. R.*, [1914] *A. C.* 599.

**4407. —**—*]*—A female prisoner, in custody on a charge of murder, desiring to go to a water-closet, was sent there by the police with a woman who was impliedly authorised to prevent her escape. When alone together in the closet, the woman, an acquaintance of prisoner, alluding to the crime, said, "How came you to do it?" whereupon prisoner made a statement in the nature of a confession:—*Held*: the statement was not induced by any hope or fear caused by a person in authority, & was, therefore, admissible in evidence against the prisoner.—*R. v. VERNON* (1872), 12 *Cox. C. C.* 153.

**4408. —**—*]*—*R. v. REASON*, No. 4342, *ante*.

**4409. —**—*]*—*R. v. KERSHAW* (1902), 18 *T. L. R.* 357.

**4410. —**—*]*—*IBRAHIM v. R.*, No. 4308, *ante*.

**4411. Questions by fellow prisoner—Under promise of secrecy.**—A. was in custody on a charge of murder. B., a fellow prisoner, said to him, "I wish you would tell me how you murdered the boy—pray split." A. replied, "Will you be

upon your oath not to mention what I tell you?" B. went upon his oath that he would not tell. A. then made a statement:—*Held*: this was not such an inducement to confess as would render the statement inadmissible.—*R. v. SHAW* (1834), 6 *C. & P.* 372.

**4412. Advice to accused—Not to confess but promise of secrecy.**—A witness stated that a prisoner, charged with felony, asked him if he had better confess, & the witness replied that he had better not confess, but that prisoner might say what he had to say to him, for it should go no further. Prisoner made a statement:—*Held*: it was receivable in evidence on the trial.—*R. v. THOMAS* (1836), 7 *C. & P.* 345.

*Annotation*:—*Apld. R. v. James* (1909), 2 *Cr. App. Rep.* 319.

**4413. — As to course of action.**—Prosecutrix lost her purse containing £1 4s., in a market, & asked prisoner, who had been standing near her, whether he had seen the purse or seen any one pick it up. He replied that he had not. She, however, suspecting that he had robbed her, gave information to the police. A policeman, a short time after, went in search of prisoner, & having found him, told him that the prosecutrix had lost her purse, & that it was supposed that he had picked it up, & added, "Now is the time for you to take it back to her." He denied having it, & went with the policeman. As they went along he commenced making a statement, but the policeman told him to say nothing until they saw the prosecutrix. Having met the prosecutrix after they had walked about 600 yards, some conversation took place, & prisoner was searched, & on a half-sovereign being found, prisoner said to the prosecutrix that he would make it all up to her. Twenty minutes had elapsed between the time of the policeman's remark, "Now is the time to take it back to her," & prisoner's, "that he would make it all up to her":—*Held*: there was no inducement held out to prisoner, & that his statement, or confession, that he would make it all up to her, was admissible in evidence against him.—*R. v. JONES* (1872), 27 *L. T.* 765; 37 *J. P.* 196; 12 *Cox. C. C.* 241, *C. C. R.*

**4414. Statement to accused—Of intention to be guided by other parties—Confession to other parties.**—Where a prosecutor told prisoner he did not wish to prosecute, but would be guided by other parties, to whom he referred him, a statement by prisoner to such parties, for the

**PART XII. SECT. 5, SUB-SECT. 6.—B.**

**4406 i. Mere questions—Without threat or promise.**—Prisoner was charged with stealing. Before arresting him the constable said, "Now I am going to ask you a few questions & I may have to arrest you over this." Prisoner then admitted taking the stolen articles:—*Held*: the words used by the constable did not amount to a threat or promise, nor to an inducement at common law.—*R. v. FAIRLEIGH* (1910), 10 *S. R. N. S. W.* 723; 27 *N. S. W. N.* 75.—*AUS.*

**4406 ii. —**—*]*—The words used to a prisoner when arrested, "I want you to tell me all about it," do not import any threat or hope of favour.—*R. v. POTTER* (1887), 6 *N. Z. L. R.* 92.—*N.Z.*

**a. Advice to accused.**—Where a prisoner was charged with the crime of murder, & while awaiting his trial in prison, the gaoler of the prison said to him "That a man was always easier in his mind for confessing his crime: that what he, prisoner, said would be used in evidence against him: that if a man committed such a crime it was always better if he confessed it to his

Maker," & prisoner thereupon confessed to having committed the murder:—*Held*: such confession was voluntary & admissible in evidence.—*R. v. STEVE* (1890), 7 *S. C.* 103.—*S. AF.*

**4413 i. — As to course of action.**—Where a police officer tells an accused that he is not obliged to make any statement unless he likes, that anything he might say may be used as evidence against him, & that he has nothing to hope for & nothing to fear, there is not implied in such words of the police officer an inducement to prisoner to make a statement.—*R. v. SPAIN*, [1917] 2 *W. W. R.* 465; 38 *Can. Crim. Cas.* 113; 36 *D. L. R.* 522.—*CAN.*

**t. Statement to accused—That father had been charged.**—On a trial for murder, it appeared that prisoner, being in the custody of A., a policeman, was cautioned by A. not to say anything to criminate himself, as in case he did it would be brought against him. Subsequently, A. told prisoner that his, prisoner's, father had been charged with the murder; whereupon prisoner said, that he hoped that nobody would be charged with the crime but himself, as

nobody else was concerned in it, & then detailed the particulars of the murder as committed by himself:—*Held*: the communication made by A. to prisoner, respecting the father of the latter, did not amount to an illegal inducement, so as to render the admissions of the prisoner inadmissible in evidence.—*R. v. NOLAN* (1839), 1 *Craw. & D.* 74.—*IR.*

**a. — Not amounting to admonition.**—A detective, before arresting one of the prisoners, said, "If you had told me this before I would have made a witness of you, but now I have no alternative but to take you as a prisoner":—*Held*: statements made afterwards by prisoner were rightly admitted in evidence.—*R. v. BOURNE & BRINKS* (1878), 1 *N. S. W. S. C. R. N. S.* 176.—*AUS.*

**b. —**—*]*—The constable, when arresting accused, said, "I arrest you for assaulting M.," & proceeded to handcuff him. Accused asked to be permitted to go to the office to get some money, & inquired, "How much will the fine be?" to which the constable replied that he did not know anything about that. Subsequently

purpose of inducing them not to prosecute, is admissible in evidence.—*R. v. BROWN* (1845), 9 J. P. 314.

**4415.** — That wife had confessed.]—*R. v. WRIGHT* (1830), 1 Lew. C. C. 48.

**4416.** — That accessory had confessed.]—*R. v. LONG*, No. 3901, *ante*.

**4417. Expressions of good will.**]—A prisoner charged with felony being in custody handcuffed in the house of the prosecutor, after a conversation with the prosecutor & another person, in which he was told that they would do all they could for him, said, "If the handcuffs are taken off, I will tell you where I put the property":—*Semble*: this statement was receivable in evidence, & could not be objected to, either as a confession made under a promise, or a statement obtained by duress.—*R. v. GREEN* (1834), 6 C. & P. 655; 2 Nev. & M. M. C. 621.

**4418. Inducement not relating to charge.**]—*R. v. WARNER & MORGAN* (1832), 2 Russell on Crimes & Misdemeanours, 8th ed., pp. 2015, 2054. *Annotation*:—*Refd.* *R. v. Gillis* (1866), 11 Cox, C. C. 69.

**4419.** —.]—A. & his wife were separately in custody on a charge of receiving stolen property. A person, who was in the room with A., said, "I hope you will tell, because Mrs. G. can ill afford to lose the money"; & the constable then said, "If you will tell where the property is, you shall see your wife":—*Held*: a statement made by A. afterwards was admissible in evidence.—*R. v. LLOYD* (1834), 6 C. & P. 393.

**4420. Inducement to person jointly accused.**]—An inducement or threat offered by the master to one of two apprentices jointly accused of larceny, will not, though offered in the presence of the other, preclude a confession immediately made by such other.—*R. v. JACOBS & TARRANT* (1849), 13 J. P. 572; 4 Cox, C. C. 54.

**4421.** —.]—*R. v. BATE*, No. 4254, *ante*.

**4422. Confession induced by drink.**]—A statement made by a prisoner when he is drunk, is receivable in evidence. *Semble*: if a constable gave him liquor to make him so, in the hope of his saying something, that will not render the statement inadmissible, but it will be matter of observation for the judge in his summing up.—*R. v. SPILSBURY* (1835), 7 C. & P. 187; 3 Nev. & M. M. C. 409.

**4423. Effect of caution.**]—On the examination

accused asked to have the handcuffs removed, as he had no intention of escaping; to which the constable answered that he was taking no chances, & that he "had not much sympathy with a man who would kick an old man & bite him":—*Held*: these remarks of the constable were not an inducement to accused to speak.—*R. v. BRUCE* (1907), 13 B. C. R. 1; 12 Can. Crim. Cas. 275.—*CAN.*

**4417 i. Expression of goodwill.**]—The words "I will help you as far as possible," do not constitute an inducement to confess.—*R. v. GRAVEL*, [1918] Q. R. 28 K. B. 146.—*CAN.*

**4418 i. Inducement not relating to charge.**]—An inducement held out to an accused person in consequence of which he makes a confession must be one having relation to the charge against him.—*R. v. TODD* (1901), 13 Man. L. R. 364.—*CAN.*

**4420 i. Inducement to person jointly accused.**]—The following words addressed to one of two prisoners by prosecutor in reference to a stolen cow then before them: "Shove the thief into it, as I have a good idea who he is," do not amount to an inducement excluding that prisoner's answer thereupon given.

—*R. v. SHEPPARD & STEPHENS* (1868), 8 N. S. W. S. C. R. 86.—*AUS.*

**4423 i. Effect of caution.**]—A conversation between a policeman & a prisoner, after a caution by the policeman to this effect, "Don't tell me anything, or it will be given in evidence against you," is admissible.—*R. v. HALLAM* (1846), Bl. D. & Osb. 88.—*IR.*

**c. Accusation in form of question.**]—L. said to prisoner, who was indicted for unlawfully wounding a grey horse of S., "What right had you to shoot that grey horse of S?" L. did not know at the time that prisoner had shot the grey horse:—*Held*: the words used by L. to prisoner did not amount to an untrue representation & that prisoner's reply was admissible.—*R. v. SUMMERELL* (1869), 8 N. S. W. S. C. R. 214.—*AUS.*

**d. Misstatement by police officer.**]—A prisoner's confession or admission is rightly admitted in evidence even if it was to some degree influenced by a misstatement of a police officer to whom it was made.—*R. v. WHITE* (1908), 13 O. W. R. 144; 18 O. L. R. 640; 15 Can. Crim. Cas. 30.—*CAN.*

**e. Conduct calculated to excite horror.]**

of a prisoner before the magistrate on a charge of felony, the magistrate's clerk told prisoner not to say anything to prejudice himself, as what he said would be taken down, "& used for him or against him at his trial":—*Held*: this was an inducement held out, & the statement was, therefore, not receivable in evidence.—*R. v. DREW* (1837), 8 C. & P. 140.

*Annotations*:—*Fold.* *R. v. Morton* (1843), 2 Mood. & R. 514; *R. v. Furley* (1844), 1 Cox, C. C. 76. *Dttd.* *R. v. Baldry* (1852), 5 Cox, C. C. 523. *Refd.* *R. v. Zeigert* (1867), 31 J. P. 598.

**4424.** —.]—Caution to a prisoner, that what she says will be used against her on the trial, will prevent the reception in evidence of any statement made in consequence.—*R. v. FURLEY* (1844), 3 L. T. O. S. 143; 1 Cox, C. C. 76.

*Annotation*:—*Dttd.* *R. v. Baldry* (1852), 5 Cox, C. C. 523.

**4425.** —.]—Where a prisoner about to be committed on a charge of felony was told that he was at liberty to make any statement but that whatever he said would be taken down & used against him, & prisoner thereupon made a statement, which was reduced into writing, & sought to be given in evidence against him on his trial:—*Held*: it could not be given in evidence against him.—*R. v. HARRIS* (1844), 3 L. T. O. S. 22; 1 Cox, C. C. 106.

*Annotation*:—*Dttd.* *R. v. Baldry* (1852), 5 Cox, C. C. 523.

**4426. By prosecution—To explain fact—Elicited on cross-examination.**]—*R. v. CHAMBERS*, No. 3966, *ante*.

**4427.** —.]—To caution a prisoner that what he said would be used against him on his trial if committed, is not an inducement to him to make a statement so as to exclude that statement from being given in evidence on the trial.—*R. v. ATTWOOD* (1851), 17 L. T. O. S. 280; 5 Cox, C. C. 322.

**4428.** —.]—*R. v. BALDRY*, No. 4368, *ante*.

### C. By whom Inducement made—Person in Authority.

#### (a) In General.

**4429. Inducement by person in authority—Confession inadmissible.**]—*R. v. GARNER*, No. 4390, *ante*.

**4430.** — —.]—*R. v. THOMPSON*, No. 4314, *ante*.

—Confession held to be admissible, although apparently induced by the acts of the parties who conducted prisoner to gaol, those acts being calculated to excite, not fear of temporal punishment but horror at the recollection of the crime.—*R. v. GIBNEY* (1822), Jebb. Cr. & Pr. Cas. 15.—*IR.*

**1. Question by doctor—Under threat of physical examination.**]—A medical man asked prisoner whether she had not recently had a child, adding, that if she refused to tell he would examine her person more closely; whereupon prisoner said: "It is unnecessary to examine me, for I had a child":—*Held*: such admission was receivable in evidence; the declaration by the medical man that he would examine prisoner's person not being a threat within the rule which excludes admissions obtained by means of threats or promises.—*R. v. CAIN* (1839), 1 Craw. & D. 36.—*IR.*

### PART XII. SECT. 5, SUB-SECT. 6.—C. (a).

**4429 i. Inducement by person in authority—Confession inadmissible.**]—*R. v. CHARCOAL* (1897), 3 Terr. L. R. 7.—*CAN.*

**Sect. 5.—Confessions and statements by accused:**  
**Sub-sect. 6, C. (a) & (b) & D.]**

— — —.]—*R. v. BOUGHTON*, No.

*ante.*

**4432. Inducement by person not in authority—**  
**Confession not admitted.]—***R. v. DUNN*, No. 4382,  
*ante.*

**4433. — — —.]—***R. v. SLAUGHTER*, No.

*ante.*

**4434. — — — Admissibility doubted.]—**There is a difference of opinion among the judges whether a confession made to a person who has no authority after an inducement held out by that person, is receivable in evidence.—*R. v. SPENCER* (1837), 7 C. & P. 776.

*Annotation:—*Refd. *R. v. Gillis* (1866), 14 W. R. 845.

**4435. — — — Confession admitted.]—**Persons having nothing to do with the apprehension, prosecution, or examination of the prisoner, advised him to tell the truth & consider his family:—*Held*: such admonition was no ground for excluding a confession made an hour afterwards to the constable in prison.—*R. v. ROW* (1809), Russ. & Ry. 153, C. C. R.

**4436. — — —.]—***R. v. HARDWICK* (1811), 1 C. & P. 98, n.

**4437. — — —.]—**The confession of a prisoner is evidence, though previous to it an inducement to confess had been held out by another person, if that person had no authority.—*R. v. GIBBONS* (1823), 1 C. & P. 97.

*Annotation:—*Mentd. *Doe d. Peter v. Watkins* (1837), 4 Scott. 155.

**4438. — — —.]—**Confession of a prisoner to a constable, who had held out no inducement, is evidence; though an inducement had been previously held out by a person in no office or authority.—*R. v. TYLER & FINCH* (1823), 1 C. & P. 129.

**4439. — — —.]—**It is the opinion of the judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority. If a person, not in any office or authority, hold out to an accused party an inducement to confess, this will not exclude a confession made to that person.

Where the house of Mr. L. had been on fire, & prisoner, a female servant there, was sent for into the parlour, where Mr. W., a person not in authority, in the presence of Mrs. L., held out an inducement to prisoner to confess respecting the fire, Mrs. L. expressing no dissent:—*Held*: a confession made after this was not receivable, as the inducement must be taken as if it had been held out by Mrs. L., who was a person in authority over the prisoner.—*R. v. TAYLOR* (1839), 8 C. & P. 733.

*Annotations:—*Refd. *R. v. Moore* (1852), 21 L. J. M. C. 199; *R. v. Gillis* (1866), 11 Cox, C. C. 69.

**4440. — — — Erroneous belief of authority by accused.]—***Semble*: where a confession is induced by the promise of a person not, in fact, having authority or power with respect to the prosecution, to show any favour to the accused, such confession is admissible, although prisoner from his knowledge of the position of the promisor

may reasonably suppose he has such authority.—*R. v. FREWIN* (1855), 6 Cox, C. C. 530.

**4441. — — — Made in presence of person in authority—Confession inadmissible.]—***R. v. CASS*, No. 4359, *ante.*

**4442. — — —.]—**A. being in the custody of a constable, on a charge of felony, was taken by the constable to an inn, where the innkeeper, in the hearing of the constable, held out an inducement to A. to confess; & A., in the hearing of the constable, made a confession to the innkeeper, which, at the trial, the constable was called to prove:—*Semble*: this confession was not receivable in evidence.—*R. v. POUNTNEY* (1836), 7 C. & P. 302; 3 Nev. & M. M. C. 432.

**4443. — — —.]—***R. v. TAYLOR*, No. 4439, *ante.*

**4444. — — —.]—**A married woman was apprehended on a charge of felony, & her husband, in the presence of the constable, held out an inducement to her to confess. She then made a statement:—*Held*: it was not receivable in evidence, as an inducement held out in the presence of the constable was the same in effect as if it had been held out by him.—*R. v. LAUGHER* (1846), 2 Car. & Kir. 225.

*Annotation:—*Refd. *R. v. Garner* (1848), 18 L. J. M. C. 1.

**4445. — — —.]—***R. v. GARNER*, No. 4390, *ante.*

**4446. — — —.]—***R. v. LUCKHURST*, No. 4381, *ante.*

**4447. — — —.]—***R. v. JONES*, No. 4413, *ante.*

**4448. — — — Except where inducement is by one prisoner to another.]—**A statement made by one of two prisoners to the other after an inducement suggested by that other in the presence of the constable in whose custody they are, & uncontradicted by the constable, is inadmissible in evidence.—*R. v. MILLEN* (1849), 3 Cox, C. C. 507.

**4449. — — —.]—**A. & B. being charged charged with felony, A. said to B., in the presence of the prosecutor & of the policeman who had charged them, "Well, John, you had better tell the truth." Whereupon, the prosecutor & policeman remaining silent, B. made a confession. B. subsequently made a further confession to the policeman on their way to the Bridewell:—*Held*: the confessions so made were admissible in evidence on the trial.—*R. v. PARKER* (1861), Le. & Ca. 42; 30 L. J. M. C. 144; 4 L. T. 451; 25 J. P. 374; 7 Jur. N. S. 586; 9 W. R. 699; 8 Cox, C. C. 465, C. C. R.

(b) *Who is person in Authority.*

**4450. Magistrate.]—***R. v. COOPER*, No. 4361, *ante.*

**4451. Police officer.]—***R. v. COLEY*, No. 4393, *ante.*

**4452. — — —.]—***R. v. HATTS & CULFFE*, No. 4396, *ante.*

**4453. — — —.]—***R. v. BOUGHTON*, No. 4373, *ante.*

**4454. Person having custody of accused.]—***R. v. ENOCH*, No. 4384, *ante.*

**4455. — — —.]—***R. v. WINDSOR*, No. 4370, *ante.*

**4456. — — —.]—***R. v. VERNON*, No. 4407, *ante.*

**PART XII. SECT. 5, SUB-SECT. 6.—**  
**C. (b).**

**4451 i. Police officer.]—***R. v. McDONALD* (1896), 3 Terr. L. R. 1.—**CAN.**

**g. Police surgeon.]—**The statements made by accused to a police surgeon, called as a witness by the Crown, were properly admitted in evidence, although elicited by questioning & without the customary warning, the surgeon not being a person having any control over accused.—*R. v.*

*ANDERSON* (1914), 26 W. L. R. 783.—**CAN.**

**h. Prison governor.]—**The governor of a prison asked a prisoner under his charge who was in a state of great mental & bodily excitement, "Whether he intended to injure himself," but did not warn prisoner that the answer might be used in evidence:—*Held*: it was incompetent to receive as evidence any answer to this question.—*H.M. ADVOCATE v. PROUDFOOT* (1882), 9

**4435 i. Inducement by person not in authority—Confession admitted.]—**A confession cannot be induced by any untrue representation or by any threat or promise so as to be inadmissible in evidence, unless such representation, etc. is made by a person in authority.—*R. v. SUMMERELL* (1869), 8 N. S. W. S. C. R. 214.—**AUS.**

**4435 ii. — — —.]—***PROSKO v. R.* (1922), 66 D. L. R. 340; 27 Can. Crim. Cas. 199.—**CAN.**

**4457. Prosecutor.**—*R. v. JONES*, No. 4413, *ante*.  
**4458.** ————*R. v. PARTRIDGE*, No. 4363, *ante*.  
**4459.** ————*R. v. COLLIER & MORRIS*, No. 4367, *ante*.

**4460. Wife of prosecutor.**—*R. v. WARRINGHAM*, No. 4313, *ante*.

**4461. Relations of prosecutor.**—*R. v. SIMPSON*, No. 4387, *ante*.

**4462.** ————*R. v. SLEEMAN*, No. 4405, *ante*.

**4463. Solicitor for prosecution.**—*R. v. CROYDON*, No. 4389, *ante*.

**4464. Master or mistress.**—A girl, accused of poisoning, was told by her mistress that if she did not tell all about it that night, a constable would be sent for in the morning to take her before a magistrate; she then made a statement:—*Held*: not admissible in evidence.

Next day, a constable was sent for, & as he was taking her to the magistrate, she said something to him, he having held out no inducement to her to do so:—*Held*: this was receivable, as the former inducement ceased on her being put into the hands of the constable.—*R. v. RICHARDS* (1832), 5 C. & P. 318; 1 Nev. & M. M. C. 362.

**4465.** ————A confession obtained from a servant through hopes & threats held out by the wife of the master & prosecutor is inadmissible.—*R. v. UPCHURCH* (1836), 1 Mood. C. C. 465, C. C. R. Annotation:—*Distd. R. v. Moore* (1852), 5 Cox, C. C. 555.

**4466.** ————*R. v. TAYLOR*, No. 4439, *ante*.

**4467.** ————*R. v. HEARN*, No. 4377, *ante*.

**4468.** ————*R. v. HEWETT*, No. 4364, *ante*.

**4469.** ————*R. v. GARNER*, No. 4390, *ante*.

**4470.** ————*R. v. RUE*, No. 4371, *ante*.

**4471.** ————*R. v. MANSFIELD*, No. 4372, *ante*.

**4472.** ————*R. v. THOMPSON*, No. 4314, *ante*.

**4473.** ———— **Not where unconcerned with charge.**—The wife of a person in whose house an offence is committed, such person not being prosecutor, nor engaged in the apprehension, prosecution, or examination of the offender, & the offence not being in any way connected with the management of the house, is not a person in authority within the rule which excludes confessions.—*R. v. MOORE* (1852), 3 Car. & Kir. 153; 2 Den. 522; 21 L. J. M. C. 199; 16 J. P. 744; 16 Jur. 621; 5 Cox, C. C. 555, C. C. R.

**4474. Medical man.**—*R. v. KINGSTON*, No. 4380, *ante*.

*R. (Ct. of Sess.)* 19; 19 Sc. L. R. 725.—**SCOT.**

**j. Departmental superior.**—On trial of a former assistant postmaster it was sought to prove that he had confessed his guilt in a conversation between him & the postmaster & one B. The witness admitted having in effect intimated to prisoner that he had better confess:—*Held*: evidence of the confession could not be admitted.—*R. v. WYLLIE* (1880), 3 L. N. 139.—**CAN.**

**k. Former fellow employee.**—A confession as to alteration of accounts made by an officer of a bank, after his connection therewith has terminated, to a fellow employee, no director of the bank being present, is not made to a person in authority.—*Re DEBAUM* (1888), 11 L. N. 323.—**CAN.**

**l. Indian agent.**—*R. v. CHARCOAL* (1897), 3 Terr. L. R. 7.—**CAN.**

**m. Rector of church—Charge against choir boy.**—Several church choir boys were implicated in an alleged assault, & a few days later the rector of the church held an inquiry:—*Held*: the rector was a person in authority.—*R. v. ROYDS* (1904), 24 C. L. T. 283; 10 B. C. R. 407; 8 Can. Crim. Cas. 209.—**CAN.**

**n. Post-office inspector.**—Prisoner

convicted for stealing a post letter & of theft of money. At the trial the post office inspector was about to testify with respect to a statement or confession made to him by the prisoner, when counsel for prisoner objected, & contended that the statement or confession was not admissible, because it was made as he contended to a person in authority, & was procured by means of threats or inducements, or by false statements made by inspector to prisoner:—*Held*: evidence was properly admitted.—*R. v. RYAN* (1905), 5 O. W. R. 125; 9 O. L. R. 137.—**CAN.**

**o. State authorities of foreign state.**—*Prosko v. R.* (1922), 66 D. L. R. 340; 37 Can. Crim. Cas. 199.—**CAN.**

**p. Railway travelling auditor—Charge against booking clerk.**—W., a travelling auditor in the service of a railway co., having discovered defalcations in the accounts of prisoner, who was a booking clerk of the co., went to him & told him that "he had better pay the money than go to gaol," & added that "it would be better for him to tell the truth":—*Held*: W. was a person in authority.—*R. v. NAVEOJI DADABHAI* (1872), 9 Bom. 358.—**IND.**

**q. Member of panchayat.**—The matter before a "panchayat" was

**4475.** ————*R. v. GARNER*, No. 4390, *ante*.

**4476. Consul.**—*R. v. ZEIGERT*, No. 4094, *ante*.

**4477. Official promise of reward.**—*R. v. Boswell*, No. 4365, *ante*.

**4478.** ————*R. v. BLACKBURN*, No. 4369, *ante*.

#### D. How long Inducement operates.

**4479. Inducement offered—Subsequent confession to magistrate—Admissible if effect of inducement effaced.**—*R. v. LINGATE* (1815), Phillipp & Arnold on Evidence, 10th ed. 414; 6 C. & P. 405, n.

**4480.** ————*R. v. ROSIER* (1821), Phillipp & Arnold on Evidence, 10th ed. 414.

**4481.** ————Where a prisoner, who made a confession to a constable, in consequence of a promise held out, was taken before a magistrate, who, knowing what had taken place, cautioned prisoner against making any confession before him, but the prisoner, notwithstanding, did make a confession to the magistrate:—*Held*: this second confession was receivable in evidence on the trial of prisoner, though it did not appear that the magistrate told prisoner that his first confession would have no effect, & he therefore might have acted under an impression, that, having once acknowledged his guilt, it was too late to retract.—*R. v. HOWES* (1834), 6 C. & P. 404; 2 Nev. & M. M. C. 199.

**4482.** ————On a prisoner being taken before a magistrate on a charge of forgery, the prosecutor said, in the hearing of prisoner, that he considered prisoner as the tool of G., & the magistrate then told prisoner to be sure to tell the truth. Upon this prisoner made a statement:—*Held*: this statement was receivable in evidence.—*R. v. COURT* (1836), 7 C. & P. 486.

Annotations:—*Consd. R. v. Laughler* (1846), 2 Car. & Kir. 225. *Refd. R. v. Holmes* (1843), 1 Car. & Kir. 248; *R. v. Baldry* (1852), 5 Cox, C. C. 523.

**4483.** ————*R. v. DINGLEY*, No. 4303, *ante*.

**4484.** ————*R. v. BATE*, No. 4254, *ante*.

**4485.** ———— **Mere caution insufficient.**—A statement by a prisoner, after a caution, before a magistrate, is not admissible if at a former time an inducement has been held out to confess by other parties.—*R. v. RULE* (1844), 8 J. P. 599.

whether M. & K. had murdered B., & thereby disqualified themselves from further intercourse with the rest of their brotherhood. M. & B. made certain statements before the panchayat which it was afterwards sought to prove against them on their trial for the murder of B. as confessions corroborating the evidence of an approver:—*Held*: the members of the panchayat were not in authority over M. & K. within the meaning of Act I. of 1872, s. 24.—*R. v. MOHAN LAL* (1881), 1 L. R. 4 All. 46.—**IND.**

#### PART XII. SECT. 5, SUB-SECT. 6.—D.

**4485 i. Inducement offered—Subsequent confession to magistrate—Admissible if effect of inducement effaced—Mere caution insufficient.**—Where it appeared that prosecutor had offered direct inducements to prisoner to confess:—*Held*: if the judge was satisfied that the promise of favour thus held out had induced the confessions, & continued to act upon prisoner's mind, notwithstanding a warning by the coroner, he was right in directing the jury to reject them.—*R. v. FINKLE* (1865), 15 C. P. 453.—**CAN.**

**r.** ———— **Subsequent confession to another person—Effect of caution.**—

**Sect. 5.—Confessions and statements by accused:**  
**Sub-sect. 6, D.; sub-sects. 7, 8 & 9.]**

**4486. ——— Duty of magistrate.]**—When a prisoner is willing to make a statement, it is the duty of magistrates to receive it; but magistrates, before they do so, ought entirely to get rid of any impression that may have before been on the prisoner's mind, that the statement may be used for his own benefit; & prisoner ought also to be told that what he thinks fit to say will be taken down, & may be used against him on his trial.—*R. v. ARNOLD* (1838), 8 C. & P. 621.

**4487. ——— Subsequent confession to coroner—Admissible if effect of inducement effaced.]**—*R. v. CLEWES*, No. 3875, *ante*.

**4488. ——— Subsequent confession to another person—Cessation of former inducement.]**—*R. v. RICHARDS*, No. 4404, *ante*.

**4489. ——— Effect of inducement remaining.]**—*R. v. COOPER*, No. 4361, *ante*.

**4490. ——— ———.]**—*R. v. MEYNELL* (1834), 2 Lew. C. C. 122.

*Annotation:—Consd. R. v. Hewett* (1842), Car. & M. 534.

**4491. ——— ———.]**—*R. v. SHERRINGTON* (1838), 2 Lew. C. C. 123.

**4492. ——— ———.]**—*R. v. HEWETT*, No. 4364, *ante*.

**4493. ——— ———.]**—*R. v. COLLIER & MORRIS*, No. 4367, *ante*.

**4494. ——— ———.]**—*R. v. CHEVERTON*, No. 4339, *ante*.

**4495. ——— ———.]**—*R. v. DOHERTY*, No. 3705, *ante*.

**4496. ——— ———.]**—*R. v. RUE*, No. 4371, *ante*.

**4497. Confession made under inducement—Effect of subsequent confirmation.]**—*R. v. SEXTON*, No. 4400, *ante*.

**4498. ——— ———.]**—If a statement made by a prisoner after an inducement, & after prisoner has been cautioned that what he says will be taken down, & may be used against him, is afterwards recognised & confirmed by prisoner in terms, that recognition will render the whole admissible.—*R. v. HORNER* (1846), 6 L. T. O. S. 523; 1 Cox, C. C. 364.

**SUB-SECT. 7.—EFFECT OF CONFESSIONS.**

**4499. Admissible as evidence in favour of accused.]**—The assertion of a party, in a conversation given in evidence against him, of facts

*Held*: before making his confession prisoner was duly cautioned & the confession was admissible in evidence although on an occasion previous to his making it an inducement may have been held out to him.—*R. v. LAI PING* (1904), 11 B. C. R. 102.—**CAN.**

**s. ——— ———.]**—Prisoner was convicted upon a confession made to a person who cautioned him not to say anything to criminate himself; but this confession was merely the second repetition of a former confession made to another person, who had previously said to prisoner: "The evidence at the inquest was so clear against you, that there can be no doubt you are the guilty man."—*Held*: the conviction was right.—*R. v. BRYAN* (1834), Jebb, Cr. & Fr. Cas. 157.—**IR.**

**4499 i. ——— Effect of inducement remaining.]**—If once any inducement is held out or false representation or threat or promise made to a prisoner, which produces a confession of guilt,

any subsequent confession, even to a different person & stated by prisoner to be voluntary is inadmissible in evidence unless it is most clearly shown by the prosecution that the operation of the original inducement, representation or promise, has been entirely removed from prisoner's mind.—*R. v. LAIRD* (1893), 14 N. S. W. L. R. 354; 10 N. S. W. W. N. 74.—**AUS.**

**4499 ii. ——— ———.]**—*R. v. BERUBE* (1852), 3 L. C. R. 212.—**CAN.**

**4499 iii. ——— ———.]**—A confession before a magistrate being irrelevant, the ct. was not prepared to say that subsequent confession made before the sessions judge was made after the impression caused by a promise of a police constable had been fully removed, & looking at the fact that a promise of safety had been made, the confession was, even if accepted, of a limited character.—*R. v. LUCHOO* (1873), 5 N. W. 86.—**IND.**

**t. ——— Statement to prosecutor—Subsequent statement after caution.]**—*R.*

in his favour, is evidence for him of those facts.—*SMITH v. BLANDY* (1825), Ry. & M. 257, N. P.

**4500. ———.]**—If the declaration of prisoner, in which she asserts her innocence, be given in evidence on the part of the prosecution, & there be evidence of other statements confessing guilt, the judge will leave the whole of the conflicting statements to the jury for their consideration; but if there be in the whole case no evidence but what is compatible with the assertion of innocence so given in evidence for the prosecution, the judge will direct an acquittal. If a prosecutor uses the declaration of a prisoner, he must take the whole of it together, & cannot select one part & leave another; & if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so; & then the statement of prisoner, & the whole of the other evidence, must be left to the jury, for their consideration, precisely as in any other case, where one part of the evidence is contradictory to another.—*R. v. JONES* (1827), 2 C. & P. 629.

**4501. ———.]**—If a prosecutor gives in evidence a declaration made by a prisoner, it becomes evidence for prisoner, as well as against him, but, like all other evidence, the jury may give credit to one part of it & not to another.—*R. v. HIGGINS* (1829), 3 C. & P. 603.

**4502. ———.]**—If a prosecutor gives in evidence a declaration made by a prisoner exculpatory of himself, the jury are not bound to take this to be true, merely because the prosecutor gives it in evidence, but they ought to consider how far it is consistent with the rest of the evidence, & whether they believe it to be really true.—*R. v. STEPTOE* (1830), 4 C. & P. 397.

**4503. ———.]**—A statement made by a prisoner before suspicion attaches to him, & before search made, in order to account for his possession, of property, which he is afterwards charged with having stolen, is admissible as evidence for him.—*R. v. ABRAHAM* (1848), 2 Car. & Kir. 550; 3 Cox, C. C. 430.

**4504. Evidence against person making them—As to meaning of a letter.]**—On an indictment for sending a threatening letter, prisoner's declarations of the meaning of the letter are admissible evidence.—*R. v. TUCKER* (1826), 1 Mood. C. C. 134, C. C. R.

**4505. ——— ———.]**—What a party says is

*v. HIGGINS* (1843), 1 L. T. O. S. 459.—**IR.**

**a. ——— Statement to police officer—Second statement next day.]**—Information given to a superintendent of police by a prisoner under a promise of safety:—*Held*: inadmissible as evidence against the prisoner & in these circumstances, a subsequent voluntary statement of the prisoner to another witness also rejected. Under the same circumstances:—*Held*: prisoner's declaration, emitted the day after his extra-judicial declaration, was inadmissible.—*H.M. ADVOCATE v. MAHLER & BERRENHARD* (1857), 2 Irv. 634; 29 Sc. Jur. 562.—**SCOT.**

**b. Prosecution must prove influence dispelled.]**—*R. v. DAVIDSON* (1898), 30 N. S. R. 349.—**CAN.**

**c. ———.]**—The burden of showing that the influences under which the first statement was made had been dispelled when the second statement was obtained rests upon the Crown.—*R. v. HOPE YOUNG* (1905), 38 N. S. R. 427.—**CAN.**



evidence against himself as an admission, notwithstanding it may relate to the contents of a written paper.—*EARLE v. PICKEN* (1833), 5 C. & P. 542.

**4506.** — **Not evidence against others.**—*R. v. CONINGSMARK (COUNT)* (1882), 9 State Tr. 1.  
*Annotation*:—*Mentd.* *Mansell v. R.* (1857), 8 E. & B. 54.

**4507.** — —.—*]*—If a letter, written by one of several prisoners, be read in evidence, & in this letter the names of the other prisoners be mentioned, these named must not be omitted in the reading of the letter, but the judge will tell the jury to pay no attention to the letter, except so far as it affects the writer.—*R. v. FLETCHER* (1829), 4 C. & P. 250; 1 Lew. C. C. 107.

**4508.** — —.—*]*—If a witness give evidence of a conversation with a prisoner, in which that prisoner says something implicating another prisoner, the witness, in giving his evidence, must not omit the name of such other prisoner & say "another person," but must give the conversation exactly as it occurred, & the judge will tell the jury that it is not evidence against such other prisoner.—*R. v. HEARNE* (1830), 4 C. & P. 215.

**4509.** — —.—*]*—What a prisoner is overheard to say to his wife, or even what he is overheard to say to himself, is receivable in evidence against him on a charge of felony.—*R. v. SIMONS* (1834), 6 C. & P. 540; 2 Nev. & M. M. C. 598.

**4510.** — —.—*]*—Statements made by a principal are not evidence against an accessory before the fact, although the act was the consequence of such previous incitement of the prisoner.

*Semble*: an indictment of an accessory should contain a positive averment that the principal was guilty.—*R. v. READ* (1844), 3 L. T. O. S. 143; 9 J. P. 10; 1 Cox, C. C. 65.

**4511.** — —.— **Special method of summing up adopted.**—Where prisoners are jointly indicted, & a statement is put in evidence in which one implicates the other, the judge will sum up the cases separately, requesting the jury to consult & come to a decision upon the one case, but not to deliver their verdict, & then he will sum up the case of the other, and take the verdict against both.—*R. v. CLOTHIER & TILER* (1844), 4 L. T. O. S. 196; 1 Cox, C. C. 113.

**4512.** — —.—*]*—Where two prisoners are indicted together, & one of them pleads guilty, any statement he may have made on his apprehension is not admissible in evidence for any purpose whatever.

*Qu.*: whether a prisoner who has pleaded guilty can be examined as a witness against another prisoner indicted with him.—*R. v. DRURY & BENSON* (1845), 1 Cox, C. C. 228.

**4513.** — —.—*]*—A statement by a deft implicating himself & a co-deft. is not evidence against the latter.—*R. v. DAVIS* (1913), 9 Cr. App. Rep. 66, C. C. A.

**4514.** — —.— **Importance of careful direc-**

#### PART XII. SECT. 5, SUB-SECT. 7.

**4506 i. Evidence against persons making them—Not evidence against others.**—Statements of accused persons can only be used in evidence as against the parties making them, & cannot be used as corroborative evidence against others.—*R. v. HURGOBIND* (1870), 2 N. W. 336.—**IND.**

#### PART XII. SECT. 5, SUB-SECT. 8.

**4515 i. Admissible in evidence.**—*M.* was charged with the murder of a girl. In the hope of pardon being given to her, she took the police to a certain place & pointed out & produced certain ornaments, which deceased was wearing

at the time of her death:—*Held*: evidence was admissible to show that accused did go to a certain place & there produced certain ornaments. Such evidence was admissible under Indian Evidence Act, s. 8, irrespective of whether the conduct of accused was or was not the result of inducement offered by the police.—*R. v. MISRI* (1909), 1 L. R. 31 All. 592.—**IND.**

**4521 i.** — **Confession admissible in so far as it relates to facts discovered.**—No judicial officer dealing with the provisions Act I. of 1872, s. 27, should allow one word more to be deposed to by a police officer detailing a statement made to him by an accused, in consequence of which he discovered a

tion.]—In every case where there is an incriminating statement by a co-prisoner, the jury should be carefully directed on the relevant law.—*R. v. ALTSHULER* (1915), 11 Cr. App. Rep. 243, C. C. A.

#### SUB-SECT. 8.—FACTS DISCOVERED IN CONSEQUENCE OF INADMISSIBLE CONFESSIONS.

**4515. Admissible in evidence.**—*R. v. WARICKSHALL*, No. 4311, *ante*.

**4516.** — —.—*]*—*R. v. MOSEY* (1784), 1 Leach, 265, n.

**4517.** — —.—*]*—A person who is discovered, though by means of an improper confession, to have purchased stolen property, is a competent witness to prove that fact.—*R. v. LOCKHART* (1785), 1 Leach, 386.

**4518.** — —.—*]*—A prisoner was charged with stealing a guinea & two promissory notes. The prosecutor told him that it would be better for him to confess:—*Held*: after this admonition the prosecutor might prove that prisoner brought him a guinea & a £5 note, which he gave up to the prosecutor as the guinea & one of the notes that had been stolen from him.—*R. v. GRIFFIN* (1809), Russ. & Ry. 151, C. C. R.

**4519.** — —.—*]*—If a confession is improperly obtained, it is a ground for excluding evidence of the confession, & of any act done by the prisoner, in consequence, towards discovering the property, unless the property is actually discovered thereby.—*R. v. JENKINS* (1822), Russ. & Ry. 492, C. C. R.

**4520.** — —.—*]*—If a confession of a crime be improperly obtained so as to be inadmissible in evidence, yet if in the course of such confession a clue is given to other evidence which will prove the case, such latter evidence is admissible.—*R. v. LEATHAM* (1861), as reported in 3 L. T. 777; 8 Cox, C. C. 498.

*Annotation*:—*Mentd.* *Taylor v. Vergette* (1861), 30 L. J. Ex. 400.

**4521.** — **Confession admissible in so far as it relates to facts discovered.**—*R. v. BUTCHER*, No. 4312, *ante*.

**4522.** — —.—*]*—Where anything is found in consequence of a statement made by a prisoner under circumstances which preclude its being given generally in evidence, such part of it as relates to the thing found in consequence is receivable, & ought to be proved.—*R. v. GOULD* (1840), 9 C. & P. 364.

**4523.** — **Reference to confession not permitted.**—*R. v. HARVEY* (1800), 2 East, P. C. 658.

**4524.** — —.—*]*—*R. v. BERRIMAN*, No. 4259, *ante*.

#### SUB-SECT. 9.—PRIVILEGED COMMUNICATIONS.

*See, generally*, DISCOVERY; EVIDENCE.

**4525. General rule.**—*R. v. DERRINGTON*, No. 4234, *ante*.

**4526. Solicitor & client—Advice on commission**

fact, than is absolutely necessary to show how the fact that was discovered is connected with accused so as in itself to be a relevant fact against him. Sect. 27 was not intended to let in a confession generally, but only such particular part of it as set the person to whom it was made in motion, & led to his ascertaining the fact or facts of which he gives evidence.—*ADU SHIKDAR v. R.* (1885), 1 L. R. 11 Calc. 635.—**IND.**

#### PART XII. SECT. 5, SUB-SECT. 9.

**d. Solicitor & client—General rule—Evidence of communications inadmissible.**—*W.* was produced as a witness, who swore that he had known the



*Sect. 5.—Confessions and statements by accused: vol. 9. Sect. 6: Sub-sects. 1 & 2.]*

**of crime.]**—All communications between a solr. & his client are not privileged from disclosure, but only those passing between them in professional confidence & in the legitimate course of professional employment of the solr. Communications made to a solr. by his client before the

**4531.** ————**]**—H., who was tried for forging the will of S., had sent the forged will to his attorney M. with some deeds of S., ostensibly for the purpose of asking his advice but really that he might find the will & act upon it. It was afterwards produced by M. before the magistrate when H. was charged with forging it. At the trial of H. for forgery M. was called to produce the will, which he did without any objection

(1884), 14 Q. B. D. 153; 54 L. J. M. C. 41; 52 L. T. 25; 49 J. P. 374; 33 W. R. 396; 1 T. L. R. 181; 15 Cox, C. C. 611, C. C. R.

*Annotations:—***Consd.** Williams v. Quebrada Ry. Land & Copper Co., [1895] 2 Ch. 751. **Refd.** R. v. Smith (1915), 84 L. J. K. B. 2153. **Refd.** Re Postlethwaite, Re Rickman, Postlethwaite v. Rickman (1887), 35 Ch. D. 722; Ward v. Marshall (1887), 3 T. L. R. 578; O'Rourke v. Darbishire, [1920] A. C. 581. **Mentd.** Proctor v. Smiles (1886), 2 T. L. R. 845; Weld-Blundell v. Stephens, [1919] 1 K. B. 520.

**4527.** ————**]**—R. v. SMITH, No. 3992, *ante*.

**4528.** ————**Letter written by solicitor—In consequence of interview with client.]**—In order to make a client criminally responsible for a letter written by his solr. it must be shown that the letter was written in pursuance of the instructions of the client. A letter by a solr. written "in consequence" of an interview with his client is not equivalent to a letter written by the instructions of his client, & is not admissible in a criminal case against the client.—R. v. DOWNER (1880), 43 L. T. 445; 45 J. P. 52; 14 Cox, C. C. 486, C. C. R.

**4529.** ————**Solicitor must produce document—As to which prisoner charged with offence.]**—A., an attorney, was employed by B. as his solr., to put out money upon mtge. C. applied to A. to procure him the advance of money on mtge., & to act as his solr. in procuring it. C. stated to A. that he was the owner of certain freehold lands, & produced a forged will in proof of his title, which he placed in the hands of A. B. advanced the money, A. acting as his solr., by preparing the mtge. deeds, etc.:—**Held:** on the trial of C. for uttering the forged will, A. was bound to produce the will, & also to give evidence of what C. said to him as to the advance of the money.—R. v. AVERY (1838), 8 C. & P. 596.

*Annotations:—***Consd.** Shore v. Bedford (1843), 12 L. J. C. P. 138. **Expld.** R. v. Tuffs (1848), 1 Den. 319. **Refd.** R. v. Farley (1846), 8 L. T. O. S. 235. **Mentd.** Gartside v. Outram (1856), 26 L. J. Ch. 113; R. v. Cox & Railton (1884), 14 Q. B. D. 153.

**4530.** ————**]**—Prisoner indicted for forging a will. The forged instrument had been given by prisoner to his attorney, ostensibly for professional purposes but in the opinion of the learned judges with some very different object. An objection that it was a privileged communication & therefore could not be read:—**Held:** invalid.—R. v. JONES (1846), 1 Den. 166, C. C. R. *Annotation:—***Refd.** R. v. Tynley, etc. (1848), 18 L. J. M. C. 36.

traverser, H., for about two years; that H. consulted him professionally about a certain manuscript, & the inquiry which was made from him by H. was whether it was safe to publish it. The witness was not engaged in any cause relating to that manuscript or to any property in it, nor was the communication made to the witness in any manner connected with or relating to any cause, civil or criminal. The witness having been asked the contents of that manuscript, upon a question whether the communication made to the witness was privileged:—**Held:** it was so, & he could not be examined to it, as a person, under the circum-

stances, asking the advice, must be considered as seeking how he may avoid, & not how he may commit a crime.—R. v. HAYDN (1825), 2 Fox & S. Ir. 379.—**IR.**

**e.** ————**]**—On the trial of an indictment for passing an accountable receipt, a witness, who was an attorney, proved that prisoner, with whose family he had been acquainted, had handed him the document & requested him to institute proceedings upon it. This the witness refused to do, but kept the document, & delivered it to a third person, to be shown to the party whose name was

M. The judge directed it to be read in evidence & the fifteen judges held it was properly so read, it not having been put into the hands of M. in professional confidence, even if that would have made a difference.—R. v. HAYWARD (1846), 2 Car. & Kir. 234; 2 Cox, C. C. 23, C. C. R.

*Annotations:—***Consd.** R. v. Cox & Railton (1884), 14 Q. B. D. 153. **Mentd.** R. v. Oswestry Treasurer (1848), 12 Q. B. 239.

**4532.** ————**]**—Indictment for forging the will of W. with intent to defraud the heir-at-law of W. *Qu.*: Whether under the circumstances of this case a valid objection could be taken to the will being produced in evidence by any attorney at the trial on the ground of its being a privileged communication.—R. v. TUFFS (1848), 1 Den. 319; 12 L. T. O. S. 224; 3 Cox, C. C. 160; *sub nom.* R. v. TYLNEY, etc., 18 L. J. M. C. 36; 12 J. P. 281, 645, C. C. R.

*Annotation:—***Consd.** R. v. Cox & Railton (1884), 14 Q. B. D. 153.

**4533.** ————**]**—A solr. for prisoner is bound to produce a document when prisoner is charged with an offence in respect of such document.—R. v. BROWN (1862), 9 Cox, C. C. 281.

**4534.** ————**Communications before professional retainer.]**—CUTS v. PICKERING (1672), 1 Vent. 197; 86 E. R. 133.

**4535.** ————**]**—The wife of A. went to B., an attorney, & produced a forged will to him & asked him to advance money to A. on the property mentioned in it. B. was not then the attorney of A. or in any way acting as his solr. A.'s wife left the forged will with B., who made a copy of it. A. afterwards called on B., who told A. all that had occurred & returned him the forged will, declining to advance any money:—**Held:** the conversation between A.'s wife & B. was not a privileged communication & on the trial of A. for forgery evidence might be given of it & also that the copy of the forged will might be given in evidence, notice having been given to A. to produce original.—R. v. FARLEY & JONES (1846), 2 Car. & Kir. 313; 1 Den. 197; 8 L. T. O. S. 235; 11 J. P. 535; 2 Cox, C. C. 82, C. C. R.

*Annotation:—***Refd.** R. v. Tynley, etc. (1848), 18 L. J. M. C. 36.

**Letter to friend to consult solicitor.]**

—A prisoner was in custody on a charge of forgery, but was not allowed even to see his wife. He wrote a friend, "to ask Mr. G. or some other solr.,

forged, after which the witness returned it to prisoner. Prisoner being convicted:—**Held:** the conviction was wrong, on the ground that the communication between the witness & prisoner was privileged.—R. v. DONAGHER (1838), Jebb, Cr. & Pr. Cas. 241.—**IR.**

**f. Minister of religion.]**—The evidence of a clergyman to whom prisoner confessed having committed a murder was received.—R. v. GILHAM (1828), 1 Ir. L. Rec. 1st ser. 346.—**IR.**

**g. Conversation between two accused during police interview.]**—A husband & wife were tried together for stealing

whether the punishment was the same, whether the names forged were those of real or fictitious persons." Mr. G. was not his attorney:—*Held*: this was not a privileged communication.—*R. v. BREWER* (1834), 6 C. & P. 363.

**Counsel & client.**—*See* BARRISTERS, Vol. III., p. 335, Nos. 238–251.

**4537. Minister of religion—Conversations with prisoner.**—A chaplain to a workhouse had in his spiritual capacity frequent conversations there with prisoner, who was charged with the murder of her child, but who was too ill to be removed from the workhouse:—*Semble*: these conversations ought not to be adduced in evidence at the trial.—*R. v. GRIFFIN* (1853), 6 Cox, C. C. 219.

**4538. — Statements received in sacramental confession.**—*Semble*: statements made to a priest or clergyman in sacramental or quasi-sacramental confession are privileged, but anything said or done out of confession is not so, even although its disclosure may incidentally disclose the identity of the party.—*R. v. HAY* (1860), 2 F. & F. 4.

**4539. Interpreter—Statements made in his presence—Interview between solicitor & foreign client.**—An interpreter who is present at conversations between a foreigner & his attorney is bound to the same secrecy as the attorney himself, & ought not to divulge the facts confided to him after the cause for the purpose of which the confidence was placed is at an end.—*DU BARRÉ v. LIVETTE* (1791), Peake, 108, N. P.  
*Annotation*:—*Refd.* *Herring v. Cloberry* (1842), 11 L. J. Ch. 149.

**Evidence of wife or husband.**—*See* Sect. 10, sub-sect. 3, *post*.

## SECT. 6.—PROOF.

### SUB-SECT. 1.—IN GENERAL.

**4540. Necessity for proof.**—A person cannot be convicted without proof.—*R. v. GEORGE* (1703), 6 Mod. Rep. 57; 87 E. R. 818.

& receiving. A conversation took place between them whilst being interviewed by police:—*Held*: such conversation, not being private & confidential, was admissible in evidence.—*R. v. PIERCE* (1917), 17 S. R. N. S. W. 135.—**AUS.**

**h. Communication by accused to supposed agent of solicitor.**—Statement made by a prisoner in a cell to a person whom he reasonably supposed to be an agent sent by his counsel to interview him regarding the defence are as much privileged as would be statements made to the counsel himself.—*R. v. CHOKEY* (1908), 7 W. L. R. 537; 17 Man. L. R. 46; 13 Can. Crim. Cas. 289.—**CAN.**

### PART XII. SECT. 6, SUB-SECT. 1.

**4540 i. Necessity for proof.**—The *corpus delicti* in a case of murder & the connection of the accused person with the commission of the crime may be proved by circumstantial evidence. In such cases, the judge should draw the jury's attention to the class of evidence & caution them to be careful in drawing inferences from the facts established.—*R. v. RYAN*, [1906] S. R. Q. 15.—**AUS.**

**4540 ii. —.**—In a criminal case accused is entitled to have the jury directed that before they can convict him they must on the evidence be satisfied of his guilt, beyond reasonable doubt.—*R. v. ROBERTS* (1910), 10 S. R. N. S. W. 612; 27 N. S. W. W. N. 148.—**AUS.**

**k. Sufficiency of proof.**—The ques-

tion whether there is any evidence of the crime charged may be reserved by the judge presiding at the trial of a criminal case as a question of law for the consideration of a supreme ct. The credibility of the witnesses does not enter into the consideration of such a question, for if any facts have been deposed to on behalf of the prosecution from which a jury might justly infer that the crime charged had been committed by prisoner, the verdict should not be disturbed.—*R. v. JUPELMAN* (1893), 10 S. C. 12; 3 C. T. R. 13.—**S. AF.**

**l. Duty of court.**—The distinction between merely "proving" & "proving beyond a reasonable doubt" has become so fixed & embedded in the law that a charge to the jury is improper which does not indicate the necessity of the higher degree of evidence required in a criminal than in a civil case, & the ct. when considering whether there is any evidence upon which a jury or judge acting as a jury, could have reasonably convicted is bound to keep in view both this necessity for a higher degree of evidence & the principle that the *onus* remains on the prosecution throughout the case to satisfy the ct. on the whole evidence that there is no reasonable doubt of the guilt of the accused. These principles apply not only where the trial is by a jury but apply to a judge acting at the same time as a judge of law & facts.—*R. v. HAYES*, [1923] 1 W. W. R. 209; [1923] 1 D. L. R. 459; 38 Can. Crim. Cas. 348; 19

**4541. —.**—The greater the crime the stronger is the proof required, for the purpose of conviction (HOLROYD, J.).—*R. v. HOBSON* (1823), 1 Lew. C. C. 261.

**4542. Innocence presumed.**—The law always presumes against the commission of crime.—*R. v. TWYNING* (GLOUCESTERSHIRE) (INHABITANTS) (1819), 2 B. & Ald. 386; 106 E. R. 407.

*Annotations*:—**Mentd.** *Newman v. Goddard* (1834), 3 L. J. Ex. 167; *R. v. Harborne* (1835), 2 Ad. & El. 540; *Nepean v. Doe d. Knight* (1837), 2 M. & W. 906; *Lapsley v. Grierson* (1848), 1 H. L. Cas. 498; *R. v. Carter* (1848), 13 J. P. 24; *R. v. Lumley* (1869) L. R. 1 C. C. R. 196; *Re Phené's Trusts* (1870), 5 Ch. App. 139.

**Proof of foreign law.**—*See* EVIDENCE.

### SUB-SECT. 2.—BURDEN OF PROOF.

**4543. Lies on prosecution—General rule.**—*R. v. STODDART*, No. 3789, *ante*.

**4544. — Breaking & entering house.**—On a trial for breaking & entering a dwelling-house with the intent to commit a felony therein, it was proved that prisoner had broken & entered the house by opening a latched door. In the course of his summing-up to the jury the chairman said: "When a man is found in another man's house the duty is cast upon him of giving an account of how he came there & it is for you to say whether his statement sounds like an honest statement or whether it is a dishonest statement made upon the spur of the moment when he is caught:—"*Held*: if this were a statement & direction of law as to the *onus* of proof it was incorrect. But the ct. did not so regard the passage. They considered that it was merely a statement of common sense as to what one would expect of a man found in the particular circumstances of this case. Under those circumstances the jury would probably infer prisoner's intention to commit a felony unless he satisfied them to the contrary.—*R. v. WOOD* (1911), 76 J. P. 103; 7 Cr. App. Rep. 56, C. C. A.

**Alta. L. R. 76.—CAN.**

**m. —.**—It is the duty of every criminal ct. to get to the bottom of a case & bring all relevant evidence upon the record & to see that justice is done.—*R. v. JANKI, PRASAD* (1920), 1 L. R. 43 All. 283.—**IND.**

### PART XII. SECT. 6, SUB-SECT. 2.

**4543 i. Onus on prosecution—General rule.**—The presumption of the innocence of an accused person cannot be shifted at a point where the evidence tends or inclines in the direction of guilt. Therefore, where the judge said to the jury, "As soon as there is sufficient evidence before you which would tend to point to the guilt of the accused, then the presumption is on the other side":—*Held*: this was a misdirection.—*R. v. SCHURMAN* (1914), 30 W. L. R. 56; 7 W. W. R. 680; 23 Can. Crim. Cas. 365; 19 D. L. R. 800.—**CAN.**

**4543 ii. —.**—There is a presumption against crime & misconduct, & the more heinous & improbable a crime is the greater is the force of the evidence required to overcome such presumption.—*WESTON v. PEARY MOHAN DASS* (1912), 1 L. R. 40 Calc. 898.—**IND.**

**n. — Quasi-criminal offence.**—The offence of carting away light soil without a licence is a quasi-criminal offence & it is therefore for complainant to prove that deft. has not a licence & has not given such security as is required by the local authority.—

*Sect. 6.—Proof: Sub-sect. 2.]*

**4545. — Receiving stolen property.]**—On indictments for receiving stolen property with guilty knowledge, the *onus* of satisfying the jury of the deft.'s guilt always rests on the prosecution; it never changes.—*R. v. SCHAMA, R. v. ABRAMOVITCH* (1914), 84 L. J. K. B. 396; 112 L. T. 480; 79 J. P. 184; 31 T. L. R. 88; 59 Sol. Jo. 288; 24 Cox, C. C. 591; 11 Cr. App. Rep. 45, C. C. A.

*Annotations:—Consd. R. v. Badash* (1917), 26 Cox, C. C. 155; *R. v. Bailey* (1917), 13 Cr. App. Rep. 27; *R. v. Norris* (1917), 88 L. J. K. B. 810; *R. v. Hamilton* (1918), 87 L. J. K. B. 734. **Refd.** *R. v. Aubrey* (1915), 11 Cr. App. Rep. 182; *R. v. Millington* (1915), 11 Cr. App. Rep. 86; *R. v. Sanders* (1919), 14 Cr. App. Rep. 11.

**4546. —**—Unless otherwise provided by statute, it is a principle of the criminal law that the burden of proving the guilt of accused always lies on the prosecution, & this is so on a charge of receiving goods knowing them to have been stolen even if the jury do not believe the explanation given by accused as to how he acquired possession of the stolen property. When, therefore, a chairman of quarter sessions, in his summing-up to the jury & referring to prisoner's explanation as to how the stolen goods came into his possession, said, "The point is whether the story is true":—**Held:** the direction was wrong & that the conviction must be quashed.—*R. v. BADASH* (1917), 87 L. J. K. B. 732; 118 L. T. 179; 26 Cox, C. C. 155; 13 Cr. App. Rep. 17, C. C. A.

**4547. — False pretence.]**—Prisoner was indicted for obtaining money by falsely pretending that he was a certificated attorney:—**Held:** it was for the prosecution to prove that prisoner had not taken out a certificate.—*R. v. WARD* (1849), 13 J. P. 237.

**4548. — Non-compliance with order of justices.]**—Upon the hearing of a summons under Vaccination Act, 1867 (c. 84), s. 31, against the parent of a child for non-compliance with an order of justices directing him to have his child vaccinated, the burden of proving non-compliance is upon the prosecution.—*OVER v. HAR-*

*MORRISON v. WOODGATE* (1878), 4 V. L. R. 430.—**AUS.**

**o. — Proof of alibi.]**—Where the defence to a criminal charge is an *alibi*, it is misdirection to tell the jury that the *onus* is on prisoner to prove it to their entire satisfaction, & to show beyond all question or reason that he could not have been present at the commission of the crime.—*R. v. MYSHRAIL* (1901), 35 N. B. R. 507.—**CAN.**

**p. — Possession of property stolen abroad.]**—On a charge of possession of property stolen abroad, knowing it to have been stolen, the *onus* is on the Crown to show that the property was in fact stolen according to the law of the foreign country.—*R. v. GRANT* (1911), 6 Hong Kong L. R. 144.—**HONG KONG.**

**q. — Removal of goods to avoid distraint.]**—Where a distraint is made under Rent Recovery Act for arrears of rent there is no presumption that it is legally made; & if persons are charged with having dishonestly removed property to avoid it, the prosecution must prove that it was a legal distraint. In the absence of such proof, persons who have resisted the distraint, or have removed their property to avoid it cannot be convicted of an offence, inasmuch as they had a right of private defence of their property unless the distraint was legal.—*R. v. GOPALASAMY* (1902), 1 L. R. 25 Mad. 729.—**IND.**

**r. — Licensee permitting drunkenness of employee in public-house.]**—*CAMERON v. CAMPBELL*, [1916] S. C. (J.) 1.—**SCOT.**

**s. — Sale without consent of owner.]**—A. bought cattle from B. on the hire-purchase system, the cattle to remain B.'s property till full payment had been made; A. in the meantime not being entitled to sell the cattle without B.'s consent. A. being charged before a jury with theft in that he sold the cattle & appropriated the proceeds:—**Held:** the *onus* was on the Crown to prove that B. had not consented to the sale; & in the absence of such evidence the case should be withdrawn from the jury.—*R. v. ROOS* (1917), T. P. D. 617.—**S. AF.**

**4551 i. When onus of proof is shifted—Negative averments—Where law presumes the affirmative.]**—The prosecution need not prove the absence of a licence. The *onus* is on prisoner to prove its existence.—*R. v. BRYANT* (1885), 3 Man. L. R. 1.—**CAN.**

**4551 ii. —**—[A conviction alleged that deft. was the agent of W., but did not state that he had not the necessary licence to entitle him to do the act complained of:—**Held:** the having a licence is a matter of defence, & not of proof by the prosecution.—*R. v. McNICOL* (1886), 11 O. R. 659.—**CAN.**

**4551 iii. —**—[On a charge under sect. 212 of the Code,

*WOOD*, [1900] 1 Q. B. 803; 69 L. J. Q. B. 272; 64 J. P. 326; 48 W. R. 608; 16 T. L. R. 163, D. C.

**4549. When onus of proof is shifted—Preliminary evidence requisite.]**—*ELKIN v. JANSON* (1845), 13 M. & W. 655; 14 L. J. Ex. 201; 9 Jur. 353; 153 E. R. 274.

**4550. — Negative averments.]**—In general the rule is considered to be, that a party is not required to prove a negative, but it lies on the other side to prove the affirmative of that which he insists on (*LE BLANC, J.*).—*R. v. STONE* (1801), 1 East, 639; 102 E. R. 247.

*Annotations:—Consd. R. v. Turner* (1816), 5 M. & S. 206. **Refd.** *R. v. Crispe* (1806), 3 Smth, K. B. 377; *Doe d. Bridger v. Whitehead* (1838), 3 Nev. & P. K. B. 557. **Mentd.** *R. v. Hughes* (1879), 4 Q. B. D. 614.

**4551. — Where law presumes the affirmative.]**—Where any act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affirmative, & throws the burthen of proving the negative on the party who insists on it. Therefore where pltf. declared that defts., who had chartered his ship, put on board a dangerous commodity, by which a loss happened, without due notice to the captain or any other person employed in the navigation, it lay upon him to prove such negative averment.—*WILLIAMS v. EAST INDIA CO.* (1802), 3 East, 192; 102 E. R. 571.

*Annotations:—Consd. R. v. Twynning, Gloucestershire* (1819), 2 B. & Ald. 386; *Calder v. Rutherford* (1822), 3 Brod. & Bing. 302. **Refd.** *R. v. Hawkins* (1808), 10 East, 211; *R. v. Haslingfield* (1814), 2 M. & S. 558; *Thornton v. Lance* (1815), 4 Camp. 231; *Pearce v. Whale* (1826), 7 Dow. & Ry. K. B. 512; *R. v. Whiston* (1836), 1 Har. & W. 696; *Newman v. Hardwicke* (1838), 2 J. P. 328; *Stikeman v. Dawson* (1847), 1 De G. & Sm. 90; *Affalo v. Lawrence & Bullen*, [1903] 1 Ch. 318. **Mentd.** *Langridge v. Levy* (1837), 2 M. & W. 519; *Keates v. Cadogan* (1851), 15 Jur. 428; *Brass v. Maitland* (1856), 6 E. & B. 470; *R. v. Lister* (1857), 26 L. J. M. C. 196; *Farrant v. Barnes* (1862), 11 C. B. N. S. 553; *Bamfield v. Goole & Sheffield Transport Co.*, [1910] 2 K. B. 94.

**4552. — Facts peculiarly within knowledge of accused.]**—I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within

under the conditions there specified, of seduction under promise of marriage, previous chastity of the girl is presumed, & its absence must be shown by the defence.—*R. v. STEFANIC*, [1921] 1 W. W. R. 1212; 16 Alta. L. R. 246; 34 Can. Crim. Cas. 319.—**CAN.**

**4551 iv. —**—[Accused was convicted with obtaining various small sums of money from different persons for alleged medical treatment by falsely pretending to be a doctor. On motion for arrest of judgment:—**Held:** there was abundant evidence that accused was not a qualified medical practitioner of any civilised State, & the *onus* of proof lay on him to show that he possessed such qualifications.—*H. v. KINGSTON* (1904), 24 N. Z. L. R. 431.—**N.Z.**

**4552 i. — Facts peculiarly within knowledge of accused.]**—*R. v. CALDER*, [1922] 2 W. W. R. 65; 65 D. L. R. 387; 37 Can. Crim. Cas. 240.—**CAN.**

**4552 ii. —**—[The existence of an exception nominated in the description of an offence created by statute must be negatived in order to maintain the charge, but if a statute creates an offence in general, with an exception by way of proviso in favour of certain persons or circumstances, the *onus* is on the accused to plead & prove himself within the proviso.—*R. v. STRAUSS* (1897), 5 B. C. R. 486.—**CAN.**

**4552 iii. —**—[Where a statute has provided that certain acts,

the knowledge of the other, the party within whose knowledge it lies, & who asserts the affirmative is to prove it, & not he who avers the negative (BAYLEY, J.).—*R. v. TURNER* (1816), 5 M. & S. 206; 105 E. R. 1026.

**Annotations:—***Consd.* Doe d. Bridger v. Whitehead (1838), 3 Nev. & P. K. B. 557; *Elkin v. Jansen* (1845), 9 Jur. 353; *Ashton v. L. & N. W. Ry.*, [1918] 2 K. B. 488. *Refd.* Tennant v. Cumberland (1859), 1 E. & E. 401; *R. v. Harvey* (1871), 19 W. R. 446; *Abrath v. N. E. Ry.* (1883), 49 L. T. 618; *James v. Nicholas* (1886), 50 J. P. 292; *R. v. Scott* (1921), 86 J. P. 69.

**4553.** ————.]—In an action of debt, on Apothecaries Act, 1815 (c. 194), s. 20, for a penalty for practising as an apothecary, without having obtained a certificate from the Apothecaries' Co. under that Act, it is not necessary, on the part of plffs., to prove that the party has not obtained his certificate, the *onus* lying on him to show that he has. It must, however, be averred in the declaration that he has not.—*APOTHECARIES' CO. v. BENTLEY* (1824), 1 C. & P. 538; *Ry. & M.* 159, N. P.

**Annotations:—***Consd.* Doe d. Bridger v. Whitehead (1838), 3 Nev. & P. K. B. 557. *Refd.* Toleman v. Portbury (1870), 39 L. J. Q. B. 136. *Mentd.* Apothecaries' Co. v. Jones, [1893] 1 Q. B. 89.

**4554.** ————.]—8 & 9 Vict. c. 100, requires every person receiving a single lunatic into his or her care to obtain & transmit to the lunacy comrs. certain orders & certificates, which are upon receipt at their office entered & filed. In the books in which the receipt of such orders, etc., were entered, no notice was found of any such having been received from deft. Notice was given to deft. to produce any orders, etc., he might have received, entitling him to take charge of the alleged lunatic:—*Held*: although, as a general rule, a deft. must have his guilt proved, & not be called upon to establish his innocence, yet seeing that the proof was in the nature of a negative proof, & that, if he had received the documents & not transmitted them, they would be

in his possession, & that, after notice to produce them had been given, he had not produced them, there was sufficient case to go to the jury.—*R. v. HARRIS* (1867), 10 Cox, C. C. 541.

**4555.** ————.]—The *onus* of proving the fact of the possession of a licence or authority was on deft. as it was a fact which was peculiarly within his own knowledge.—*R. v. SCOTT* (1921), 86 J. P. 69.

**4556.** ————.]—What is necessary to change the *onus*.—*ELKIN v. JANSON*, No. 4549, ante.

**4557.** ————.]—Consent of owner of property.]—On an indictment on 42 Geo. 3, c. 107, s. 1, though there must be some evidence to negative the owner's consent, the owner need not be called for the purpose; his non-consent may be inferred from other circumstances, or proved by his agents.—*R. v. ALLEN* (1826), 1 Mood. C. C. 154, C. C. R.; *previous proceedings* (1823), *Russ. & Ry.* 513, C. C. R.

**Annotation:—***Mentd.* Cureton v. R. (1861), 1 B. & S. 208.

**4558.** ————.]—Two persons were indicted on 6 Geo. 3, c. 36, for lopping & topping an ash timber tree, without the consent of the owner. The owner died before the trial, having first given order for the apprehension of prisoners on suspicion. The land steward of the owner proved that he had not given any consent, & did not believe that his master had:—*Held*: this was evidence from which the jury might infer that no consent had been given by the owner.—*R. v. HAZY & COLLINS* (1826), 2 C. & P. 458.

**4559.** ————.]—Giving statutory notice.]—In an information for having in possession cattle diseased, & neglecting to give notice to a police constable:—*Held*: the burden of proving that deft. gave notice to a constable lay upon him.—*HUGGINS v. WARD* (1873), L. R. 8 Q. B. 521; 29 L. T. 33; 37 J. P. 405; 21 W. R. 914.

**4560.** ————.]—Proof of nationality.—*Allens'*

etc., shall constitute a crime, subject to certain exceptions or provisos the indictment of a person for committing such a crime must show negatively that the party or the matter pleaded does not come within the meaning of such exceptions or provisos. In cases where the subject of such negative averments relates to accused personally, or is peculiarly within his knowledge, the negative is not to be proved by prosecutor, but the affirmative must be proved by accused. If the subject of such averment does not relate personally to the accused, or be not peculiarly within his knowledge, or at least be as much within the knowledge of prosecutor as of accused, prosecutor must prove the negative.—*R. v. LYONS* (1883), 2 S. C. 221.—*S. AF.*

**4552 iv.** ————.]—It. v. SMITH (1883), 2 S. C. 357.—*S. AF.*

**4552 v.** ————.]—*R. v. GOLDSTEIN* (1882), 2 S. C. 164.—*S. AF.*

**4552 vi.** ————.]—Accused was convicted of contravening a "scab" regulation. On appeal it was contended that as the Crown had proved only that the local inspector had not given a permit the conviction ought to be quashed, because it had not been also proved that a permit had not been given by any other officer:—*Held*: if any other officer did give a permit, assuming there was an officer with authority so to do, it was a matter specially within accused's knowledge; the Crown had established a *prima facie* case, & the *onus* was cast on accused to prove that he had obtained a permit.—*R. v. WHITE* (1917), C. P. D. 567.—*S. AF.*

**4552 vii.** ————.]—Accused was convicted of removing stock liable to the disease of scab out of an area declared to be infected with scab without the written permission of an officer of the Agricultural Department. The evidence showed that the local sheep inspector after inspecting stock belonging to accused, & finding them infected, placed them under quarantine & informed accused that the quarantine could not be raised:—*Held*: there was *prima facie* evidence that no order allowing the stock to be removed was given, & as there was no rebuttal of this evidence & as the fact was clearly within the knowledge of accused, he had been rightly convicted.—*R. v. FRONEMAN*, [1917] C. P. D. 56.—*S. AF.*

**t.** ————.]—Sufficient evidence to convict.—*Accused must rebut.*]—On a charge of theft of goods from a store evidence of the finding in prisoner's house of the goods & of keys fitting the store doors, & of the fact that the goods were in the store exposed for sale at the time of the alleged theft & had not been sold, is sufficient to put the *onus* upon prisoner of accounting for his possession.—*R. v. THERIAULT* (1904), 11 B. C. R. 117.—*CAN.*

**a.** ————.]—While, under the criminal law, accused is not called upon to explain suspicious circumstances there may yet come a time when, circumstantial evidence having enveloped him in a strong network of inculpatory facts, he is bound to make some explanation or stand condemned.—*R. v. JENKINS* (1908), 14 B. C. R. 61; 9 W. L. R. 405; 14 Can. Crim. Cas. 221.—*CAN.*

**b.** ————.]—An accused person is not bound to account for his

movements at or about the time an offence was committed, unless there has been given legal evidence sufficient *prima facie* to convict him of the offence.—*R. v. BEPIN BISWAS* (1884), L. L. R. 10 Calc. 970.—*IND.*

**c.** ————.]—When in a criminal proceeding, it is sought to establish a charge of felony by circumstantial evidence, any reasonable account of the facts proved, consistent with the innocence of the culprit, which can be conceived, will warrant his acquittal.—*GOGARTY v. GREAT SOUTHERN & WESTERN RY. CO.* (1874), L. R. 8 C. L. 344; 9 I. C. L. R. 233.—*IR.*

**d.** ————.]—Reasonable suspicion of guilt.—*Accused must rebut.*]—When the Crown has established that deft. knowingly was in possession of certain property & that that property might reasonably be suspected of being stolen, the *onus* is upon deft. of satisfying the justice that he came by the property honestly & that that *onus* is not discharged if the justice is left in doubt as to whether deft. came by the property honestly.—*WILLIS v. BURNES* (1921), 29 C. L. R. 511.—*AUS.*

**e.** ————.]—Where a person is under reasonable grounds of suspicion of having stolen any of the valuable metals mentioned in sect. 424 (a) of the Criminal Code, or having dealt with them contrary to the provisions of sect. 424 (b) or (c), the *onus* of the proof of the "right to the possession of the same" is on him.—*It. v. KARP* (1917), 41 C. L. R. 540; 13 O. W. N. 435; 30 Can. Crim. Cas. 115.—*CAN.*

**f.** ————.]—False pretence.]—Where the word "Armida" was written at

## Sect. 6.—Proof: Sub-sects. 2 &amp; 3 A.]

**Restriction Act, 1914 (c. 12).]**—Under sect. 1, sub-sect. 4. of the above Act when a question arises whether a person charged with an offence against the Aliens Restriction (Consolidation) Ord., 1914, is an alien, or whether he belongs to a particular class of alien, the *onus* of proving that he is not an alien, or does not belong to the particular class, is upon him, & if the magistrate is not satisfied that the person had discharged this *onus* the magistrate's finding is, apart from the admission or rejection of evidence, one of fact & not of law, & there is no ground for the review, by the ct., of his decision on appeal.—**SIMON v. PHILLIPS** (1916), 85 L. J. K. B. 656; 114 L. T. 460; 80 J. P. 194; 32 T. L. R. 243; 25 Cox, C. C. 315; 14 L. G. R. 476, D. C.

**4561.** ————.]—Upon an information charging applt. with having failed to comply with the provisions of the Aliens Restriction (Consolidation) Ord., 1914, the magistrate held that applt. had failed to discharge the *onus* cast upon him by above Act of showing that he was not an alien enemy, & convicted applt.:—**Held**: applt. was properly convicted.—**KOPELOWITZ v. McLAUGHLAN** (1916), 85 L. J. K. B. 1700; 114 L. T. 1037; 80 J. P. 263; 25 Cox, C. C. 384; 14 L. G. R. 1074, D. C.

## SUB-SECT. 3.—SUFFICIENCY OF PROOF.

A. Of *Corpus Delicti*.

**4562. Necessity for—General rule.]**—If you have a criminal fact ascertained, you may then take presumptive proof to show who did it to fix the

the head of a cheque, in a prosecution for false pretences:—**Held**: evidence could be given to show that a cheque drawn in that form would be paid only at the Armidale branch of the bank & not at the Sydney office. It is incumbent on deft. to show that he had funds at any other branch of the bank, it being shown that there were no funds to his credit at the Armidale branch.—**R. v. BUTLER** (1879), 2 N. S. W. S. C. R. N. S. 289.—**AUS.**

**g.** ———— *Possession of stolen goods explained—Explanation not investigated—Prosecution must prove theft.*—When at the time stolen goods are found in the custody of a person under such circumstances as to impose upon him the duty of explaining how possession was acquired he offers a reasonable explanation which is accepted & then nothing is done for such a length of time as to make it improbable that accused will be in a position to verify his explanation, the *onus* is not shifted from the Crown to accused but rests upon the Crown to show an actual theft by accused.—**R. v. McCLURE** (1921) 1 W. W. R. 87; 34 Can. Crim. Cas. 93.—**CAN.**

**Manslaughter by negligence—Accused must prove care.]**—The negligence which calls for punishment as a criminal offence is the same in kind as the negligence which can be satisfied by damages in a civil action; the former differs from the latter in degree. The question of degree is for the jury. The burden of proof is on accused to show that he took reasonable care.—**R. v. MURPHY** (1914), 49 J. L. T. 15.—**IR.**

**k.** ————.]—Prisoner was indicted for the manslaughter of a woman by driving a cab over her in a public street, & his defence was that he had used due & proper care in driving the cab upon the occasion in question:—**Held**: the burden of proving negligence did not lie on the

Crown, but, upon the fact of the killing being proved, it was cast upon prisoner to show that he had used due & proper care in driving the cab.—**R. v. CAVENDISH** (1874), 1 R. 8 C. L. 178.—**IR.**

**l.** ———— *Arson—Building fixed to soil—Presumption.]*—Prisoner was indicted, under sect. 308 of the Criminal Code Act, 1893, on a charge of wilfully setting fire to a building fixed to the soil. No direct proof was given that the building was a fixture, but certain facts were proved which were sufficient evidence to go to the jury that the building was fixed to the soil:—**Held**: the *onus* was by the evidence shifted on to prisoner to prove that it was a non-fixture.—**R. v. JOHNSON** (1908), 27 N. Z. L. R. 485.—**N.Z.**

**m.** ———— *Uncommon goods stolen—Accused must explain possession.]*—Where goods of an unusual description, or of a sort not common in a district, have been stolen, & similar goods, although they cannot be identified as the stolen goods, are found in a person's recent possession, the *onus* is cast on that person of explaining how he came by those goods, & in the absence of a satisfactory explanation, he may be convicted of receiving.—**R. v. PAGET & McGEORGE** (1906), 26 N. Z. L. R. 76.—**N.Z.**

## PART XII. SECT. 6, SUB-SECT. 3.—A.

**4563 i. Charge of murder—Whether production of body necessary.]**—The mere fact that the body of the murdered person has not been found is not a ground for refusing to convict accused of the murder.—**R. v. BHAGIRATH** (1880), 1 L. R. 3 All. 383.—**IND.**

**4563 ii.** ————.]—Although, under some circumstances, a charge of murder may be sustained, when the body of the person said to have been murdered is not forthcoming, still, when that is the case, the strongest

criminal, having then an actual *corpus delicti*. But to take presumptions in order to swell an equivocal fact, a fact that is absolutely ambiguous in its own nature, into a criminal fact is a mode of proceeding of a very different nature & would, I take it, be an entire misapplication of the doctrine of presumptions (SIR WILLIAM SCOTT).—**EVANS v. EVANS** (1790), 1 Hag. Con. 35; 161 E. R. 466.

**Annotations:**—**Consd.** **R. v. Burton** (1854), 23 L. J. M. C. 52; **R. v. Stephens** (1888), 58 L. T. 776. **Mentd.** **Neeld** (1831), 4 Hag. Ecc. 263; **Trevanion v. Trevanion** (1837), 1 Curt. 406; **Lockwood v. Lockwood** (1839), 2 Curt. 281; **Re Cochrane** (1840), 8 Dowl. 630; **Clowes v. Clowes** (1843), 3 Curt. 185; **Re Bartlett, Ex p. Bartlett** (1846), 2 Coll. 661; **Saunders v. Saunders** (1846), 10 Jur. 143; **Dysart v. Dysart** (1847), 1 Rob. Eccl. 470; **Greenway v. Greenway** (1848), 6 Notes of Cases, 221; **Connelly v. Connelly** (1850), 2 Rob. Eccl. 201; **Paterson v. Paterson** (1850), 3 H. L. Cas. 308; **Bostock v. Bostock** (1858), 1 Sw. & Tr. 221; **Curtis v. Curtis** (1858), 1 Sw. & Tr. 192; **Tomkins v. Tomkins** (1858), 1 Sw. & Tr. 168; **White v. White** (1859), 1 Sw. & Tr. 591; **Milford v. Milford** (1866), 36 L. J. P. & M. 30; **Buzloor Ruheem v. Shumsoonnissa** (1867), 11 Moo. Ind. App. 551; **Kelly v. Kelly** (1870), L. R. 2 P. & D. 59; **Russell v. Russell**, [1897] A. C. 395; **Armstrong v. Armstrong** (1898), 78 L. T. 689; **Fisk v. Fisk** (1920), 122 L. T. 803.

**4563. Charge of murder—Whether production of body necessary.]**—In cases of murder the rule as to express proof of the *corpus delicti* is according to Lord Hale a rule of caution not necessarily to be observed in every case (MAULE, J.).—**R. v. BURTON** (1854), **Dears. C. C.** 282; 23 L. J. M. C. 52; 22 L. T. O. S. 336; 18 J. P. 103; 18 Jur. 157; 2 W. R. 230; 6 Cox, C. C. 293, C. C. R.

**Annotations:**—**Refd.** **R. v. Sullivan** (1887), 16 Cox, C. C. 347. **Mentd.** **R. v. Joiner** (1910), 74 J. P. 200.

**4564.** ———— **Confession of accused.]**—**R. v. PERRY** (1660), 14 State Tr. 1312.

**4565.** ———— **Circumstantial evidence.]**—On the trial of an indictment for murder, the death

possible evidence as to the fact of the murder should be insisted on before an accused is convicted.—**ADU SHIKDAR v. R.** (1885), 1 L. R. 11 Calc. 635.—**IND.**

**4563 iii.** ————.]—**R. v. WOODGATE** (1877), 3 C. A. 320; 2 J. R. N. S. 5.—**N.Z.**

**4563 iv.** ————.]—The *corpus delicti* is not absolutely necessary in a trial for murder if there is evidence to go to the jury that the deceased person was seen to be killed; as, for instance, if witnesses saw the deceased actually shot by means of a gun, & dying from the wounds so inflicted.—**URINGTON v. SOLOMON (SAUL) & CO., URINGTON v. DORMER** (1879), Buch. 240.—**S. AF.**

**4563 v.** ————.]—On a charge of murder it is not necessary that the body of the person alleged to have been killed by accused should have been found, it is sufficient that there is credible evidence that the person was actually killed.—**R. v. GANYANA** (1917), E. D. L. 319.—**S. AF.**

**4564 i.** ———— *Confession of accused.]*—On a trial for the murder of the infant illegitimate daughter of accused, evidence was given that he had directly confessed to the actual commission of the crime, but the dead body of the infant had not been found. The jury found prisoner guilty:—**Held**: the judge had rightly refused to withdraw the case from the jury; there was evidence upon which prisoner could rightly be convicted, & the conviction should be affirmed.—**R. v. McNICHOLL**, [1917] 2 I. R. 557.—**IR.**

**4565 i.** ———— *Circumstantial evidence.]*—The *corpus delicti* in a case of murder & the connection of accused with the commission of the crime may be proved by circumstantial evidence.—**R. v. RYAN**, [1905] S. R. Q. 15.—**AUS.**

**4565 ii.** ————.]—Applt., a medical practitioner, was convicted of

of the person charged to have been killed, may be collected from the circumstances, if incapable of being proved by other evidence.—*R. v. HINDMARSH* (1792), 2 Leach, 569.

**4566.** ————.]—*R. v. ARMSTRONG* (1875), 13 Cox, C. C. 184.

*Annotation*:—*Mentd.* *R. v. Keyn* (1876), 2 Ex. D. 63.

**4567.** ————.]—A jury are entitled to infer that there has been a violent death from circumstantial evidence.

Applt. was convicted of the murder of her son. The body was discovered in a well, the features were unrecognisable, & decomposition was very advanced. There was no evidence even as to sex except from the general appearance & dress. There was nothing to show whether death was natural or violent:—*Held*: in view of the facts that the child left home well & was afterwards found dead, that applt. was last seen with it, & made untrue statements about it, this was not a case which could have been withdrawn from the jury.—*R. v. NASH* (1911), 6 Cr. App. Rep. 225, C. C. A.

**4568.** ————.]—On an indictment for murder no overt act need be proved against accused; circumstantial evidence may suffice.

Applt. was convicted of the murder of one of his children. He stated that they had been taken by the Salvation Army, but their dead bodies were found buried beneath the floor, being then in such a condition that it was impossible for the medical witnesses to say that they did not die a natural death; they could only say that the appearance of the bodies was consistent with the fact of the children having been smothered.—*R. v. ROBERTSON* (1913), 9 Cr. App. Rep. 189, C. C. A.

**4569.** ———— *Necessity for proof of death.*—Where, in summing-up, the judge told the jury that the intention was to be collected from the paper itself, unless explained by the mode of publication or other circumstances; & that, if its contents were likely to excite sedition, etc., deft. must be presumed to intend that which his act was likely to produce; & that, if they found such to be the intent, he was of opinion it was a libel; & that they were to take the law from him, unless they were satisfied that he was wrong:—*Held*: this was a correct mode of leaving the question to the jury under 32 Geo. 3, c. 60, s. 1.

It was said, & truly said, that guilt & crime are never to be presumed; & the cases of supposed murder, mentioned by Lord Hale, & which have since operated as a caution to all judges, were quoted on this occasion. But the cases are wholly different. In those cases, there was no actual proof of the death of the person supposed to have been slain, & consequently, no proof that

the crime of murder had been committed. The *corpus delicti* was not established (*ABBOTT, C.J.*).

It has been said, that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, & yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided, that there is no difference between the rules of evidence in civil & criminal cases (*BEST, J.*).—*R. v. BURDETT* (1820), 4 B. & Ald. 95; 1 State Tr. N. S. 1; 106 E. R. 873; *subsequent proceedings* (1821), 4 B. & Ald. 314.

*Annotations*:—*Consd.* *Stikeman v. Dawson* (1847), 1 De G. & Sm. 90. *Mentd.* *Pearson v. McGowan* (1825), Dow. & Ry. K. B. 616; *R. v. Perkins* (1826), 1 Lew. C. C. 99; *A. G. v. Kenifeek* (1837), 2 M. & W. 715; *R. v. Lovett* (1839), 9 C. & P. 462; *Hall v. Story* (1846), 16 M. & W. 63; *R. v. Grant, Ranken v. Hamilton* (1848), 7 State Tr. N. S. 507; *R. v. Duffy* (1849), 7 State Tr. N. S. 795; *Doe d. Bennett v. Hale* (1850), 15 Q. B. 171; *R. v. Meany* (1867), 15 W. R. 1082; *Cherry v. Thompson* (1872), 41 L. J. Q. B. 243; *R. v. Cooper* (1875), 45 L. J. M. C. 15; *R. v. Carden* (1879), 49 L. J. M. C. 1; *Doe v. Mervin* (1881), 7 Q. B. D. 434; *R. v. Holmes* (1883), 12 Q. B. D. 23; *Tozier v. Hawkins* (1885), 15 Q. B. D. 650; *Broad v. Perkins* (1888), 4 T. L. R. 545; *R. v. Ellis*, [1899] 1 Q. B. 230; *R. v. De Marry*, [1907] 1 K. B. 388.

**4570.** ————.]—*R. v. TAWELL*, No. 3980, *ante*.

**4571.** ———— *Identification of body.*—

A girl was indicted for the murder of her child. She was proceeding from B. to L. & was seen near T. with the child at 6 p.m., she arriving at L. at between 8 & 9 p.m., without the child. The body of a child was afterwards found near T., which appeared not to be the child of prisoner:—*Held*: prisoner must be acquitted, & she could not by law either be called upon to account for her child or to say where it was, unless there was evidence to show that her child was actually dead.—*R. v. HOPKINS* (1838), 8 C. & P. 591.

**4572.** ————.]—*R. v. CHEVERTON*, No. 4339, *ante*.

**4573. Charge of attempting to conceal birth.—Whether production of body necessary.—Identification of body.**—In order to convict a woman of attempting to conceal the birth of her child, a dead body must be found, & must be identified

the murder of M, an unmarried woman. The case presented by the Crown was that an operation was performed by applt. & a miscarriage procured, that M. died from the results of the miscarriage & that applt. secretly disposed of her body, of which no trace was afterwards discovered. Upon a trial for murder:—*Held*: the fact of death & the fact that prisoner caused the death may be proved by circumstantial evidence.—*Perkins* (1826), 1 Lew. C. C. 99.

**4565 iii.** ————.]—Evidence showed that remains of a human being had been destroyed by fire at the dump where prisoner & H. had camped:—*Held*: this was direct proof of the death of a human being, & circumstantial evidence was sufficient to prove that the dead man was H. & that he was murdered by prisoner.—*J.*—VOL. XIV.

*R. v. KING* (1905), 1 W. L. R. 348.—*CAN.*

**4565 iv.** ————.]—*R. v. MURPHY* (1867), 4 W. W. & A.B. 63.—*AUS.*

*n.* ———— *Necessity for proof of commission of crime.*—The evidence against accused on a charge of murder consisted of the evidence of accomplices, & in respect of the first accused, of a confession also. The body of the deceased, who had disappeared for a year before the arrest of accused, was not identified, only a few small bones having been found:—*Held*: there was not sufficient evidence upon which to convict either accused in the absence of proof by independent evidence that the crime charged had been committed.—*R. v. DADABULA* (1912), S. R. 14.—*S. AF.*

*o.* ————.]—*R. v. TSHING-WAYO & UZULU*, [1914] E. D. L. 472.—*S. AF.*

*p. Charge of manslaughter.—Whether examination of body necessary.—Circumstantial evidence.*—A conviction for manslaughter is sustainable, although there has been no coroner's inquest or examination of the body, or evidence of medical witnesses as to the cause of death, it being sufficient if the cause of death be proved by circumstantial evidence.—*R. v. DOGHERTY* (1826), Jebb, Cr. & Pr. Cas. 66.—*IR.*

**4573 i. Charge of attempting to conceal birth.—Whether production of body necessary.—Identification of body.**—In a charge of concealment of birth it is not necessary that the dead body of the child should be found & identified.—



*Sect. 6.—Proof: Sub-sect. 3, A. & B.]*

as that of the child of which she is alleged to have been delivered.

A woman apparently pregnant, while staying at an inn at Stafford, received by post, on Aug. 28, 1870, a Rugby newspaper, with the Rugby postmark upon it. On the same day her appearance & the state of her room seemed to indicate that she had been delivered of a child. She left for Shrewsbury next morning, carrying a parcel. That afternoon a parcel was found in a waiting room at Stafford Station. It was the dead body of a newly born child, wrapped in a Rugby Gazette of Aug. 27, 1870, bearing the Rugby postmark. No proof was given of the woman having been at Stafford Station:—*Held*: this evidence was insufficient to identify the body found as the child of which the woman was said to have been delivered, & would not, therefore, justify her conviction for concealment of birth.—*R. v. WILLIAMS* (1871), 11 Cox, C. C. 684.

**4574. ——— Confession of accused.]**—In a charge of child murder the only evidence was the confession of the accused, & no dead body of the child was found. The jury acquitted accused of murder & found her guilty of concealment of birth:—*Held*: (1) there was not sufficient evidence of a separate existence of the child to convict of murder but sufficient to convict for concealment of birth, although no dead body had been found.

(2) With regard to the confession, confessions depend upon the circumstances under which they are made, & in this case, the confession was one upon which the jury were entitled to act.—*R. v. KERSEY* (1908), 21 Cox, C. C. 690; 1 Cr. App. Rep. 260, C. C. A.

**4575. Charge of larceny—Proof of loss—Identity of stolen**

**be good**

yet a property must be proved in somebody at the trial, otherwise it shall be presumed that the property was in prisoner by his pleading not guilty to the indictment (GILBERT, C.B.).—*ANON.* (1724), 8 Mod. Rep. 248; 88 E. R. 177.

**4576. ———.]**—In a charge of larceny, if prosecutor cannot swear to the loss of the article said to be stolen, prisoner must be acquitted.

It seems to me that you have failed to establish in this case the *corpus delicti*. It is true prosecutor swears that the doll was once his, but he cannot state that it was taken from him, & for aught that appears to the contrary, prisoner may have come by it in an honest manner (ERLE, J.).—*R. v. DREDGE* (1845), 5 L. T. O. S. 433; 1 Cox, C. C. 235.

*Annotation*:—*Consd. R. v. Burton* (1854), Dears. C. C. 282.

**4577. ———.]**—On the first floor of a warehouse a large quantity of pepper was kept in bulk. Prisoner was met coming out of the lower room of the warehouse, where he had no business to be, having on him a quantity of pepper of the same description with that in the room above. On being stopped, he threw down the pepper, & said, "I hope you will not be hard with me." From the large quantity in the warehouse, it could not be proved that any pepper had been taken from the bulk. It was objected

that as there was no direct proof that any pepper had been stolen, the judge was bound to direct an acquittal:—*Held*: without such direct proof of a loss, there was abundant evidence to warrant the conviction of prisoner.—*R. v. BURTON* (1854), Dears. C. C. 282; 23 L. J. M. C. 52; 22 L. T. O. S. 336; 18 J. P. 103; 18 Jur. 157; 2 W. R. 230; 6 Cox, C. C. 293, C. C. R.

*Annotations*:—*Consd. R. v. Sullivan* (1887), 16 Cox, C. C. 347; *R. v. Joiner* (1910), 74 J. P. 200.

**4578. ———.]**—Though no portion of prosecutor's goods has been missed, it is a question for the jury, under all the circumstances of the case, whether the goods, which are the subject of the indictment, are his property.

No evidence has been produced to show that the coals delivered at the customers were less than a ton in weight, but it is a question for you whether the 190 lbs. weight sold by prisoner were not a part of that ton (WILLES, J.).—*R. v. HOOPER* (1858), 1 F. & F. 85.

**4579. ———.]**—Prisoner was found with dead fowls in his possession, of which he could give no account, & was tracked to a fowl house where a number of fowls were kept, & on the floor of which were some feathers corresponding with the feathers of one found on prisoner, from the neck of which feathers had been removed. The spot where prisoner was found was 1,200 yards from the fowl house, & prosecutor, not knowing the number of fowls kept, could not swear that he had lost any:—*Held*: there was evidence to support a conviction for larceny.—*R. v. MOCKFORD* (1868), 17 L. T. 582; 32 J. P. 133; 16 W. R. 375; 11 Cox, C. C. 16, C. C. R.

**4580. ———.]**—*R. v. PEARSON*, No. 4354, *ante*.

**4581. ——— What is sufficient identification.]**—Slight identification of stolen property may be sufficient for a conviction.

Appls. were convicted with two others for stealing fowls. They appealed against their conviction, on the grounds that the jury were misdirected by the chairman in his summing up, that the verdict was not in accordance with the evidence, & that it was wrong in law. No evidence had been given that the fowls were those of prosecutor. The witnesses had only stated that the fowls found on appls. were similar to those stolen. It was contended on the authority of *R. v. Pearson*, No. 4354, *ante*, that the prosecution should have proved that the fowls found were those stolen:—*Held*: there had been no misdirection by the chairman to the jury, & there was ample evidence to go to the jury that these four men had been together, & that there was a community of interest between them.—*R. v. HOWELLS & ALLEN* (1908), 1 Cr. App. Rep. 197, C. C. A.

**4582. ———.]**—J., who was a breeder of pheasants, left his cottage on Dec. 28, at 3.15 a.m. with nothing in his hands. Three hours later he returned carrying a sack containing eleven tame pheasants. J. was tried for larceny, & the case for the prosecution consisted of the above facts given in evidence by the police who were watching J.'s cottage. No one was called to prove that he had lost any tame pheasants. J.'s counsel

*R. v. BROWN* (1911), 31 N. Z. L. R. 225.—N.Z.

**4575 i. Charge of larceny—Proof of loss—Identity of stolen property.]**—*R. v. MACCAFFREY* (1900), 33 N. S. R. 232.—CAN.

**q. ——— Identity of stolen property—Circumstantial evidence.]**—Upon a

charge of stealing gold from a mine it was held sufficient to prove that gold sold by prisoner was of the same quality, as that found in the mine & of different quality from that found in the locality where he said he found it when charged, that he had opportunities of stealing it from the mine, & that he had stated shortly previously

that he was destitute.—*R. v. BRAMWELL* (1875), 1 V. L. R. 311.—AUS.

**r. Charge of rape—Fact must be proved.]**—In a prosecution for a rape, the fact itself must be proved, unless dispensed with by counsel.—*R. v. MADDERS* (1804), Rowe, 343.—IR.



submitted that there was no evidence of larceny to go to the jury; but this contention was overruled & J. was convicted:—*Held*: there was no evidence of larceny to go to the jury, & counsel for the prisoner having taken the point at the close of the case for the prosecution, that there was no evidence to go to the jury, the Ct. of Criminal Appeal would not look to see whether any evidence of larceny was elicited subsequently in the case for the defence.—*R. v. JOINER* (1910), 74 J. P. 200; 26 T. L. R. 265; 4 Cr. App. Rep. 64, C. C. A. Annotations:—*Overd. R. v. Fraser* (1911), 76 J. P. 168. *N.F. R. v. Power*, [1919] 1 K. B. 572.

**4583.** — — — — —.]—*R. v. HILL* (1912), 7 Cr. App. Rep. 250, C. C. A. Annotation:—*Consd. R. v. Smith* (1914), 11 Cr. App. Rep. 19.

**4584.** — — — — —.]—On an indictment for receiving stolen property, the jury should be directed clearly to the question of the identity of the goods found with those stolen.—*R. v. SMITH* (1914), 11 Cr. App. Rep. 19.

**4585.** — — — — — *Property not seen after loss.*]—A. had agisted his horse with B., who lived fourteen miles from him, & in consequence of hearing of the loss of it, he went to the field of B., where it was not:—*Held*: not sufficient proof of loss to support an indictment for horse-stealing.—*R. v. YEND & HAINES* (1833), 6 C. & P. 176.

**4586.** — — — — — *Property not seen before loss.*]—In cases of robbery from the person, where the property alleged to have been stolen has not been seen or known to be safe immediately before the robbery, if there be any evidence on the subject, it is for the jury to say whether the property really was in a position to be stolen as alleged.—*R. v. WILKINS & DAVIS* (1866), 10 Cox, C. C. 363.

#### B. Of Intent.

**4587. Criminal intent implied.—From other unlawful acts.**]—There are some cases where an unlawful or felonious intent to do one act may be carried over to another act, done in prosecution thereof; & such other act will be felony, because done in prosecution of an unlawful or felonious intent. As if a man shoots at a wild fowl, wherein no man hath any property, & by such shooting, happens unawares to kill a man, this homicide is not a felony but only a misadventure or chance-medley, because it was an accident that happened in the doing of a lawful act. But if this man had shot at a tame fowl wherein another had property, but not with intent to steal it & by such shooting had accidentally killed a man, he would then have been guilty of manslaughter, because done in prosecution of an unlawful action, namely committing a trespass on another's property: but if he had had an intention of stealing this tame fowl then such accidental killing of a man would have been murder, because done in prosecution of a felonious intent, namely an intent to steal (KING, C.J.).—*R. v. WOODBURN & COKE* (1722), 16 State Tr. 53.

#### PART XII. SECT. 6, SUB-SECT. 3.—B.

**4594 i. Criminal intent implied.—Intent to defraud.—Fraud on creditors by bankrupt.**]—P., a trader, surrendered his estate as insolvent in July, 1919. At the end of May, 1919, he entered in his journal in lump sums & under various headings of expenditure amounts totalling £800, some of which referred to matters which had occurred two years previously & which were not reflected in his cash books or ledger. The magistrate convicted P. of an offence under Act 32, 1916, s. 351 (1):—*Held*: the magistrate was justified in

his finding that the entries were false entries; & in the absence of any satisfactory evidence that there was no intention to defraud, the conviction must be sustained.—*PARAK v. R.* (1919), 40 N. L. R. 328.—S. AF.

**s. ——— Intent to injure.**]—An indictment charged prisoner with shooting at B., with intent to maim & disable him, stating, in one count, that the gun was loaded with gunpowder & leaden slugs, & in another count, with gunpowder & leaden shot. There was no evidence that any ball, slug, or shot had been found, or any

**4588. ——— When onus not discharged by defendant.**]—Where an act in itself indifferent, if done with a particular intent, becomes criminal, there the intent must be proved & found; but where the act is in itself, unlawful, as in this case, the proof of justification, or excuse, lies on deft.; & in failure thereof, the law implies a criminal intent (LORD MANSFIELD, C.J.).—*R. v. WOODFALL* (1770), 5 Burr. 2661; 20 State Tr. 895; 98 E. R. 398.

Annotations:—*Consd. R. v. Topham* (1791), 4 Term Rep. 126; *It. v. Philipps* (1805), 6 East, 464. *Refd. R. v. Shipley* (1784), 4 Doug. K. B. 73. *Mentd. Monson v. Tussaud*, *Monson v. Tussaud* (1894), 63 L. J. Q. B. 454; *R. v. Morris* (1907), 71 J. P. Jo. 520.

**4589. ——— When act unlawful.**]—Where an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment & proved. But where the act is in itself unlawful, the law infers an evil intent, & the allegation of such intent is merely matter of form, & need not be proved by extrinsic evidence on the part of prosecutor.—*R. v. PHILIPPS* (1805), 6 East, 464; 2 Smith, K. B. 550; 102 E. R. 1365.

**4590. ——— Intent to defraud.—Uttering forged instrument.**]—Uttering a forged stock receipt to a person who employed prisoner to buy stock to that amount & advanced the money, is sufficient evidence of an intent to defraud that person.—*R. v. SHEPPARD* (1810), Russ. & Ry. 169, C. C. R.

**4591. ——— ———.]**—A jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although, from the manner of executing the forgery, or from that person's ordinary caution it would not be likely to impose on him, & although the object was general to defraud whoever might take the instrument, & the intention of defrauding, in particular, the person who would have to pay the instrument, if genuine, did not enter into prisoner's contemplation.—*R. v. MAZAGORA* (1815), Russ. & Ry. 291, C. C. R.

Annotation:—*Consd. R. v. Harvey* (1823), 2 B. & C. 257.

**4592. ——— ———.]**—*R. v. COOKE*, No. 4241, *anlc.*

**4593. ——— ———.]**—*R. v. HILL* (1838), 8 C. & P. 274; 2 Mood. C. C. 30, C. C. R.

Annotation:—*Refd. R. v. Cooke* (1838), 8 C. & P. 582.

**4594. ——— Fraud on creditors by bankrupt.**]—On an indictment under Bkpcy. Act, 1861 (c. 134), against a bkpt., charging him with fraudulently concealing & disposing of goods & fraudulently omitting transactions & inserting fictitious transactions in his schedule, the jury are to judge as to the intent, in such instances, from the general character of the transactions, as disclosed in the whole of the evidence, & to consider whether it indicates a scheme & design on the part of the debtor to obtain the benefit of the bkpcy. law & relieve himself from his liabilities without making an honest disclosure & surrender of his property for the benefit of his creditors.—*R. v. MANSER* (1864), 4 F. & F. 45.

Annotation:—*Refd. Re Howard, Ex p. Stallard* (1868), 3 Ch. App. 408.

wound inflicted, nor was it shown in what manner the gun had been loaded. The judge told the jury that it was not necessary that they should be satisfied that the gun was loaded with slugs or shot, but that if they believed it was loaded with any substance calculated to act like slugs or shot, it was sufficient, & he left the case to the jury to say, upon the circumstantial evidence, whether it was so loaded. The jury found prisoner guilty:—*Held*: the conviction was right.—*R. v. BRADY* (1839), Jebb, Cr. & Pr. Cas. 257; 1 Craw. & D. 105.—IR.

**Sect. 6.—Proof: Sub-sect. 3, B.]**

**4595. — False pretences.]**—If a man makes statements of fact which he knows to be untrue, & makes them for the purpose of inducing persons to deposit with him money which he knows they would not deposit but for their belief in the truth of those statements, & if he intends to use the money so obtained for purposes different from those for which he knows the depositors understand from his statements that he intends to use it, he has an intent to defraud, although he may intend to repay the money if he can, & although he may honestly believe, & even have good reason to believe, that he will be able to repay it.—*R. v. CARPENTER* (1911), 76 J. P. 158; 22 Cox, C. C. 618.

**Annotation:—***Apld. R. v. Parker & Bulteel* (1916), 25 Cox, C. C. 145.

**4596. — — — — —.]**—Where money is obtained by pretences that are false, *prima facie* there is an intent to defraud, but the presumption may be displaced (*BANKES, J.*).—*R. v. HAMMERSON* (1914), 10 Cr. App. Rep. 121, C. C. A.

**4597. — Insolvent bank carrying on business.]**—The position of a banker differs from that of an ordinary trader. The ordinary trader by the mere fact that his premises are open & that his business is being carried on does not represent that he is solvent.

In the case of a banker, the mere fact of his keeping his doors open for business & carrying on business may afford some evidence from which a jury may find that he impliedly represents that he is solvent.—*R. v. PARKER & BULTEEL* (1916), 80 J. P. 271; 25 Cox, C. C. 145.

**4598. — Intent to injure.]**—*R. v. MAWRIDGE* (1706), 1 East, P. C. 276; Kel. 119; 17 State Tr. 57; Holt, K. B. 484; Fost. 274; 84 E. R. 1107.

**Annotations:—***Refd. R. v. Keite* (1696), 1 Ld. Raym. 138; *R. v. Oneby* (1727), 1 Barn. K. B. 18; *R. v. Doherty* (1887), 16 Cox, C. C. 306. **Mentd. R. v. Simpson (1716), 10 Mod. Rep. 341; *R. v. Francis* (1735), Cunn. 165; *R. v. Adey* (1779), 1 Leach, 206.**

**4599. — — — — —.]**—Prisoner was indicted for setting fire to a mill with intent to injure the occupiers thereof.—*Held*: an injury to the mill being the necessary consequence of setting fire to it, the intent to injure might be inferred; for a man must be supposed to intend the necessary consequence of his own act.—*R. v. FARRINGTON* (1811), Russ. & Ry. 207, C. C. R.

**Annotation:—***Consd. R. v. Harvey* (1823), 2 B. & C. 257.

**4600. — From natural consequences of act—Injury to person—Arising from lawful act.]**—Trespass & assault will lie for originally throwing a squib, which after having been thrown about in self-defence by other persons, at last put out ptlf.'s eye.—*SCOTT v. SHEPHERD* (1773), 3 Wils. 403; 2 Wm. Bl. 892; 95 E. R. 1124.

**Annotations:—***Refd. Leame v. Bray* (1803), 3 East, 593; *Clifford v. Brooke* (1806), 13 Ves. 131; *Langridge v. Levy* (1837), 6 L. J. Ex. 137; *The George & Richard* (1871), L. R. 3 A. & E. 466; *Snoesby v. L. & Y. Ry.* (1874), L. R. 9 Q. B. 263; *Clark v. Chambers* (1878), 3 Q. B. D. 327; *Whalley v. L. & Y. Ry.* (1884), 13 Q. B. D. 131; *Latham v. Johnson*, [1913] 1 K. B. 398. **Mentd. Fitzsimons v. Inglis (1814), 5 Taunt. 534; *M'Laughlin v. Pryor* (1842), 4 Man. & G. 48; *Rich v. Basterfield* (1846), 2 Car. & Kir. 257; *Gilbertson v. Richardson* (1848), 5 C. B. 502; *Lock v. Ashton* (1848), 13 Jur. 167; *Sharrod v. L. & N. W. Ry.* (1849), 4 Exch. 589; *Coward v. Baddeley* (1859), 33 L. T. O. S. 125; *Seymour v. Greenwood* (1861),**

6 H. & N. 359; *Clark v. Hoskins* (1868), 37 L. J. Ch. 561; *Holmes v. Mather* (1875), 44 L. J. Ex. 176; *R. v. Ashwell* (1885), 16 Q. B. D. 190; *H. M. S. London*, [1914] P. 72; *Ruoff v. Long*, [1916] 1 K. B. 148; *Bradley v. Newsom*, [1919] A. C. 16; *Weld-Blundell v. Stephens*, [1920] A. C. 956.

**4601. — — — — — Arising from unlawful act.]**—*R. v. FARRINGTON*, No. 4599, *ante*.

**4602. — — — — —.]**—Prisoner was the first, or almost the first, to leave the gallery of a theatre at the close of the performance, & ran down the stairs & wilfully put out the gas, & placed an iron bar across the doorway. This caused a panic among the persons when leaving the gallery, & several of them were seriously injured through the pressure of the crowd.—*Held*: prisoner was properly convicted of unlawfully & maliciously doing & inflicting grievous bodily harm within the meaning of Offences against the Person Act (c. 100), s. 17.

Prisoner must be taken to have intended the natural & probable consequences of what he did (*LORD COLERIDGE, C.J.*).—*R. v. MARTIN* (1881), 8 Q. B. D. 54; 51 L. J. M. C. 36; 45 L. T. 444; 46 J. P. 228; 30 W. R. 106; 14 Cox, C. C. 633, C. C. R.

**Annotations:—***Apld. R. v. Halliday* (1889), 61 L. T. 701. *Fold. R. v. Chapin* (1909), 22 Cox, C. C. 10. **Refd. R. v. Clarence (1888), 22 Q. B. D. 23.**

**4603. — — — — — Adulteration of food.]**—A baker who sells bread containing alum in a shape which renders it noxious is guilty of an indictable offence, if he ordered the alum to be introduced into the bread, although he gave directions for mixing it up in a manner which would have rendered it harmless.—*R. v. DIXON* (1814), 4 Camp. 12; 3 M. & S. 11; 105 E. R. 516.

**Annotations:—***Fold. R. v. Hicklin* (1868), L. R. 3 Q. B. 360. **Refd. A.-G. v. Siddon (1830), 1 Cr. & J. 220; *R. v. Aspinall* (1876), 2 Q. B. D. 48; *R. v. Brailsford*, [1905] 2 K. B. 730.**

**4604. — — — — — Publication inciting sedition.]**—*R. v. BURDETT*, No. 4569, *ante*.

**4605. — — — — — Malice in libel.]**—The jury having retired for a considerable time, returned into ct., & desired to know whether it was necessary that there should be a malicious intention in order to constitute a libel; to which the judge answered, "The man who publishes slanderous matter calculated to defame another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary; & it is for him to show the contrary:—"*Held*: this answer was correct in point of law, & the judge was not bound to answer in the affirmative or negative the abstract question put to him; & assuming that a malicious intention is necessary to constitute a libel that intention is to be inferred from the mischievous tendency of the publication itself, unless deft. shows something to rebut such inference, & therefore the publication of a libel of mischievous tendency having been proved, & deft. not having shown that he published it from authority, the jury were bound to find that he published it with a malicious intention.—*R. v. HARVEY* (1823), 2 B. & C. 257; 3 Dow. & Ry. K. B. 464; 2 L. J. O. S. K. B. 4; 2 State Tr. N. S. 1; 107 E. R. 379.

**Annotations:—***Refd. R. v. Grant, Ranken & Hamilton* (1848), 7 State Tr. N. S. 507; *Nevill v. Fine Arts & General Insc.*, [1895] 2 Q. B. 156; *R. v. Munslow*, [1895] 1 Q. B. 758. **Mentd. Gummoe v. Howes (1857), 23 Beav. 184.**

**4601 i. — From natural consequences of act—Injury to person—Arising from unlawful act.]**—Prisoner was indicted, *inter alia*, under sect. 415 of the Criminal Code for being unlawfully in the house of P. with intent to commit an assault on D. The jury, in

effect, found that prisoner was unlawfully in the house, & committed an assault on D.—*Held*: the intent to commit the assault was involved in the commission of it; the jury could not find prisoner guilty of committing an assault without finding that he had the

intent to commit it, & the being in & the intent concurring in point of time, the offence was complete & the conviction must be affirmed.—*R. v. HIGGINS* (1905), 38 N. S. R. 328.—**CAN.**

**4608.** — **Publication injuring public morality.**—A society of persons exposed for sale at their office a pamphlet. About one half of the pamphlet related to casuistical & controversial questions which were not obscene, but "the remainder of the pamphlet was obscene, relating to impure & filthy acts, words & ideas. A member of the society kept & sold these pamphlets with the purpose of promoting the objects of the society, & exposing what he deemed to be errors of the Church of Rome:—*Held*: notwithstanding the object of deft. was not to injure public morals, but to attack the religion & practice of the Roman Catholic Church, this did not justify his act, nor prevent it from being a misdemeanor proper to be prosecuted, as the inevitable effect of the publication must be to injure public morality; & although he might have had another object in view, he must be taken to have intended what was the natural consequence of his act.—*R. v. HICKLIN* (1868), L. R. 3 Q. B. 360; 37 L. J. M. C. 89; 16 W. R. 801; 18 L. T. 395; 11 Cox, C. C. 19; *sub nom.* *SCOTT v. WOLVERHAMPTON JJ.*, 32 J. P. 533.

*Annotations*:—*Folld.* *Steele v. Brannan* (1872), L. R. 7 C. P. 261. *Refd.* *R. v. Prince* (1875), L. R. 2 C. C. R. 154; *R. v. Barraclough*, [1906] 1 K. B. 201. *Mentd.* *R. v. Adams* (1888), 5 T. L. R. 85.

**4607.** — **Crime committed during drunkenness.**—Upon an indictment for murder, where there is evidence that prisoner was drunk at the time of the commission of the crime, the proper direction to the jury is that a man must be presumed to intend the natural consequences of his acts, but that that presumption may be rebutted by showing that his mind was so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous—that is likely to inflict serious injury.—*R. v. MEADE*, [1909] 1 K. B. 895; 78 L. J. K. B. 476; 73 J. P. 239; 25 T. L. R. 359; 53 Sol. Jo. 378; 2 Cr. App. Rep. 54, C. C. A.

*Annotations*:—*Consd.* Public Prosecutions Director v. Beard, [1920] A. C. 479. *Refd.* *R. v. Honeyands* (1914), 10 Cr. App. Rep. 60.

**4608.** — **Does not extend to accidental acts.**—Prisoner was indicted for shooting with intent to resist his lawful apprehension. The defence was that prisoner's gun went off accidentally. In his summing-up, the judge directed the jury that a man must be taken to intend the natural consequences of his acts, & that it was for prisoner, & not for the prosecution, to satisfy them that the gun went off accidentally. Prisoner was convicted:—*Held*: the conviction must be quashed as the judge's direction might have been understood by the jury as laying down a proposition of law which was not correct, namely, that a person must be taken to intend the consequences, not only of his intentional, but also of his accidental acts.—*R. v. DAVIES* (1913), 29 T. L. R. 350; 8 Cr. App. Rep. 211, C. C. A.

*See, also*, Part I., Sect. 2, sub-sect. 2, *ante*.

**4609. Onus on prosecution—Onus may shift in certain cases.**—D. & others were charged under the Treason-Felony Act, 1848 (c. 12), s. 3, with being in the possession of certain instruments & explosive materials, with intent to use them for the purpose of carrying out the objects of certain treasonable combinations existing in the United Kingdom & abroad:—*Held*: (1) for the purpose of showing such intent, evidence might be given showing that the only known use hitherto made of such instruments & explosive compounds had been in causing destructive explosions to property; & the fact of some of these explosions having

happened out of the jurisdiction of the court did not affect the admissibility of the evidence.

(2) For the purpose of showing a treasonable object on the part of prisoners, & negating any private object, evidence might be given of the existence, down to a period nearly approaching the date of the alleged acts, in the country from which the explosives & instruments were brought, of a treasonable conspiracy having for its object the alteration of the existing form of government by violent means, although such evidence did not establish that the prisoners were members of, or directly connected with, such conspiracy.

Though the general rule is that the prosecution must make out intent, there may be circumstances under which the burden of proof is shifted to the other side.—*R. v. DEASY* (1883), 15 Cox, C. C. 334.

**4610. Sufficiency of proof—Question of fact for jury.**—Upon a trial for larceny the question whether the goods were taken *animo furandi* is a question of fact for the jury.—*R. v. FARNBOROUGH*, [1895] 2 Q. B. 484; 64 L. J. M. C. 270; 73 L. T. 351; 59 J. P. 505; 44 W. R. 48; 11 T. L. R. 554; 39 Sol. Jo. 691; 18 Cox, C. C. 191; 15 R. 497, C. C. R.

*Annotation*:—*Refd.* *R. v. Meyer* (1908), 99 L. T. 202.

**4611. Whether special intent must be proved.**—*R. v. WOODFALL*, No. 4588, *ante*.

**4612.** — *R. v. PHILLIPS*, No. 4589, *ante*.

**4613.** — *R. v. COPPARD* (1855), Wills on Circumstantial Evidence, 5th ed. 217.

**4614.** — **In murder.**—*R. v. WOODBURN & COKE*, No. 4587, *ante*.

**4615.** — *Indictment for murder.* Defence that deceased committed suicide. Verdict "guilty," the jury adding that they believed the act was committed without premeditation.

"You are not asked to say if it were premeditated or not. If prisoner killed the woman, he is guilty of murder. Prosecutor is not bound to prove that the homicide was committed from malice prepense. If the homicide be proved, the law presumes malice" (BYLES, J.).—*R. v. MALONEY* (1861), 9 Cox, C. C. 6.

**4616.** — **In manslaughter.**—*R. v. WOODBURN & COKE*, No. 4587, *ante*.

**4617.** — **To do grievous bodily harm.**—On an indictment for felony under Prevention of Offences Act, 1851 (c. 19), s. 7, for maliciously throwing stones into a railway carriage, with intent to endanger the safety of any person in it, there must be evidence of an intent to do some grievous bodily harm, such as would support an indictment for wounding a particular person with that intent, & if it appear that prisoner's intention was only to commit a common assault on some person in the carriage he must be acquitted.—*R. v. ROOKE* (1858), 1 F. & F. 107.

**4618.** — **In wounding.**—W., intending to frighten, but not to hurt, prosecutor, fired a gun, but owing to prosecutor slewing round in his boat, the shot wounded him. W. was indicted for maliciously wounding with intent to do grievous bodily harm. The jury found W. guilty of unlawful wounding, under Prevention of Offences Act, 1851 (c. 19), s. 5:—*Held*: the word "maliciously" was implied in the words "unlawful wounding," there was here evidence of such malice as to support the finding of the jury.—*R. v. WARD* (1872), L. R. 1 C. C. R. 356; 41 L. J. M. C. 69; 26 L. T. 43; 36 J. P. 453; 20 W. R. 392; 12 Cox, C. C. 123, C. C. R.

*Annotations*:—*Refd.* *R. v. Pembilton* (1847), L. R. 2 C. C. R. 119; *R. v. Martin* (1881), 8 Q. B. D. 54; *Allen v. Flood*, [1898] A. C. 1; *R. v. Clemens* (1898), 78 L. T. 204.

**4619.** — **In receiving stolen property.**—

*Sect. 6.—Proof: Sub-sect. 3, B. & C.; sub-sect. 4. A.]*

On an indictment against A. for feloniously receiving stolen goods, the property of B., evidence was admitted after objection made, of possession by A. of other stolen property not the property of B., & which, it was shown, must have been stolen at different times & from other places. The evidence was admitted, on the ground that it went to prove a guilty knowledge in W. On a case reserved:—*Held*: the evidence was inadmissible.

Whatever may be the rule respecting the admissibility of such evidence on an indictment for receiving stolen goods with a guilty knowledge, in the present case this evidence merely went to show that prisoner was in possession of other property which had been previously stolen in Dec., & not that he had received such property after it had been stolen. The mere possession of stolen property is evidence of stealing & not of receiving, & to admit such evidence in the present case would be to allow prosecutor, in order to make out that a prisoner had received property stolen in Mar. with a guilty knowledge, to show that prisoner had stolen some other property from another place & belonging to other persons in the previous Dec. (*ALDERSON, B.*).—*R. v. ODDY* (1851), 2 Den. 264; *T. & M.* 593; 4 New Sess. Cas. 602; 20 L. J. M. C. 198; 17 L. T. O. S. 136; 15 J. P. 308; 15 Jur. 517; 5 Cox, C. C. 210, C. C. R.

*Annotations*:—*Consd.* *Makin v. A.-G. for New South Wales*, [1894] A. C. 57; *R. v. Bond*, [1906] 2 K. B. 389. *Refd.* *It. v. Richardson* (1860), 2 F. & F. 343; *Parker v. Green* (1862), 2 B. & S. 299; *R. v. Francis* (1874), 22 W. R. 663; *R. v. Carter* (1884), 50 L. T. 596; *R. v. Ollis*, [1900] 2 Q. B. 758; *Thompson v. It.*, [1918] A. C. 221. *Mentd.* *It. v. Green* (1852), 3 Car. & Kir. 209.

**4620. — In malicious damage to property.]—**The word “maliciously” in Malicious Damage Act, 1861 (c. 97), s. 51, requires that an act to be criminal within that sect. should be done wilfully.

A conviction under that sect., for unlawfully & maliciously committing damage above the value of £5 to a house, where deft., after fighting in a crowd in the street near the window of the house, separated himself from the crowd, picked up a stone, threw it at one of the persons with whom he had been fighting, missed his aim, & hit a plateglass window above the value of £5 in the house, but did not intend to break the window, was quashed.—*R. v. PEMBLTON* (1874), L. R. 2 C. C. R. 119; 43 L. J. M. C. 91; 30 L. T. 405; 38 J. P. 454; 22 W. R. 553; 12 Cox, C. C. 607, C. C. R.

*Annotations*:—*Distd.* *R. v. Latimer* (1886), 17 Q. B. D. 359. *Consd.* *R. v. Faulkner* (1877), 13 Cox, C. C. 550. *Refd.* *R. v. Welch* (1875), 33 L. T. 753; *R. v. Martin* (1881), 8 Q. B. D. 54; *Hall v. Richardson* (1889), 6 T. L. R. 71.

*C. Confession by Accused.*

**4621. Whether sufficient without corroboration—General rule.]—**A confession properly proved in law needs no corroboration to found a conviction, although in practice there is invariably some corroboration.—*R. v. SYKES* (1913), 8 Cr. App. Rep. 233, C. C. A.

**4622. — — —.]—**It is doubtful whether a crime can be established without other evidence than that of prisoner's confession.—*R. v. EDGAR*

(1831), 2 Russell on Crimes & Misdemeanours, 8th ed. p. 1996, n.

*Annotation*:—*Refd.* *R. v. Sullivan* (1887), 16 Cox, C. C. 347.

**4623. — Manslaughter.]—**The evidence against prisoner charged with manslaughter was an admission, on his part, that, unfortunately, he was the man who shot deceased; & the fact that on their coming together, apparently not in ill humour, from the South Metropolitan Cemetery, where prisoner was a watchman, but with which deceased had no connection, prisoner said to the deceased, “Now, you mind, don't let me see you on my premises any more.” At the time this was said, the wound had been given of which deceased eventually died:—*Held*: in point of law, the evidence was sufficient to sustain the charge.—*R. v. MORRISON* (1837), 8 C. & P. 22.

**4624. — To prove identity.]—**Where a felon is condemned, & escapeth, & is retaken, upon confession that he is the same party execution may be awarded.—*MIDDLETON'S CASE* (1617), Poph. 131; 79 E. R. 1233.

**4625. — Murder.]—**A boy of ten may be convicted of murder on his own confession together with circumstances tending to corroborate it.—*R. v. YORK* (1748), Fost. 70, C. C. R.

**4626. — — —.]—**Weak circumstantial evidence may be strongly corroborated by a confession.—*R. v. SHAWCROSS* (1909), 2 Cr. App. Rep. 286, C. C. A.

**4627. — Sending threatening letter.]—**Prisoner was indicted for sending a threatening letter. The only evidence against him was his own statement, that he should never have written it, but for W.:—*Held*: this was not sufficient.—*R. v. HOWE* (1836), 7 C. & P. 268.

**4628. — On proof of the confession.]—***R. v. WHEELING* (1789), 1 Leach, 311, n.

*Annotation*:—*Refd.* *It. v. Sullivan* (1887), 16 Cox, C. C. 347.

**4629. — — —.]—***R. v. PRICE* (1837), 1 J. P. 2.

**4630. — On proof of an offence having been committed.]—**Prisoner's confession is sufficient ground for a conviction, though there is no other proof of his having committed the offence, or of the offence having been committed, if that confession was in consequence of a charge against prisoner.—*R. v. ELDRIDGE* (1821), Russ. & Ry. 440, C. C. R.

*Annotation*:—*Refd.* *R. v. Falkner & Bond* (1822), Russ. & Ry. 481.

**4631. — — —.]—**Prisoner's confession is sufficient ground for a conviction, though there is no other proof of his having committed the offence, or of the offence having been at all committed, if such confession was in consequence of a charge against prisoner.—*R. v. FALKNER & BOND* (1822), Russ. & Ry. 481, C. C. R.

*Annotations*:—*Refd.* *R. v. Bond* (1850), 4 Cox, C. C. 231; *R. v. Sullivan* (1887), 16 Cox, C. C. 347.

**4632. — — —.]—**The confession of prisoner before a magistrate is sufficient ground to warrant a conviction, though there is no positive proof *aliunde* that the offence was committed.—*R. v. WHITE* (1823), Russ. & Ry. 508, C. C. R.

**4633. — — —.]—**Confession of prisoner is evidence against him, without positive proof *aliunde* of the offence having been committed.—*R. v. TIPPET* (1823), Russ. & Ry. 509, C. C. R.

*Annotation*:—*Refd.* *R. v. Sullivan* (1887), 16 Cox, C. C. 347.

**4634. — — — Larceny.]—**Prisoner, indicted

thing more than accused's own admission or even confession; there must also be some independent evidence of the crime having been committed.—*R. v. TSHINGWATO & UZULU*, [1914] E. D. L. 472.—*S. AF.*

**PART XII. SECT. 6, SUB-SECT. 3.—C.**

**4621 I. Whether sufficient without corroboration—General rule.]—**A confession is sufficient to warrant a conviction.—*R. v. GRAF* (1909), 13 O. W. R. 1133; 19 O. L. R. 238; 15

Can. Crim. Cas. 193.—*CAN.*

*t. — Treason.]—**R. v. SPROTS* (1608), 2 State Tr. 697.—*IR.*

**4630 I. — On proof of offence having been committed.]—**There must be some-

for stealing two heifers, said, "I drove away two heifers from the World's End Drovers." The prosecutor's farm was called by that name, but he could not swear that there was not any other of the same name in the neighbourhood:—*Held*: this was insufficient to warrant a conviction.—*R. v. TUFFS* (1831), 5 C. & P. 167.

*Annotation*:—*Reid. R. v. Sullivan* (1887), 16 Cox, C. C. 347.  
4635. ————*]*—*R. v. BURTON*, No. 4577, *ante*.

4636. ———— **Where offence not completed in law.**—Prisoner cannot be convicted on his own confession where there is express evidence that the offence has not been completed in point of law.—*R. v. SALTER* (1840), 4 J. P. 189.

4637. ———— **Question for jury.**—*R. v. KERSEY*, No. 4574, *ante*.

4638. **Negated in part—By other evidence.**—A voluntary confession of participation in a crime negated, in part, by other evidence is evidence of prisoner's guilt to go to the jury.—*R. v. SUTCLIFFE* (1850), 15 L. T. O. S. 371; 4 Cox, C. C. 270.

4639. **Bigamy—Proof of first marriage.**—In a case of bigamy there ought to be some proof of the first marriage beyond the mere statement of prisoner while in custody; therefore, where a man went to a police-station & stated, that he had committed bigamy, & when & where the first marriage took place, & while in custody signed a statement to the same effect, the judge thought this, though some evidence of the first marriage, was not sufficient, & so told the jury.—*R. v. FLAHERTY* (1847), 2 Car. & Kir. 782.

#### SUB-SECT. 4.—METHOD OF PROOF.

##### A. In General.

4640. **Rules of evidence the same in civil & criminal cases.**—*R. v. WATSON*, No. 4220, *ante*.

4641. ————*]*—The rules of evidence are exactly the same in civil & criminal cases, & in both it is in the discretion of the judge how far he will allow the examination in chief of a witness to be by leading questions, or to assume the form of a cross-examination.—*R. v. MURPHY* (1837), 8 C. & P. 297.

*Annotations*:—*Mentd. R. v. Blake* (1844), 6 Q. B. 126; *R. v. O'Connell* (1844), 5 State Tr. N. S. 1.

4642. ————*]*—The rules of evidence are the same in civil & criminal cases.—*LEACH v. SIMPSON* (1839), 5 M. & W. 309; 7 Dowl. 513; 3 Jur. 654; 151 E. R. 132.

4643. ————*]*—*R. v. FRANCIS*, No. 4056, *ante*.

4644. ———— **Enforcement modified in criminal cases.**—*R. v. CHRISTIE*, No. 3811, *ante*.

4645. ————*]*—Assuming the burden of proving a theft by pltf.'s servant to lie on deft., he might establish such a theft by evidence which possibly might not be admitted or sufficient to convict in a criminal prosecution. Evidence that two days before the theft the servant was seen in conference with three notorious thieves was admissible to prove his complicity.

I doubt whether the evidence would have been admissible in a criminal prosecution, not because it was irrelevant, but because in a criminal case

evidence is frequently rejected which tends to prejudice deft. and prevent a fair trial (*LUSH, J.*).—*HURST v. EVANS*, [1917] 1 K. B. 352; 86 L. J. K. B. 305; 116 L. T. 252; 33 T. L. R. 96.

*Annotations*:—*Mentd. Compania Maritima de Barcelona v. Wishart* (1918), 87 L. J. K. B. 1027; *Munro, Brice v. War Risks Assocn.*, [1918] 2 K. B. 78.

4646. **Special rules in criminal cases—Admissions cannot be made.**—Where there are two prosecutions against the same person for felony, the judge will not, even by consent, take the evidence of the first trial, as given in the second, but the witnesses may be re-sworn in the second case, & their evidence read over to them from the judge's notes.

I doubt whether that can be done, even by consent, in a case of felony: though I know that it may in cases of misdemeanour (*PATTESON, J.*).—*R. v. FOSTER* (1836), 7 C. & P. 495.

4647. ————*]*—On the trial of an indictment for perjury on the Crown side of the assizes, where it appeared that the attorneys on both sides had agreed that the formal proofs should be dispensed with, & that that part of prosecutor's case should be admitted, the judge would not allow this admission, & prosecutor not being prepared with the formal proofs, deft. was acquitted. A judge will not allow a criminal case upon the Crown side of the assizes to be tried on admissions of this sort, unless they be made at the trial by deft. or his counsel.—*R. v. THORNHILL* (1838), 8 C. & P. 575.

4648. ———— **Except in case of misde-**

4646, *ante*.

4650. **Governing principle of proof.**—The governing rule & principle of English criminal law is that the question is not simply whether the person charged is guilty or not guilty, but whether the prosecution proves the case strictly & in form (*LORD ESHER, M.R.*).—*COTTERILL v. LEMPRIERE* (1890), 24 Q. B. D. 634; 59 L. J. M. C. 133; 62 L. T. 695; 54 J. P. 583; 6 T. L. R. 262; 17 Cox, C. C. 97, D. C.

*Annotations*:—*Mentd. R. v. Hankey, etc. JJ.* (1905), 93 L. T. 107; *Ex p. Norman* (1915), 114 L. T. 232; *R. v. Jones, Ex p. Thomas*, [1921] 1 K. B. 632.

4651. ————*]*—A person accused of crime in this country can properly be convicted in a ct. of justice only upon evidence which is legally admissible & which is adduced at his trial in legal form & shape (*LORD ALVERSTONE, C.J.*).—*R. v. TIBBITS*, [1902] 1 K. B. 77; 71 L. J. K. B. 4; 85 L. T. 521; 66 J. P. 5; 50 W. R. 125; 18 T. L. R. 49; 46 Sol. Jo. 51; 20 Cox, C. C. 70, C. C. R.

*Annotation*:—*Mentd. R. v. Nield* (1909), *Times*, Jan. 27.

4652. **Weight of presumptions.**—A slight or probable presumption only has little or no weight: but a violent presumption amounts in law to full proof, that is, where circumstances speak so strongly, that to suppose the contrary would be absurd . . . where that presumption necessarily arises from circumstances, they are more convincing & satisfactory than any other kind of evidence, because fact cannot lie (*LEGGE, B.*).—*R. v. BLANDY* (1752), 18 State Tr. 1117, 1186.

4653. ————*]*—*R. v. BORDEN*, No. 4600, *ante*.

4639 i. **Bigamy—Proof of first marriage.**—Upon an indictment for bigamy the first marriage must be strictly proved as a marriage *de jure*. Evidence of a confession by prisoner of his first marriage is not evidence upon which he can be convicted.—*R. v. RAY* (1890), 20 O. R. 212.—*CAN.*

#### PART XII. SECT. 6, SUB-SECT. 4.—A.

4640 i. **Rules of evidence the same in civil & criminal cases.**—There is no difference between the rules of evidence for the production of documents in criminal & civil cases.—*R. v. JORDAN* (1876), 14 N. S. W. S. C. R. 296.—*AUS.*  
a. **Whether X-ray photographs ad-**

missible.—At a trial of a person accused of wounding with intent to cause grievous bodily harm, X-ray photographs of the wounds inflicted may be tendered in evidence by the doctor, by whose direction they were taken, & may be shown to the jury.—*R. v. ASHF* (1922), 39 Can. Crim. Cas. 193; 50 N. B. R. 82.—*CAN.*

*Sect. 3.—Proof: Sub-sect. 4, B., C., D., E. & F. Secls. 7 & 8.]*

*B. Discovery and Inspection.*

**4654. Production of documents.—By accused.]**—The ct. will never compel deft. in a criminal prosecution to produce evidence against himself. The ct. will not compel the production of books of a private nature in favour of a person who has no interest in them.—*R. v. WORSENHAM* (1701), 1 *Ld. Raym.* 705; 91 *E. R.* 1370.

**4655. ———.]**—A man shall not be compelled to produce or give a copy of books of a private nature particularly if the object is to obtain evidence in support of a criminal prosecution against him.—*R. v. MEAD* (1703), 2 *Ld. Raym.* 927; 92 *E. R.* 119.

*Annotation:—Refd. R. v. Purnell* (1748), 1 *Wils.* 239.

**4656. ———.]**—No inspection of books by a prosecutor of a misdemeanour.—*R. v. CORNELIUS* (1744), 2 *Stra.* 1210; 93 *E. R.* 1133.

*Annotations:—Folld. R. v. Purnell* (1747), 1 *Wm. Bl.* 37. *Refd. Entick v. Carrington* (1765), 2 *Wils.* 275; *R. v. Sholley* (1789), 3 *Term Rep.* 141.

**4657. ———.]**—On an information against a magistrate of a corpn. for misdemeanour, the ct. will not grant a rule to inspect the books of the corpn. to furnish evidence.—*R. v. PURNELL* (1748), 1 *Wm. Bl.* 37; 1 *Wils.* 239; 96 *E. R.* 20.

*Annotations:—Folld. R. v. Heydon* (1762), 1 *Wm. Bl.* 351. *Refd. Entick v. Carrington* (1765), 2 *Wils.* 275; *R. v. Sholley* (1789), 3 *Term Rep.* 141; *R. v. Holland* (1792), 4 *Term Rep.* 691.

**4658. ———.]**—A rule to compel a corpn. to furnish evidence from their books in a criminal prosecution was denied.—*R. v. HEYDON* (1762), 1 *Wm. Bl.* 351; 96 *E. R.* 195.

**4659. ———.]**—A.-G. v. LE MERCHANT (1772), 2 *Term Rep.* 201, n; 100 *E. R.* 109.

*Annotations:—Refd. Cates v. Winter* (1789), 3 *Term Rep.* 306. *Mentd. Wilson v. Rastall* (1792), 4 *Term Rep.* 753; *J. v. Downham* (1858), 1 *F. & P.* 386.

**4660. ———.]**—ANON (1773), *Lofft.* 321; 98 *E. R.* 673.

**4661. — By prosecutor.]**—Where an information is filed by the A.-G. against an officer of the East India Co., on charges of delinquency there, founded upon the report of a board of inquiry in India, deft. has no right to have an inspection of that report, nor has this ct. any discretionary power to grant it.—*R. v. HOLLAND* (1792), 4 *Term Rep.* 691; 100 *E. R.* 1248.

**4662. ———.]**—On an indictment in the Central Criminal Ct., for obtaining money by a false pretence that a parcel contained certain letters of prosecutrix to prisoner, which he had promised, for a valuable consideration, to give up, & which had been seized under a search warrant, a judge on the rota for the session, after the session had opened, made an order in favour of prisoner for an inspection of the letters, but the judge in chambers has no such power although on the rota of the Central Criminal Ct., if the

session has not been opened & the ct. is not sitting, the Central Criminal Ct. being an intermittent ct.—*R. v. COLUCCI* (1861), 3 *F. & P.* 103.

**4663. Inspection of defendant's bank account.—By prosecutor.—Bankers' Books Evidence Act, 1879 (c. 11), s. 7.]**—A magistrate before whom criminal proceedings are being taken has power to make an order, under the above sect. for prosecutor to inspect & take copies of entries in the books of a bank at which deft. keeps an account.—*R. v. KINGHORN*, [1908] 2 *K. B.* 949; 72 *J. P.* 478; 25 *T. L. R.* 219; *sub nom. R. v. KINGHORN, Ex p. DUNNING*, 78 *L. J. K. B.* 33; 99 *L. T.* 794; 21 *Cox, C. C.* 727.

*C. Evidence on Commission.*

**4664. Not permitted in criminal cases.]**—A rule was made upon prosecutor to show cause why the trial should not be put off, one of deft.'s witnesses not being able without danger of her life to appear at the trial. Prosecutor offered to allow her testimony to be taken before a judge, but the ct. said, they never suffered it to be done in criminal cases.—*R. v. BUDGEL* (1727), 1 *Barn. K. B.* 20; 94 *E. R.* 13.

**4665. ———.]**—Evidence on Commission Act, 1830 (c. 22), s. 4, which gave power to the ct. to issue commissions in certain cases for the examination of witnesses, did not apply to indictments.—*R. v. BRISCOE* (1833), 1 *Dowl.* 520.

*Annotation:—Folld. R. v. Upton St. Leonard's* (1847), 10 *Q. B.* 827.

**4666. ———.]**—An order for the examination of a witness resident in England but unable from illness to attend the trial cannot be made in a criminal prosecution either by the common law authority of the ct. or under Evidence on Commission Act, 1830 (c. 22), s. 4.—*R. v. UPTON ST. LEONARD'S (INHABITANTS)* (1847), 10 *Q. B.* 827; 2 *New Pract. Cas.* 272; 17 *L. J. M. C.* 13; 9 *L. T. O. S.* 246; 12 *J. P.* 120; 12 *Jur.* 11; 2 *Cox, C. C.* 254; 116 *E. R.* 313.

*Annotation:—Refd. Bailey v. Macaulay, etc.* (1849), 19 *L. J. Q. B.* 73.

**4667. ———.]**—An application having been made on the part of the prosecution in a case of felony to examine a witness before the master on the ground that he was about to leave this country for China, prisoner consenting to such application:—*Held*: the ct. could not act on such consent in a case of felony, & had no power to make such order.—*R. v. BIGNELL* (1851), 16 *L. T. O. S.* 394; 15 *J. P.* 116.

**4668. Permitted in special case on application of accused.]**—The ct., upon application of deft., postponed the trial of an information for a misdemeanour, upon deft.'s consenting by writing under his own hand, to the examination upon interrogatories of a witness for the Crown.—*R. v. MORPHEW* (1814), 2 *M. & S.* 602; 105 *E. R.* 506.

**PART XII. SECT. 6, SUB-SECT. 4.—C.**

**4664 i. Not permitted in criminal cases.]**—Where evidence has been taken on commission before the trial, the mere fact of an omission to object to it before the cour. cannot impair the rule that it is the duty of the presiding judge at a criminal trial to allow only admissible evidence to go to the jury.—*R. v. HAWKES* (1915), 32 *W. L. R.* 720; 9 *W. W. R.* 445; 25 *D. L. R.* 631.—**CAN.**

**4664 ii. ———.]**—At the trial of a person for an offence under sect. 411 of the Penal Code, the Ct. of Session, under Evidence Act, 1872, s. 33, used against accused the evidence of the

owner of the property in respect of which accused was charged, & of his wife taken by commission during the inquiry, & the evidence of the servant of those persons taken at the inquiry, & also the evidence of the owner of the property taken during the trial under a commission issued by the sessions judge under sect. 503 of the Criminal Procedure Code:—*Held*: the sessions judge had improperly admitted such evidence.—*R. v. BURKE* (1884), 1 *L. L. R.* 641. 224.—**IND.**

**b. Testimony for use in foreign court.—Examiner to be accused.]** Letters rogatory were issued from a French ct. seeking the aid of the

Superior Ct. of Canada in obtaining the testimony of a person within the jurisdiction of the Ontario Ct. in relation to criminal proceedings pending against him in the French Ct.:—*Held*: an order should be made under Canada Evidence Act, R. S. C., 1906 (c. 145), s. 41, for the examination upon oath in Ontario of the person referred to & commanding his attendance for examination, leaving it to him to object, if he should see fit, to undergo any examination or to answer any questions upon the ground that to answer might incriminate him.—*Re ISLER* (1915), 34 *O. L. R.* 375; 9 *O. W. N.* 18.—**CAN.**



*D. Depositions taken Abroad.*

**4669. Under mandamus from King's Bench—Wisdemeanours committed abroad.**—*R. v. PICTON* (1805), 30 State Tr. 225.

*Annotations*:—**Mentd.** *Lacon v. Higgins* (1822), 3 Stark. 178; *Barnes v. Stuart* (1834), 1 Y. & C. Ex. 119; *De Bode's Case* (1845), 8 Q. B. 208; *Scott v. Seymour* (1862), 1 H. & C. 219; *Re Kyre* (1868), 16 W. R. 754; *Anderson v. Gorrie*, [1895] 1 Q. B. 668.

**4670.** ———.]—An information was filed by the A.-G., under East India Co. Act, 1793 c. 52), s. 62, against an officer of the East India Co., for receiving gifts in India. A *mandamus* was granted under East India Co. Act, 1773 c. 63), s. 40 for the examination of witnesses in the Supreme Ct. at Madras. One of the witnesses here gave in evidence certain original accounts, copies of which were returned to the Ct. of Q. B. by the Supreme Ct. at Madras, with the examinations:—**Held**: on the trial of the information in the Ct. of Q. B., these copies were not receivable in evidence, & the Ct. at Madras should have transmitted the original accounts to the Ct. of Q. B.—*R. v. DOUGLAS* (1845), 1 Car. & Kir. 670; *New Pract. Cas.* 267, N. P.

**4671. Depositions taken by consul—Merchant Seamen Act, 1844 (c. 112), ss. 58, 59.**—*Seemle*: depositions taken by a consul abroad under the above Act, & returned to this country & certified under the consular seal to have been duly taken, are admissible in evidence under Mercantile Marine Act, 1850 (c. 93), s. 115 without further proof, although it appears from extrinsic evidence that the witnesses gave their evidence in a foreign language, which was translated into English to the prisoner, & inserted in the depositions by the consul.

such depositions are admissible after the examination of each witness, asked prisoner whether he had anything to say, & on prisoner saying he knew nothing about the witnesses, proceeded to examine the next witness without expressly telling prisoner that he might put questions to the witness.

*Qu.*: whether depositions of witnesses, containing a great portion of hearsay evidence are admissible.

*Qu.*: whether the judge has power to strike out the portion that consists of such hearsay evidence, & admit the residue.—*R. v. RUSSELL* (1852), 6 Cox, C. C. 70.

**4672. — Merchant Shipping Act, 1854 (c. 104), s. 270.**—A witness whose evidence had been taken abroad by the British Consul under sect. 270 of the above Act, was captain of a British sailing vessel, which was stated, after examination of the official records, by an officer of the Board of Trade, never to have been in this country. When some of the other witnesses left the captain, he was in charge of the vessel at Bordeaux, but it was not known where she was then bound for, or whether he had since sailed:—**Held**: it was sufficiently proved that the witness was not in the United Kingdom, & his deposition was accordingly admitted in evidence.—*R. v. ANDERSON* (1868), 32 J. P. 760; 11 Cox, C. C. 154.

**4673. —**—]—Witnesses whose evidence had been taken abroad by the British Vice-Consul under sect. 270 of the above Act, were officers of a British sailing vessel, which was stated,

after examination of the official records, by an officer of the Board of Trade never to have been in this country:—**Held**: it was sufficiently proved that the witnesses were not in the United Kingdom, & the depositions were accordingly admitted in evidence.—*R. v. CONNING* (1868), 32 J. P. 199; 11 Cox, C. C. 134.

**4674. —**—]—Witnesses whose evidence had been duly taken at New York by the British Consul-General under sect. 270 of the above Act, were seamen of a British sailing vessel which was proved by affidavits to be still at sea & none of the witnesses were likely to be in the United Kingdom for many months:—**Held**: the affidavits sufficiently proved that the witnesses were out of the United Kingdom, their depositions were read & prisoner convicted & sentenced.—*R. v. STEWART* (1876), 13 Cox, C. C. 296.

*E. Identification of Accused.*

*See Sect. 2, ante.*

*F. Corroboration.*

*See Sect. 11, sub-sect. 4, post.*

## SECT. 7.—BEST EVIDENCE.

*See EVIDENCE.*

## SECT. 8.—HEARSAY EVIDENCE.

*See, generally, EVIDENCE.*

**4675. Statement by deceased person—Made in the course of employment—In absence of accused.**]

*R. v. BUCKLEY, No. 2878, ante.*

*BLANDY, No. 4652, ante.*

**4677. —**—]—Conversations between deceased & others, immediately preceding her death, are admissible in order to show the condition she was in at the time of making a particular statement.—*R. v. DALMAS* (1844), 3 L. T. O. S. 243; 9 J. P. 120; 1 Cox, C. C. 95.

**4678. —**—]—On a trial for murder by poisoning, statements made by deceased in conversation shortly before the time at which the poison is supposed to have been administered, are evidence to prove the state of his health at that time.—*R. v. JOHNSON* (1847), 2 Car. & Kir. 354.

**4679. —**—]—In absence of accused.]—A complaint by a deceased child of being hungry, although made in the absence of prisoners, was admitted in evidence.—*R. v. CONDE* (1867), 10 Cox, C. C. 547.

*Annotations*:—**Mentd.** *R. v. Gibbins & Proctor* (1918), 82 J. P. 287; *R. v. Chattaway & Chattaway* (1922), 17 Cr. App. Rep. 7.

**4680. —**—]—Upon an indictment of murder, statements made by deceased, in the absence of prisoner, are admissible as evidence of the bodily condition of deceased, so far as they relate to symptoms contemporaneous with the making of the statement, in order to prove that her death resulted from the condition she was then in. Such statements are, however, inadmissible so far as they narrate the cause of the symptoms, & cannot be given in evidence to prove that the condition of deceased was caused by the

crime had been committed not by him but by another seaman also a foreigner on board the same vessel, & that the said seaman who was now out of the country, had made verbal statements & had also signed a written document, confessing his own guilt & absolving

## PART XII. SECT. 8.

*c. General rule—Inadmissible.*—]—is incorrect in a medical report to include any statement of circumstances from hearsay evidence, & when a report containing such a statement is given in, the sheriff ought to

send it back to be corrected.—*Re SHIELDS* (1846), Arkley, 171.—**SCOT.**

*d. —*—]—In the trial of a foreigner, a seaman on board of a foreign ship, for the crime of assault, special defences were lodged for the panel setting forth *inter alia* that the



**Sect. 8.—Hearsay evidence. Sects. 9, 10, 11 & 12:**  
**Sub-sect. 1.]**

act of any particular person.—*R. v. GLOSTER* (1888), 16 Cox, C. C. 471.

*Annotations:—Fold. R. v. Thomson*, [1912] 3 K. B. 19. *Mentd. R. v. Abbott* (1903), 67 J. P. 151; *R. v. Perry*, [1909] 2 K. B. 697.

**4681. ——— In presence of accused.]—R. v. BLACK**, No. 4152, *ante*.

**Statements against interest.]—See EVIDENCE.**

**4682. Proof of marriage—Evidence of reputation & cohabitation.]—R. v. ATKINSON** (1814), 1 Russell on Crimes & Misdemeanours, 8th ed., p. 103.

**4683. ———.]—Where, on the trial of a man & woman for larceny, it appears by the evidence that they addressed each other as husband & wife, & passed & appeared as such, & were so spoken of by the witnesses for the prosecution, it will be for the jury to say whether they are satisfied that they are in fact husband & wife, even though the woman pleaded to the indictment which described her as a single woman. In such a case a female prisoner ought not to be indicted as a single woman.—R. v. WOODWARD** (1838), 8 C. & P. 561.

*See, also*, Part I., Sect. 5, sub-sect. 4, *ante*; Part XXVII., Sect. 1, *post*.

**4684. Fact of & result of inquiries.]—A witness having stated that, by inquiries, he traced prisoners from place to place:—Held:** the witness might properly say that he made inquiries, & in consequence of directions given to him in answer to those inquiries, he followed prisoners from place to place until he apprehended them.—*R. v. WILKINS* (1849), 4 Cox, C. C. 92.

**4685. ———.]—Deft. was charged with conspiring with two other persons to obtain goods by false pretences from various tradesmen. During the trial a deputy chief constable was called & asked, with reference to a shop opened by one of the persons charged, who had pleaded guilty, "Did you make inquiries as to whether any trade had been done?" The answer was, "I did." He was then asked "Did you, as a result of such inquiries, find that any trade had been done?" & he answered, "I did not":—Held:** this evidence was inadmissible, & the conviction must be quashed.—*R. v. SAUNDERS*, [1899] 1 Q. B. 490; 68 L. J. Q. B. 296; 80 L. T. 28; 63 J. P. 150; 15 T. L. R. 186; 43 Sol. Jo. 245, C. C. R.

*Annotations:—Mentd. R. v. Albutt & Screen* (1910), 6 Cr. App. Rep. 55; *R. v. Yeldham* (1922), 128 L. T. 28.

**4686. ———.]—Applt. had set up an alibi, & had got the governor of the prison to write a letter to a shopkeeper in L., making inquiries as to prisoner's movements; a reply was received to the effect that a police constable had called at the shop & would communicate with B. The chairman read**

the panel:—*Held:* it was not competent to prove the verbal statements by the evidence of those persons to whom they were made.—*Re CAVALARI* (1854), 1 Irv. 564.—**SCOT.**

**4687 i. Conversation with witness not called.]—A person was convicted in a ct. of petty sessions for an offence under Police Offences Act, 1890, Part IV. At the trial, evidence was given by a witness for the prosecution that another person had stated certain facts with regard to accused. The person who made the statements was not called as a witness. Accused gave no evidence with regard to these statements:—Held:** this evidence was wrongfully received in proof of the guilt of accused.—*DUNCAN v. PILCHER* (1895), 21 V. L. R. 412.—**AUS.**

**4687 ii. ———.]—On the trial of an**

that letter to the jury in his summing up, & at that point B. was called into the witness box & gave hearsay evidence as to applt. having been seen in L., but not on the day on which the burglary was committed:—*Held:* the evidence was clearly inadmissible.—*R. v. CAMPBELL* (1912), 77 J. P. 95; 8 Cr. App. Rep. 75, C. C. A.

**4687. Conversation with a witness not called.]—Applt. was convicted of stealing a pair of glasses in a shop. The witness for the Crown who spoke of the theft at the police ct. said that the glasses stolen were Zeiss glasses. This witness was ill at the time of the trial, & being unable to attend, his depositions at the police ct. were read. A pair of glasses were produced from the custody of a pawnbroker, which the prosecution alleged to be the stolen glasses. These glasses were identified by another witness as the property of the firm from whom the pair of glasses had been stolen, but he said that these glasses were Busch glasses. He explained the inconsistency by stating that the other witness who was ill had made a mistake at the police ct. in saying that the stolen glasses were Zeiss glasses, & that he knew this mistake had been made as the other witness had told him so. The ct. quashed the conviction on the ground that the judge at the trial had not told the jury to ignore the conversation spoken to between the two witnesses as being hearsay, but had, on the contrary, suggested to the jury what it was likely the witness who was ill might have said had he come into the box & given evidence.—R. v. RUFFINO** (1911), 76 J. P. 49; *sub nom. R. v. RUFINO*, 7 Cr. App. Rep. 47, C. C. A.

**4688. Existence of rumour.]—Evidence of the fact of a rumour is no evidence of the knowledge of a particular individual & is not within any of the exceptions to the rule which excludes the reception of hearsay evidence.—R. v. GUNNELL** (1886), 55 L. T. 786; 51 J. P. 279; 3 T. L. R. 209; 16 Cox, C. C. 154, C. C. R.

**4689. As evidence for defence—Perjury—Statement made by witness now dead.]—On a prosecution for perjury, where, on the part of the prosecution, the depositions of a deceased person were offered in evidence, & upon the cross-examination of prosecutor's witness, certain declarations of deceased witness, not upon oath, were proved for the purpose of corroborating the facts stated in his depositions, in a matter material to deft.:—Held:** evidence of such declarations was not admissible.—*R. v. PARKER* (1783), 3 Doug. K. B. 242; 99 E. R. 634.

**4690. ——— To rebut contents of dying declaration.]—In an indictment for manslaughter, it is not competent to prisoner to give evidence of a statement made by deceased, as to the cause of the accident 24 hours after it had occurred, unless any dying declarations had been proved on the**

indictment for riot, evidence of general conversations between a witness & the person at whose house prisoners were alleged to have committed the riot was not allowed to be given.—*R. v. MAILLOUX* (1876), 3 Pug. 493.—**CAN.**

**4688 i. Existence of rumour.]—Evidence that there are rumours in a particular place that a man has committed acts of extortion on various occasions, & generally that he is a man of bad character, is not evidence of general repute under Criminal Procedure Code, s. 117. Evidence of rumour is mere hearsay evidence of a particular fact.—RAI ISRI PERSHAD v. R.** (1895), 1 L. R. 23 Calc. 621.—**IND.**

**e. Statement by third party.]—Evidence of the statements of a child not**

made in the witness box is inadmissible as against the guardian as they are statements by a third party & are hearsay.—*SLAPE v. BYRNE* (1918), S. A. L. R. 313.—**AUS.**

**f. ———.]—N. was charged with having made a false statement before a sub-registrar in identifying K. During the hearing of the case it was sought to prove a statement made by R. to a third party, R. having died previous to the institution of the case, to the effect that N. had told him certain facts:—Held:** the statement made by R. to the third party was inadmissible.—*NOBIN KRISHNA MOOKERJEE v. RASSICK LALL LAHA* (1884), 1 L. R. 10 Calc. 1047.—**IND.**

**g. Report of evidence given before committee of House of Commons.]—At the hearing of a criminal charge**

fact of the prosecution. In that case it would be competent to prisoner to contradict such evidence by proving the previous statement of deceased.—*R. v. BROWN* (1840), 4 J. P. 445.

**4691. — Rape—Statement made by third party in presence of prosecutrix.**—*R. v. ARNALL* (1861), 8 Cox, C. C. 439.  
*Annotation*:—*Refd. R. v. Holmes & Furness* (1871), 41 L. J. M. C. 12.

**4692. — Abortion—Death of woman from other cause—Statement by deceased woman as to procurement of abortion by herself.**—*R. v. THOMSON*, No. 3997, *ante*.

#### SECT. 9.—DYING DECLARATIONS.

See Part XXIII., Sect. 1, sub-sect. 1, Q. (b), *post*.

#### SECT. 10.—DEPOSITIONS AND STATEMENTS.

Depositions & statements of witnesses, see Part VII., Sect. 7, sub-sect. 6, G., *ante*.

Depositions of absent witness, see Part VII., Sect. 7, sub-sect. 6, E., *ante*.

before a county judge, sitting as police magistrate, evidence given before a special committee of the House of Commons, & taken by stenographers, was tendered before the magistrate & refused by him:—*Held*: the ct. had no power to grant a *mandamus* to the county judge directing him to receive such evidence.—*R. v. CONNOLLY* (1891), 22 O. R. 220.—*CAN.*

#### PART XII. SECT. 12, SUB-SECT. 1.

**h. Whether competent—Witness under death sentence.**—*GRAEME v. GLOBE PRINTING CO.* (1890), 10 C. L. T. Occ. N. 367.—*CAN.*

**k. —**—*On an indictment for murder against depts., the evidence of one T., convicted of murder & under sentence of death, was tendered by the Crown:—Held*: he was a competent witness.—*R. v. HATCH, MURRAY & HATCH* (1909), 7 E. L. R. 502.—*CAN.*

**l. —**—*Prisoner under sentence of death confined in any prison is a competent witness in any ct. of criminal jurisdiction & is bound to attend upon the order of the judge.*—*R. v. KUZIN* (1915), 30 W. L. R. 803; 8 W. W. R. 166; 21 D. L. R. 378.—*CAN.*

**m. —**—*A person under sentence of death is a competent witness in a criminal trial.*—*R. v. TOM* (1914), T. P. D. 317.—*S. AF.*

**n. — Sentence commuted.**—*A person who has been sentenced to death is competent to give evidence after his sentence has been commuted.*—*R. v. UMHLAHLU* (1904), 25 N. L. R. 264.—*S. AF.*

**o. — Co-prisoner.**—*A co-deft. in a criminal case cannot be compelled to testify, but he may do so if he sees fit.*—*R. v. CONNORS*, [1893] Q. R. 3 Q. B. 100.—*CAN.*

**p. — Acquitted.**—*Where a witness has been rightly, by direction of the ct., acquitted, he may be examined for the prosecution.*—*R. v. O'BRYEN* (1857), 28 L. T. O. S. 360.—*IR.*

**q. — Fresh charge.**—*On first B. & C. having been charged with theft, the charge was not proceeded with against A. & B. C. pleaded guilty & was conditionally released under First Offenders Act, 1887 (c. 25).*

*The prosecutor having brought a new complaint against A. & B., tendered C. as a witness:—Held*: C.'s

evidence was admissible.—*TODD v. PRIESTLY* (1905), 7 F. (Ct. of Sess.) 94; 42 Sc. L. R. 742; 13 S. L. T. 253.—*SCOT.*

**r. — While plea of not guilty stands.**—*A man jointly indicted with others, & who has pleaded not guilty, cannot be a witness for the prosecution whilst his plea stands.*—*R. v. RYAN* (1822), Jebb, Cr. & Pr. Cas. 5.—*IR.*

**s. — As witness for & against co-prisoner.**—*Two persons accused of the same offence, but by two separate indictments, are competent as witnesses either in favour of the Crown & against one another, or the one for the other, & that, even where a verdict has been rendered against them, provided that sentence has not been pronounced.*—*R. v. TELLIER, R. v. PELLETIER* (1870), 1 R. L. O. S. 565.—*CAN.*

**t. — Aboriginal.**—*A judge has power under Act of 1900, No. 20, s. 13, to treat a full-grown aboriginal as incompetent to take an oath, without examining him as to his religious belief, or having some evidence before him of the witness's incompetency.*—*R. v. SMITH* (1906), 6 S. R. N. S. W. 85.—*AUS.*

**u. — Enemy alien.**—*Objection to the admissibility of a witness, in a charge of theft, that he was the subject of a nation with which Great Britain was at war, repelled.*—*H.M. ADVOCATE v. M'GUIRE* (1857), 2 Irv. 620.—*SCOT.*

**v. — Epileptic witness.**—*Evidence of epileptic witness was admitted, with the caution to the jury that they could not safely proceed upon it except in so far as it was corroborated by other witnesses.*—*H.M. ADVOCATE v. STOTT* (1894), 1 Adam, 386.—*SCOT.*

**w. — Persons interested—Forgery.**—*Prisoner was indicted for forging an order for the delivery of goods. The only witnesses examined were the person whose name was forged & the person to whom the order was addressed, & who delivered the goods thereon; & there was no corroborative testimony:—Held*: not sufficient evidence.—*R. v. GILES* (1856), 6 C. P. 84.—*CAN.*

**x. —**—*R. v. McDONALD* (1871), 31 U. C. R. 337.—*CAN.*

**y. —**—*R. v. BANNERMAN* (1878), 43 U. C. R. 547.—*CAN.*

**z. —**—*R. v. FARRELL* (1888), 1 Terr. L. R. 166.—*CAN.*

**Statement of accused at preliminary examination before magistrate, see Part VII., Sect. 7, sub-sect. 6, F.; Part XII., Sect. 5, sub-sect. 2, ante.**

**Statements of persons other than accused, see Part XII., Sect. 4, sub-sect. 5, ante.**

**Complaints, see Part XII., Sect. 4, sub-sect. 6, ante.**

#### SECT. 11.—CREDIBILITY OF WITNESSES.

See EVIDENCE.

#### SECT. 12.—COMPETENT AND COMPELLABLE WITNESSES.

##### SUB-SECT. 1.—IN GENERAL.

See EVIDENCE.

**4693. Person in court—Called as witness—Although not subpoenaed.**—*In a criminal case, a person, who is present in ct., when called as a witness, is bound to be sworn & to give his evidence, although he has not been subpoenaed.*—*R. v. SADLER* (1830), 4 C. & P. 218.

**g. —**—*R. v. HAGERMAN* (1888), 15 O. R. 598.—*CAN.*

**aa. —**—*R. v. SELBY* (1888), 16 O. R. 255.—*CAN.*

**bb. —**—*R. v. DEEGAN* (1889), 6 Man. L. R. 81.—*CAN.*

**cc. —**—*R. v. RHODES* (1892), 22 O. R. 480.—*CAN.*

**dd. —**—*R. v. MCBRIDE* (1895), 26 O. R. 639.—*CAN.*

**ee. —**—*HOULE v. R.* (1905), Q. R. 15 K. B. 170.—*CAN.*

**ff. —**—*Deft. was tried before a judge & jury & convicted of forging the name of J. as maker of three promissory notes. J. had actually made three promissory notes in favour of deft., who had endorsed them to a bank as collateral security for an indebtedness. Deft., needing money, offered to sell these notes to P., who agreed to purchase them, but the bank declined to give them up. Deft. obtained from the bank copies of the three notes, minus the signatures, & afterwards handed over to P. what purported to be three notes signed by J. & endorsed by deft. & his brother, & received from P. the price bargained for. J. swore that the maker's signature upon the notes was not his, & two of the bank officers testified, as did deft. himself:—Held*: there was sufficient corroboration of the testimony of J. to satisfy Criminal Code, s. 1002.—*R. v. SCHELLER* (1914), 27 W. L. R. 621.—*CAN.*

**gg. —**—*R. v. MAGNOLO* 32 D. L. R. 512.—*CAN.*

**hh. Whether compellable—Co-prisoner.**—*A co-deft. in a criminal case cannot be compelled to testify.*—*R. v. CONNORS* (1893), Q. R. 3 Q. B. 100.—*CAN.*

**kk. — Parent as witness against child.**—*A parent adduced as a witness against his child has an option to decline to give evidence.*—*LORD ADVOCATE v. HERVEY* (1835), 13 Sh. (Ct. of Sess.) 1170; 10 Fac. Coll. 30.—*SCOT.*

**ll. — Witness adduced by public prosecutor.**—*A person adduced by a public prosecutor as a witness in a criminal trial cannot refuse to give evidence on the ground that his evidence may implicate him as a socius criminis, the law being that the fact of his having been adduced as a witness by the prosecutor ipso facto discharges him from all liability to prosecution.*—*MACMILLAN v. MURRAY*, [1920] S. C. (J.) 13.—*SCOT.*

*Sect. 12.—Competent and compellable witnesses: Sub-sect. 2, A., B. & C. (a).]*

2.—EVIDENCE OF ACCUSED.

A. On own Behalf.

**4694. General rule—Every criminal charge—Criminal Evidence Act, 1898 (c. 36), ss. 1, 6.]**—Applt. was charged before a ct. of summary jurisdiction with an offence under Prevention of Cruelty to Children Act, 1894 (c. 41), & gave evidence on his own behalf as that Act permits. He was asked in cross-examination whether he had not been previously convicted of a similar offence, & answered that he had. The Criminal Evidence Act, 1898 (c. 36), s. 1, enables "every person charged with an offence "to give evidence on his own behalf; but "a person charged & called as a witness in pursuance of this Act" shall not be asked or required to answer any question of any other offence than that with which he is charged. By s. 6 "this Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act."

The ct. of summary jurisdiction convicted applt.:—*Held*: Criminal Evidence Act, 1898 (c. 36), s. 1, applied; the evidence of the applt.'s previous conviction was wrongly admitted, & therefore, the conviction was bad.—*CHARNOCK v. MERCHANT*, [1900] 1 Q. B. 474; 69 L. J. Q. B. 221; 82 L. T. 89; 64 J. P. 183; 48 W. R. 334; 16 T. L. R. 139; 44 Sol. Jo. 196; 19 Cox, C. C. 443, D. C.

*Annotations*:—*Consd.* *Jenkins v. Feit* (1922), 129 L. T. 95. *Reid. Barker v. Arnold* (1911), 27 T. L. R. 374.

**4695. May be cross-examined.]**—Where a prisoner is on his trial for an offence in which he may & does give evidence, he may be cross-examined to the same extent as in the case of an ordinary witness.—*R. v. GAWTHROP* (1895), 59 J. P. 377.

**4696. — To incriminate co-defendant.]**—A prisoner who is called as a witness for the defence may be cross-examined by counsel for the prosecution in order to incriminate another prisoner charged jointly with him.—*R. v. PAUL, R. v. McFARLANE*, [1920] 2 K. B. 183; 89 L. J. K. B.

PART XII. SECT. 12, SUB-SECT. 2.—A.

**4694 i. General rule—Every criminal charge—Evidence Act, 1898.]**—Under Evidence Act, 1898 (s. 5), an accused person is a competent witness upon his own trial.—*R. v. WHITE* (1898), 20 N. S. W. L. R. 12; 15 N. S. W. N. 197.—*AUS.*

*t.* ———.]—*R. v. AHO* (1904), 25 C. L. T. 50; 11 B. C. R. 114; 8 Can. Crim. Cas. 453.—*CAN.*

*a.* ———.]—By Crimes Act, 1900 (N.S.W.), s. 407, every accused person in a criminal proceeding shall be competent, but not compellable to give evidence in such proceeding.—*JACKSON v. R.*, [1918] 25 C. L. R. 113.—*AUS.*

*b.* *Cannot be compelled to furnish specimen of handwriting.]*—A prisoner,

specimen of his handwriting.—*R. v. GRINDER* (1905), 11 B. C. R. 370.—*CAN.*

*c.* *Not allowed—Before 1898 Act.]*—Deft. on his trial upon an indictment cannot give evidence for himself.—*R. v. HUMPHREYS* (1853), 9 U. C. R. 337.—*CAN.*

*d.* ———.] *Assault occasioning bodily harm.]*—Where a prisoner was indicted under 32 & 33 Vict., c. 20, s. 47 (D), for an assault occasioning bodily harm:—*Held*: he could not be deemed to be on his trial on an indictment for a common assault, so as to

entitle him to be admitted & give evidence as witness on his own ———, under 41 Vict., c. 18, s. 1 (D).—*R. v. BONTRE* (1879), 30 C. P. 19.—*CAN.*

*—*—]—On an indictment for assault & battery, occasioning actual bodily harm:—*Held*: deft. is not a competent witness on his own behalf under 43 Vict. c. 37 (D).—*R. v. RICHARDSON* (1880), 46 U. C. R. 375.—*CAN.*

*f.* ———.]—On an indictment for assault & battery occasioning actual bodily harm accused, at the close of the evidence for the prosecution, asked to be sworn & examined as a witness on his own behalf. The trial judge held that he was not in a position to find that the only case apparently made out was one of common assault or assault & battery, & refused to allow the evidence:—*Held*: accused was not a competent witness on his own behalf under R. S. C., c. 174, s. 216.—*R. v. DRAIN* (1892), 8 Man. L. R. 535.—*CAN.*

*g.* ———.] *Indecent assault—Where offence proved.]*—Prisoner was indicted for an indecent assault. At the close of the case for the Crown prisoner tendered himself as a witness in his own behalf. The judge at the trial ruled that as upon the evidence adduced an indecent assault had been proved, prisoner could not be a witness:—*Held*: the conviction must be affirmed.—*R. v. McDONALD* (1878), 30

801; 123 L. T. 336; 84 J. P. 144; 36 T. L. R. 418; 64 Sol. Jo. 447; 26 Cox, C. C. 619; 14 Cr. App. Rep. 155, C. C. A.

**4697. — Though answer incriminates another person.]**—A deft. giving evidence under the Criminal Evidence Act, 1898 (c. 36), is not dispensed from answering a question merely because his answer might tend to criminate some other person.—*R. v. MINIHANE* (1921), 16 Cr. App. Rep. 38, C. C. A.

**4698. Not allowed—Before grand jury.]**—*R. v. RHODES*, No. 4057, ante.

**4699. — —.]**—A person charged with an offence has no right to give evidence on his own behalf before the Grand Jury.—*R. v. SAUNDERS* (1898), 63 J. P. 24; 15 T. L. R. 104, C. C. R. *Annotation*:—*Mentd.* *R. v. Yeldham* (1922), 128 L. T. 28.

**4700. Time for giving evidence—Whether after plea of guilty—In mitigation of sentence.]**—Prisoner is not entitled to give evidence on oath in mitigation of his sentence after he has pleaded guilty.—*R. v. HODGKINSON & MANNING* (1900), 64 J. P. 808. *Annotations*:—*Dbtd.* *R. v. Bright* (1916), 12 Cr. App. Rep. 69; *R. v. Wheeler*, [1917] 1 K. B. 283.

**4701. — —.]**—Evidence given between a plea of guilty & sentence is given at a stage of the proceedings within Criminal Evidence Act, 1898 (c. 36), s. 1.

Sect. 2 of the Act does not exhaust the opportunities for deft. giving evidence upon oath.

It is very difficult to say that, in an enabling Act of this kind, the legislature wished to prevent prisoner giving evidence except at this particular time in all cases or that he cannot go into the witness box after he has pleaded guilty. It would be a harshness to prisoner (LORD READING, C.J.).—*R. v. WHEELER*, [1917] 1 K. B. 283; 86 L. J. K. B. 40; 116 L. T. 161; 81 J. P. 75; 33 T. L. R. 21; 61 Sol. Jo. 100; 25 Cox, C. C. 603; 12 Cr. App. Rep. 159, C. C. A.

B. For Co-defendant.

**4702. One defendant competent to give evidence on behalf of another—Criminal Evidence Act, 1898 (c. 36), s. 1.]**—If one of two prisoners charged jointly in the same indictment gives evidence on behalf of the other, he is a competent witness for

C. P. 21, n.—*CAN.*

PART XII. SECT. 12, SUB-SECT. 2.—B.

*h.* *One defendant competent to give evidence on behalf of another—Where separately indicted.]*—Two persons accused of the same offence, but in two separate indictments, are competent as witnesses in favour of the Crown, & against one another, or the one for the other, & that even when a verdict has been rendered against them, provided the sentence has not been pronounced against them.—*R. v. TELLER, R. v. PELLETTIER* (1870), 1 R. L. O. S. 565.—*CAN.*

*k.* ———.]—When several persons are separately indicted, one of the persons indicted who has not been tried, is competent on the trial of any of the others who are indicted.—*R. v. DUFFY* (1833), 1 Craw. & D. 195.—*IR.*

*l.* ———.]—Where one of several panels pleaded guilty, the other panels, whose case went to trial, found entitled to the benefit of her evidence.—*H.M. ADVOCATE v. WILSON* (1860), 3 Irv. 623.—*SCOT.*

*m.* ———.] *Not where indictment joint.]*—When several persons are jointly indicted, any one of them, though not upon his trial, cannot be a witness for the others who are on their trials.—*R. v. DUFFY* (1833), 1 Craw. & D. 195.—*IR.*

*n.* ———.] *Except after formal acquittal—Unless joined to exclude*

the defence within the meaning of the above Act.—*R. v. McDONELL (OR McDONALD)* (1909), 73 J. P. 490; 25 T. L. R. 808; 53 Sol. Jo. 745; 2 Cr. App. Rep. 322, C. C. A.

*Annotation*:—*Reid. R. v. Paul, R. v. McFarlane*, [1920] 2 K. B. 183.

**4703. — Not compellable.**—Applt. was not allowed at the trial to call a prisoner jointly indicted with him. The latter declined to give evidence for applt. unless he was compelled. The chairman ruled that, in the circumstances, he was neither a compellable nor a competent witness:—*Held*: the evidence was properly rejected.—*R. v. JENNER* (1910), 6 Cr. App. Rep. 63, C. C. A.

**4704. One defendant giving evidence for another—May be cross-examined to show his own guilt.**—*R. v. ROWLAND*, No. 4034, *ante*.

### C. Cross-Examination as to Character.

#### (a) General Rule.

**4705. Discretion of judge—To allow cross-examination as to character.**—The trial judge has a discretion, with which the ct. is slow to interfere, whether he will allow cross-examination as to character under Criminal Evidence Act, 1898 (c. 36), s. 1 (f).

*Qu.*: whether evidence consistent both with the story of an accomplice-witness & of deft. is corroboration of the former.

If a witness is put forward by the prosecution as an accomplice & a man of bad character, & questions are asked in cross-examination by prisoner with a view of inducing the jury not to accept the evidence given by the witness, such questions may be imputations on the character of the witness within the meaning of the above section.—*R. v. WATSON* (1913), 109 L. T. 335; 29 T. L. R. 450; 23 Cox, C. C. 543; 8 Cr. App. Rep. 249, C. C. A.

*Annotation*:—*Apld. R. v. Cohen* (1914), 111 L. T. 17.

**4706. Whether admissible—Criminal Evidence Act, 1898 (c. 36), s. 1.**—*R. v. ELLIS*, No. 3819, *ante*.

**4707. —**—Applt. was charged before justices sitting as a ct. of summary jurisdiction with an offence, & gave evidence on his own behalf. The solr. who appeared for the prosecution asked applt. in cross-examination whether he had been previously convicted of a similar offence. The justices disallowed the question as being contrary to Criminal Evidence Act, 1898 (c. 36), s. 1 (f), & no answer was given to it, the solr., however, remarking that he had a certified copy of the conviction. The justices convicted applt., stating that the above mentioned incident was entirely ignored by them in arriving at their decision:—*Held*: though the question ought not to have been asked or the observation made, yet inasmuch as the decision of the justices was not affected thereby the conviction was not invalid.—*BARKER v. ARNOLD*, [1911] 2 K. B. 120; 80

L. J. K. B. 820; 105 L. T. 112; 75 J. P. 364; 27 T. L. R. 374; 22 Cox, C. C. 533, D. C.

*Annotation*:—*Consd. Jenkins v. Feit* (1923), 129 L. T. 95.

**4708. —**—Applt. was convicted of obtaining money by false pretences. He appealed on the ground that questions were put to applt. on cross-examination which only tended to show that he was of a generally fraudulent disposition contrary to the Criminal Evidence Act, 1898 (c. 36), s. 1 (f). The appeal was allowed.—*R. v. WILSON* (1915), 11 Cr. App. Rep. 251; 79 J. P. Jo. 508, C. C. A.

*Annotation*:—*Reid. R. v. Beecham*, [1921] 3 K. B. 464.

**4709. — Cross-examination placing accused in a dilemma—Of committing perjury or admitting previous conviction.**—On charges of obtaining food & money by false pretences with intent to defraud, accused was undefended, & gave evidence on his own behalf. The cross-examination of accused was of such a nature that he would be compelled either to commit perjury or to admit a previous conviction:—*Held*: such cross-examination was irregular & contrary to the provisions of Criminal Evidence Act, 1898 (c. 36), s. 1 (f), & the conviction must be quashed.—*R. v. HASLAM* (1916), 85 L. J. K. B. 1511; 114 L. T. 617; 25 Cox, C. C. 344; 12 Cr. App. Rep. 10, C. C. A.

**4710. — Cross-examination in nature of a trap.**—Where questions are put to a prisoner in cross-examination with the object of entrapping him into making imputations on the character of a witness for the prosecution, & he succeeds in doing so, the judge should not upon that ground admit evidence of previous convictions or of bad character pursuant to Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii).—*R. v. GROUT, R. v. JONES* (1909), 74 J. P. 30; 26 T. L. R. 59, 60; 3 Cr. App. Rep. 64, 67, C. C. A.

**4711. —**—The ct. is always inclined to interpret the answers of a prisoner in a way favourable to him, & the prosecution is not entitled to ensnare prisoner into making an attack on the prosecution.—*R. v. SEIGLEY* (1911), 6 Cr. App. Rep. 106, C. C. A.

**4712. —**—Deft. was charged on indictment with manslaughter, it being alleged that by driving his motor car at an excessive speed he ran down & killed a boy. Deft. in cross-examination was repeatedly asked & pressed to answer the question whether he did not buy the motor car because it was capable of being driven at high speed, & he at last replied, "It did not appeal to me for that reason, because I do not care for driving at a high rate of speed myself." The prosecution, treating that statement as evidence given by deft. of his good character as a driver, then asked him whether he had not been repeatedly convicted of driving to the public danger, & deft., being required by the judge to reply, admitted that that was so. Deft. was convicted:—*Held*:

testimony.]—Where no evidence appears against one of several prisoners, he ought to be acquitted at the close of prosecutor's case. *Qu.*: whether without such formal acquittal he may be called as a witness for his co-prisoner; *semble*: not, unless it appear that he has been joined in order to exclude his testimony.—*R. v. HAMBLY* (1859), 16 U. C. R. 617.—*CAN.*

### PART XII. SECT. 12, SUB-SECT. 2.—C. (a).

*o. Whether admissible.*—*R. v. D'Aoust* (1902), 22 C. L. T. 228; 3 O. L. R. 653; 1 O. W. R. 344;

5 Can. Crim. Cas. 407.—*CAN.*

**4709 i. — Cross-examination placing accused in dilemma—Of committing perjury or admitting previous conviction.**—On a trial upon an indictment accused gave evidence on his own behalf & in the course of cross-examination was asked a question, the answer of which would have involved an admission, that he had been previously convicted. No circumstances existed that would have rendered the question a proper one, & the judge instructed accused not to answer & disallowed the question:—*Held*: inasmuch as the accused had not in fact answered the question the conviction must stand.—

*R. v. REIMER* (1910), 12 W. A. L. R. 91.—*AUS.*

*p. — Question answered without objection.*—Accused was tried before a judge & jury & convicted on a charge of theft of money from a passenger in a sleeping-car on a specified day. Accused, having testified on his own behalf, was cross-examined by counsel for the Crown, & asked questions relating to money which had been lost in sleeping-cars on other occasions when he had been, as suggested. In such cases. The questions were not objected to, & were answered by accused, who denied all knowledge of such losses. The Crown made no attempt to prove

*Sect. 12.—Competent and compellable witnesses:*  
*Sub-sect. 2, C. (a), (b), (c) & (d).]*

the method of cross-examination by which deft. had been led to make the above-quoted statement could not be approved; by making the statement in the circumstances he could not be taken to have given evidence of his good character within the meaning of Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii), & therefore, he ought not to have been asked or required to answer the question as to his previous convictions & his evidence regarding them was inadmissible.—*R. v. BEECHAM*, [1921] 3 K. B. 464; 90 L. J. K. B. 1370; 85 J. P. 276; 37 T. L. R. 932; 65 Sol. Jo. 768; 16 Cr. App. Rep. 26, C. C. A.

**4713. Time for taking objection.**—Objections to questions or answers as to character must be taken by counsel at the moment.—*R. v. FARRINGTON* (1908), 1 Cr. App. Rep. 113, C. C. A.

**4714.** —.]—Technical objections to the admission of evidence must be taken at the trial.—*R. v. BENSON* (1909), 3 Cr. App. Rep. 70, C. C. A.

**4715.** —.]—Applt. was charged with having stolen money & a bank book from the prosecutor in a public-house; applt. & several other men were present at the time of the theft, & the bank book was found in the applt.'s pocket. The defence set up was that one or more of the other men had committed the theft & had put the bank book into applt.'s pocket, & when two of these men were called as witnesses for the prosecution, they were asked questions by applt.'s counsel with a view to show that they had committed the theft. Applt. was called as a witness for the defence &, without objection by his counsel, was asked questions by counsel for the prosecution as to a previous conviction:—*Held*: the nature & conduct of the defence were such as to involve imputations on the character of witnesses for the prosecution, within Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii), & therefore the accused could be cross-examined as to previous convictions.

The absence of objection by prisoner's counsel at the trial to the admissibility of the cross-examination as to previous convictions is not conclusive, but may have an important bearing upon the question whether prisoner should be allowed to raise the question of its admissibility on appeal.—*R. v. HUDSON*, [1912] 2 K. B. 464; 81 L. J. K. B. 861; 107 L. T. 31; 76 J. P. 421; 28 T. L. R. 459; 56 Sol. Jo. 574; 23 Cox, C. C. 61; 7 Cr. App. Rep. 256, C. C. A.

*Annotations*:—*Apld.* *R. v. Watson* (1913), 109 L. T. 335. *Distd.* *R. v. Biggin*, [1920] 1 K. B. 113.

**4716. Questions by judge.**—A judge in endeavouring to help a prisoner by showing that he had not a bad character, elicited the fact that he had been previously convicted. The evidence against prisoner was slight, but, although the judge warned the jury to pay no attention to the fact that had been elicited, he was convicted. The judge, in certifying that the case was fit for appeal on the ground of this error, said that he was not satisfied that it might not be possible that had it not been for this knowledge applt. might have been acquitted. The conviction was quashed.—*R. v. HEMINGWAY* (1912), 77 J. P. 15; 29 T. L. R. 13; 8 Cr. App. Rep. 47, C. C. A.

*Annotation*:—*Refd.* *R. v. Redd*, [1923] 1 K. B. 104.

**4717.** —.]—Prisoner, charged with looting a shop during a riot, alleged that he was pushed into

the shop, & in giving evidence he stated that he had been in the army in 1916, 1917 & 1918, & in the merchant service in 1919. He was closely questioned by the recorder as to his alleged service in the army & merchant service, & was warned that if he persisted in his statements the matter would be pursued further. He admitted eventually that he was not in France in the early part of 1918, & that he was not in the army in 1916. He was convicted, & appealed on the ground that the questions asked were contrary to the provisions of the Criminal Evidence Act, 1898 (c. 36), s. 1, as tending to show that he was previously of bad character:—*Held*: the questions put by the recorder, taken either individually or as a whole, tended to show that accused was of bad character or had previously committed a criminal offence, & were improper; the ct. could not say that if the questions had not been put the jury were bound to arrive at the same verdict; the appeal must be allowed & the conviction quashed.—*R. v. RATCLIFFE* (1919), 89 L. J. K. B. 135; 122 L. T. 384; 84 J. P. 15; 26 Cox, C. C. 554; 14 Cr. App. Rep. 95, C. C. A.

*Annotation*:—*Refd.* *R. v. Redd*, [1923] 1 K. B. 104.

**4717a. Effect of inadmissible question.**—*Previous conviction.*—If questions are asked, in the course of summary proceedings, of accused, which contravene Criminal Evidence Act, 1898 (c. 36), s. 1 (f), it is not a universal rule that the information must be dismissed; the mere asking of such questions is not conclusive, but the ct. should consider whether the impression made upon its mind by these questions, or the answers given to them, can or cannot be effaced when the task of forming the judgment arises, & whether upon the rest of the evidence, that is to say, the evidence which is not open to any observation, the materials are such as to lead to a conviction.—*JENKINS v. FEIT* (1923), 129 L. T. 95; 87 J. P. 129; 39 T. L. R. 467; 67 Sol. Jo. 706; 27 Cox, C. C. 427, D. C.

(b) *When relevant to Offence charged.*

**4718. Commission of other similar acts.**—*R. v. CHITSON*, No. 4010, *ante*.

**4719.** —.]—*R. v. THOMSON*, No. 3997, *ante*.

**4720.** —.]—*To substantiate identification.*—*PERKINS v. JEFFERY*, No. 3941, *ante*.

**4721. To rebut issue raised by defence.**—Applt. & four other men were convicted for conspiring by means of false pretences to defraud the prosecutor, the false pretences alleged being the holding of a mock auction.

Defts. denied the false pretences & also alleged that they were all merely the servants of a woman who was the proprietress of the auction business. Applt. gave evidence & was asked in cross-examination whether it was not the fact that he & the proprietress of the business were at the date of the offence living together as man & wife. Applt. answered the question in the affirmative. Applt. appealed against his conviction on the ground that this question was a contravention of Criminal Evidence Act, 1898 (c. 36), s. 1 (f), in that it tended to show that he was a person of bad character:—*Held*: the defence having raised the issue that defts. were only the servants of the proprietress of the business, it was material to show what were the real relations existing between her & applt., & the question was therefore admissible.—*R. v. KURASCH*, [1915] 2 K. B. 749; 84 L. J. K. B.

the facts suggested. The trial judge directed the jury to disregard those questions & answers & any inferences suggested by them:—*Held*: full

justice was done to accused by the trial judge's direction, & it was his duty to give such direction, independently of whether the questions were

properly asked or not.—*R. v. HURD* (1913), 23 W. L. R. 812; 10 D. L. R. 475; 4 W. W. R. 185; 21 Can. Crim. Cas. 98.—*CAN.*

1497; 113 L. T. 431; 79 J. P. 399; 25 Cox, C. C. 55; 11 Cr. App. Rep. 166, C. C. A.

**4722.** —.]—When a matter is distinctly relevant to the defence set up, a question about it in cross-examination of deft. even though the answer may incriminate him is admissible within Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii).—*R. v. O'DONNELL* (1917), 12 Cr. App. Rep. 219, C. C. A.

**4723. To corroborate evidence of accomplice.**—*R. v. KENNAWAY*, No. 3922, *ante*.

*See, also, Sect. 4, ante.*

(c) *When Accused or Witness gives Evidence of good Character.*

**4724. Witnesses to character.**—If upon the trial of a prisoner he calls witnesses to character, the prosecutor may in answer show that he had previously been charged with or indicted for a similar offence.

But the prosecutor will not be allowed to give evidence of any such charge or indictment made & preferred contemporaneously with that under consideration. It must have been so made or preferred antecedently to be admissible on evidence.—*R. v. ROGERS & ELLIOTT* (1846), 10 J. P. 170.

**4725.** —. **Not when evidence is unsolicited.**—*R. v. REDD*, No. 3820, *ante*.

**4726. Evidence by accused.**—The ct. refused to reduce a sentence of 21 months' hard labour.

A statement to the jury of applt.'s previous conviction of which he complained was due to his defence that his character was good.—*R. v. WILLIAMS* (1908), 1 Cr. App. Rep. 20, C. C. A.

**4727.** —.]—*Qu.*: whether prisoner who gives evidence that he is in respectable employment

**4728.** —.]—Applt. was convicted of larceny. The appeal was upon the ground that there had been a miscarriage of justice owing to applt. having been cross-examined as to previous convictions.

Applt. went into the box, & after having said he was a Roman Catholic, asked to read a letter, which was allowed. In the letter applt. stated that he had attended mass & service for over 36 years, & that he had "never taken any article from his Faith." The letter showed that he was a member of several religious societies.

If prisoner merely calls the prosecutor or one of his witnesses a liar, his character cannot forthwith be attacked, but there is no ground whatever for granting leave to appeal (*per Cur.*).—*R. v. FERGUSON* (1909), 2 Cr. App. Rep. 250, C. C. A.

**4729.** —.]—Under Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii), a person charged with an offence & called as a witness, who has given evidence of his own good character, may be asked & required to answer a question tending to show that he has been convicted of an offence other than that with which he is then charged, notwithstanding that that other offence was committed subsequently to the offence with which he is then charged.—*R. v. WOOD*, [1920] 2 K. B. 179; 89 L. J. K. B. 435; 123 L. T. 335; 84 J. P. 92; 64 Sol. Jo. 409; 26 Cox, C. C. 617; 14 Cr. App. Rep. 149, C. C. A.

— **Elicited by cross-examination.**—*See Nos. 3821–3823, ante.*

(d) *When Defence involves Imputations on Character of Prosecutor or Witnesses for Prosecution.*

He was  
for how

when he was arrested, "I am a respectable man; I am earning my living; I never robbed anyone of a penny." Upon this, cross-examination as to credit was introduced, & proceeded with in spite of objections:—*Held*: if applt. gave evidence of what he said to the police officer, & that was only to be taken to be evidence of that statement, a way out of the above Act was at once made, because prisoners would be told that they had merely to make a statement alleging good character when they were arrested, & that could be made evidence at the trial without their being themselves attacked, & evidence as to recent employment & its duration was not evidence of good character.—*R. v. SOLOMON* (1909), 2 Cr. App. Rep. 80, C. C. A.

*Annotations*:—*Reid*, *Ibrahim v. R.*, [1914] A. C. 599; *R. v. Beecham*, [1921] 3 K. B. 464.

#### PART XII. SECT. 12, SUB-SECT. 2.— C. (c).

**4725 i. Witnesses to character.**—*Not when evidence is unsolicited.*—Even after evidence of prisoner's good character has been made by the cross-examination of Crown witnesses, the prosecution is entitled to prove his general reputation & not particular acts of misconduct.—*R. v. LONG* (1902), Q. R. 11 K. B. 328.—*CAN.*

**4726 i. Evidence by accused.**—Prisoner in examination-in-chief gave evidence that she was a certified midwife & had carried on that business for 15 years at her house & used to deliver maternity cases there. In cross-examination she was asked, "How long

is it since a child was born at your house?" & she answered "2½ years":—*Held*: the question was relevant & admissible as tending to rebut the defence that the acts of prisoner were not done to procure abortion & to answer evidence the effect of which was to suggest the good character of prisoner.—*R. v. GRAHAM*, [1915] V. L. R. 402.—*AUS.*

#### PART XII. SECT. 12, SUB-SECT. 2.— C. (d).

**4733 i. What amounts to imputation.**—*Calling witness a liar—Insufficient.*—Upon a trial by presentment for certain offences, one of the issues was whether or not prisoner was one of three persons

191, C. C. A.

**4732.** —. **Attack on general veracity of prosecutor—Sufficient.**—An attack on the general veracity of the prosecutor is a sufficient imputation within Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii), to justify cross-examination as to previous conviction.—*R. v. RAPPOLT* (1911), 6 Cr. App. Rep. 156, C. C. A.

**4733.** —. **Calling witness a liar—Insufficient.**—Upon the trial of an indictment for conspiring by false pretences to induce the prosecutor to sell a mare, the prosecutor gave evidence that one of defts. had previously offered to buy the mare on credit. Deft. in question was called as a witness for the defence, & was asked in cross-examination, "Did you ask the prosecutor to sell you the mare in April, or has he invented all this?" To which he replied, "No, it is a lie, & he is a liar." Counsel

who were driven in a motor-car on the occasion in question. A witness, who was the sole witness for the prosecution, identified prisoner as a person whom he had then driven. Prisoner pleaded not guilty & relied on the defence of alibi. After giving evidence he was cross-examined & in reply to questions stated that the witness was a liar & suggested that he was an accessory to another person who was then being tried for similar offences. He was thereupon, notwithstanding objection, cross-examined as to prior convictions which he admitted. On appeal:—*Held*: the answers in cross-examination in relation to the witness were part of the case for the prosecution & therefore the nature or conduct of the



*Sect. 12.—Competent and compellable witnesses: Sub-sect. 2, C. (d) & (e).]*

for the prosecution was thereupon allowed to cross-examine deft. as to previous convictions:—*Held*: deft.'s answer amounted only to an emphatic denial of the truth of the charge against him; the nature or conduct of the defence was not such as to involve imputations on the character of the prosecutor within the meaning of Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii), & therefore deft. was not liable to be cross-examined as to his previous character.—*R. v. ROUSE*, [1904] 1 K. B. 184; 73 L. J. K. B. 60; 89 L. T. 677; 68 J. P. 14; 52 W. R. 236; 20 T. L. R. 68; 48 Sol. Jo. 85; 20 Cox, C. C. 592, C. C. R.

*Annotations*:—*Foll.* *R. v. Grout* (1909), 26 T. L. R. 60. *Refd.* *R. v. Bridgewater* (1904), 74 L. J. K. B. 35; *R. v. Hudson* (1912), 76 J. P. 421; *R. v. Jones* (1923), 87 J. P. 147.

**4734.** — — — — —.]—*R. v. FERGUSON*, No. 4728, *ante*.

**4735.** — *Suggestion that witness for prosecution committed the offence—Sufficient.*—Where a prisoner makes a statement on oath in her own defence, to the effect that one of the witnesses for the prosecution committed the offence for which she is indicted, the nature of the defence is such as to involve imputations on the character of that witness within the meaning of Criminal Evidence Act, 1898 (c. 36), s. 1, even though such statement relates only to facts material to the actual charge for which prisoner is then being tried, & not to any antecedent facts, & is not made for the purpose of casting imputations, but only as a necessary part of the defence.—*R. v. MARSHALL* (1899), 63 J. P. 36.

*Annotation*:—*Consd.* *R. v. Hudson*, [1912] 2 K. B. 464.

**4736.** — — — — —.]—*R. v. HUDSON*, No. 4715, *ante*.

**4737.** — *Suggestion that prosecutrix a "drunken wastrel"—Sufficient.*—*R. v. HOLMES* (1899), *Times*, Jan. 31.

**4738.** — *Suggestion that witness keeps a disorderly house—Sufficient.*—To suggest in cross-examination that a witness for the prosecution keeps a disorderly house falls within the express terms of Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii) & exposes prisoner to the risk of his past life being inquired into.

By leave of ct. fresh evidence can be called for defence.—*R. v. MORRISON* (1911), 75 J. P. 272; 22 Cox, C. C. 214; 6 Cr. App. Rep. 159, C. C. A.

**4739.** — *Suggestion that prosecutor a habitual drunkard—Insufficient.*—Applt. cross-examined the prosecutor with a view to showing that the prosecutor was not only drunk at the time he said he was robbed, but was a habitual drunkard. The judge allowed applt. to be cross-examined as to previous convictions:—*Held*: the imputations made by applt. did not bring the case within Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii), & therefore the conviction would be quashed.—*R. v. WESTFALL* (1912), 107 L. T. 463; 76 J. P. 335; 28 T. L. R. 297; 23 Cox, C. C. 185; 7 Cr. App. Rep. 176, C. C. A.

*Annotations*:—*Consd.* *R. v. Hudson*, [1912] 2 K. B. 464. *Refd.* *R. v. Roberts* (otherwise Spalding) (1920), 37 T. L. R. 69.

defence did not involve imputation on the character of any witness for the prosecution within Crimes Act, 1915 (No. 2) (No. 2789), s. 2 (5) (b), & cross-examination as to prior convictions was inadmissible & conviction quashed.—*R. v. EVERITT*, [1921] V. L. R. 245.—**AUS.**

**4735 i.** — *Suggestion that witness for prosecution committed the offence—*

*Sufficient.*—At the trial of a charge of robbery & receiving, counsel for accused cross-examined a witness for the prosecution, with the view of showing that he was guilty of receiving the property alleged to have been stolen. Witness denied guilt. Accused gave evidence & leave was given to cross-examine him as to prior convictions on the ground that the nature

**4740.** — *Imputations against witness of admittedly bad character—Sufficient.*—*R. v. WATSON*, No. 4705, *ante*.

**4741.** — — — — —.]—To suggest that a witness for the prosecution, tendered as an accomplice & a person of bad character, has committed a crime other than that he has admitted, is an imputation within Criminal Evidence Act, 1898 (c. 36), s. 1, (f) (ii).

The practice of the C. C. A. is to require corroboration of an accomplice's evidence even though it be not required by statute.—*R. v. COHEN* (1914), 111 L. T. 77; 24 Cox, C. C. 216; 10 Cr. App. Rep. 91, C. C. A.

*Annotations*:—*Consd.* *R. v. Baskerville*, [1916] 2 K. B. 658. *Expld.* *R. v. Willis*, [1916] 1 K. B. 933.

**4742.** — *Suggestion that prosecution is due to desire for revenge—Sufficient.*—A suggestion that the prosecution is due to a desire for revenge is an imputation within Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii).—*R. v. ROBERTS* (OTHERWISE SPALDING) (1920), 37 T. L. R. 69; 15 Cr. App. Rep. 65, C. C. A.

**4743.** — *Suggestion of consent in rape—Sufficient.*—*R. v. FISHER* (1899), *Times*, Jan. 31; *sub nom.* *R. v. —*, 34 L. Jo. 100.

*Annotations*:—*Consd.* *R. v. Bridgewater* (1904), 74 L. J. K. B. 35. *Dbtd.* *R. v. Sheean* (1908), 72 J. P. 232.

**4744.** — — — — —.]—*Insufficient.*—Prisoner was indicted for a rape upon a woman of full age. Sworn as a witness upon his own behalf he alleged that the acts complained of took place with the consent of the prosecutrix:—*Held*: this was not a defence such as to involve imputation on the character of the prosecutrix within the meaning of Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii), so as to entitle the prosecution to cross-examine as to previous convictions.—*R. v. SHEEAN* (1908), 72 J. P. 232; 24 T. L. R. 459; 21 Cox, C. C. 561.

*Annotations*:—*Consd.* *R. v. Preston*, [1909] 1 K. B. 568. *Refd.* *R. v. Morgan* (1910), 5 Cr. App. Rep. 157; *R. v. Jones* (1923), 87 J. P. 147. *Mentd.* *R. v. Wright* (1910), 5 Cr. App. Rep. 131.

**4745.** — *Suggestion that story of rape is invented—Sufficient.*—Prisoner was indicted for rape upon a girl of 13. He gave evidence on his own behalf, & in cross-examination, he was asked whether the girl had invented the story, to which he replied that she had not invented it herself; & on being asked who had, said it was her mother, the prisoner's wife, who was a witness in the case. In answer to further questions prisoner said his wife wanted to get rid of him, & that he had heard his children say that another man had been coming to the house in his absence. Counsel for the prosecution then said, "You suspect your wife of immoral relations with another man," to which the prisoner replied, "Yes." Thereupon counsel for the prosecution was allowed to put questions to prisoner under Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii), as to his relations with another girl, who was a witness in the case, which, if established, amounted to a criminal offence, but the prisoner denied those relations. The prisoner was convicted:—*Held*: the answers given by prisoner in cross-examination were not necessary for the "conduct of the defence," & as they involved imputations on the character of

or conduct of the defence involved imputations on the character of a witness for the prosecution. Accused was convicted. On appeal:—*Held*: under Crimes Act (No. 2), 1915, s. 2 (5), cross-examination of accused as to his prior convictions was rightly allowed.—*R. v. MALCOLM*, [1919] V. L. R. 596.—**AUS.**



a witness for the prosecution, the questions as to prisoner's relations with the other girl were properly allowed.—*R. v. GROUT, R. v. JONES* (1909), 74 J. P. 30 ; 26 T. L. R. 59, 60 ; 3 Cr. App. Rep. 64, 67, C. C. A.

**4746. — Imputations on conduct of police.—Sufficient.]**—*R. v. FISHER, No. 4743, ante.*

**4747. — Insufficient.]**—A prisoner who was arrested in possession of stolen property said in answer to the charge that he was acting under instructions from a detective, & at the trial at quarter sessions the detective was cross-examined as to whether he had not employed prisoner as an informer:—*Held*: the nature or conduct of the defence was not such as to involve imputations on the character of the witnesses for the prosecution under Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii), so as to render prisoner liable when called in his own defence to be cross-examined as to previous convictions.—*R. v. BRIDGWATER, [1905] 1 K. B. 131 ; 74 L. J. K. B. 35 ; 91 L. T. 838 ; 69 J. P. 26 ; 53 W. R. 415 ; 21 T. L. R. 69 ; 49 Sol. Jo. 69 ; 20 Cox, C. C. 737, C. C. R.*

*Annotations:—Consd. R. v. Preston, [1909] 1 K. B. 568 ; R. v. Hudson, [1912] 2 K. B. 464. Refd. R. v. Westfall (1912), 107 L. T. 463 ; R. v. Watson (1913), 8 Cr. App. Rep. 249 ; R. v. Roberts (otherwise Spalding) (1920), 15 Cr. App. Rep. 65 ; R. v. Jones (1923), 87 J. P. 147. Mentd. R. v. Biggin (1919), 83 J. P. 293.*

**4748. — ]**—Upon the trial of an indictment for an offence one of the issues was whether deft. was the man who was seen near the place where the offence was committed. Two witnesses identified deft. at the police station as the man they had seen near the place, but a third person failed to identify him. With respect to this latter occasion deft. in his evidence stated that the police inspector, who was present on the occasion & who gave evidence for the prosecution, said to the constable who was sent to bring the person in for the purpose of seeing whether he could identify deft., "the second," or something like it ; that he, deft., was placed second from one end of a row of men ; & that the person who was brought in did not pick him out, but picked out the man who was second from the other end. Counsel for the prosecution was then allowed to ask deft. whether he had not been convicted on previous occasions. No reliance was placed upon the above evidence in support of the defence, nor was the defence conducted on the footing that the inspector's evidence ought not to be believed:—*Held*: the allegation of deft., so far as it reflected on the inspector, was made with reference to the conduct of the identification proceedings, which were relevant to the defence ; though the identification on the particular occasion had failed, & therefore the allegation was not strictly relevant to the defence, it was natural for deft. to make some comment on those proceedings ; & the nature or conduct of the defence was not such as to involve imputations on the character of the inspector within the meaning of Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii), so as to allow deft. to be cross-examined as to previous convictions.—*R. v. PRESTON, [1909] 1 K. B. 568 ; 78 L. J. K. B. 335 ; 100 L. T. 303 ; 73 J. P. 173 ; 25 T. L. R. 280 ; 53 Sol. Jo. 322 ; 21 Cox, C. C. 773 ; 2 Cr. App. Rep. 24, C. C. A.*

*Annotations:—Consd. R. v. Hudson, [1912] 2 K. B. 464 ; R. v. Roberts (otherwise Spalding) (1920), 15 Cr. App. Rep. 65 ; R. v. Jones (1923), 87 J. P. 147. Refd. R. v. Wright (1910), 5 Cr. App. Rep. 131 ; R. v. Westfall (1912), 107 L. T. 463 ; R. v. Watson (1913), 8 Cr. App. Rep. 249 ; R. v. Biggin, [1920] 1 K. B. 213.*

**4749. — Sufficient.]**—A suggestion by prisoner that admissions made by him when in custody were obtained from him by the bribes or threats of a police officer is an imputation within Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (ii), & on that ground questions as to applt.'s character were properly admitted.—*R. v. WRIGHT (1910), 5 Cr. App. Rep. 131, C. C. A.*

**4750. — ]**—During applt.'s trial on a charge of burglary his counsel, acting on instructions, stated that his client's case was that there was no genuine evidence against him, but that the police had invented a confession by him & had obtained four remands when the case was before the magistrates to enable them to perfect their scheme:—*Held*: the nature & conduct of the applt.'s defence was such as to involve imputations on the character of the police who had given evidence for the prosecution & he had rightly been cross-examined as to his previous convictions.—*R. v. JONES (1923), 87 J. P. 147 ; 39 T. L. R. 457 ; 67 Sol. Jo. 751 ; 17 Cr. App. Rep. 117, C. C. A.*

**4751. — Imputations on character of dead prosecutor.—Insufficient.]**—Applt. was indicted for murder. The defence set up was that the act had been done in self-defence, the killed man having made improper overtures to the applt., & on these being rejected had violently assaulted him. Questions were addressed to applt. in cross-examination which had no relevance to the charge of murder, but which tended to show that applt. had previously committed an offence other than that for which he was being tried. No evidence had been given or questions asked to show that applt. had a good character. The questions although objected to, were admitted on the grounds that the dead man was the prosecutor & that the defence involved an imputation upon his character, & because they tended to show that applt. did not always speak the truth. Applt. was convicted of manslaughter & appealed:—*Held*: the questions were not admissible on the ground that the defence involved an imputation on the character of the dead man inasmuch as he was not the prosecutor within the meaning of Criminal Evidence Act, 1898 (c. 36), s. 1 (4), & the questions were not admissible to prove that applt. did not always speak the truth, & therefore the conviction must be quashed.—*R. v. BIGGIN, [1920] 1 K. B. 213 ; 89 L. J. K. B. 99 ; 83 J. P. 293 ; 36 T. L. R. 17 ; 26 Cox, C. C. 545 ; 14 Cr. App. Rep. 87, C. C. A.*  
*Annotation:—Refd. R. v. Ratcliffe (1919), 89 L. J. K. B. 135.*

**4752. Whether warning to accused necessary.]**—*R. v. BENSON, No. 4714, ante.*

**4753. Accused not to be trapped into attacking prosecution.]**—*R. v. GROUT, R. v. JONES, No. 4710, ante.*

**4754. — ]**—*R. v. SEIGLEY, No. 4711, ante.*

(e) *When Evidence given against Another for same Offence.*

**4755. Evidence against co-defendant—Right to cross-examine.]**—Where a deft. gives evidence on his own behalf, counsel for another deft. cannot ask him further questions on behalf of his client without giving the prosecution the right of reply. But if the evidence given by the witness has been hostile to another deft., counsel for such deft. has the right to cross-examine without giving such right of reply.—*R. v. PAGET (1900), 64 J. P. 281.*

**PART XII. SECT. 12, SUB-SECT. 2.—C. (e).**

**4755 i. Evidence against co-defendant J.—VOL. XIV.**

—*Right to cross-examine.*—Where two persons were jointly indicted the evidence of one is legally admissible to inculcate the other & the latter is

entitled to cross-examine the former.—*R. v. MARRIOTT (1908), 8 S. R. N. S. W. 350.—AUS.*

*Sect. 12.—Competent and compellable witnesses:*  
*Sub-sect. 2, C. (e); sub-sect. 3, A. (a).]*

**4756. — As to character.]**—The Criminal Evidence Act, 1898 (c. 36), was passed, the object of which was to enable prisoners to be called as witnesses on their own behalf. . . . I think that it occurred to the Legislature that cases might arise, where prisoners were jointly indicted, in which one prisoner might give evidence attacking the other prisoner, because clause (f) of s. 1, after limiting the right to cross-examine a prisoner, by providing that he shall not be asked questions tending to show that he has committed other offences or is of bad character, goes on to remove that restriction in certain cases, one of which is, where prisoner "has given evidence against any other person charged with the same offence." I think that the most ordinary case of that would be where there are two or more prisoners jointly indicted. . . . I think that the ordinary case of two or more prisoners being jointly indicted for the same offence is exactly the case where general cross-examination ought to be allowed (LORD ALVERSTONE, C.J.).—*R. v. HADWEN*, [1902] 1 K. B. 882; 71 L. J. K. B. 581; 86 L. T. 601; 66 J. P. 456; 50 W. R. 589; 18 T. L. R. 555; 20 Cox, C. C. 206, C. C. R.  
*Annotations:—**Reid. R. v. Hunting & Ward* (1908), 1 Cr. App. Rep. 177; *R. v. Macdonnell (or Macdonald)* (1909), 2 Cr. App. Rep. 322; *R. v. Paul*, *R. v. McFarlane*, [1920] 2 K. B. 183.

**SUB-SECT. 3.—EVIDENCE OF WIFE OR HUSBAND OF ACCUSED.**

**A. At Common Law.**

**(a) For or against Accused.**

**4757. General rule—Not admissible.]**—ANON. (1612), 1 Brownl. 47; 123 E. R. 656.

**4758. — ]**—A wife cannot be admitted, at common law, to give evidence against her husband or *vice versa*, in any indictable crime other than treason.—GRIGGS'S CASE (1660), T. Raym. 1; 83 E. R. 1.

**4759. — ]**—A wife shall not be called in any case to give evidence even tending to criminate her husband. In a case of settlement, where a marriage in fact had been proved between two paupers, the first wife of the husband is not a

competent witness to prove a former marriage with him, because such evidence shows him to have been guilty of bigamy.—*R. v. CLIVIGER (INHABITANTS)* (1788), 2 Term Rep. 263; 100 E. R. 143.

*Annotations:—**Dbtd. R. v. All Saints Worcester* (1817) 6 M. & S. 194. *Consd. R. v. Bathwick* (1831), 2 B. & Ad. 639. *Refd. Aveson v. Kinnaird* (1805), 6 East, 188. *Henman v. Dickinson* (1828), 5 Bing. 183; *Stapleton v. Crofts* (1852), 18 Q. B. 367.

**4760. — ]**—Husbands & wives cannot in any case be witnesses either for or against each other.—DAVIS v. DINWOODY (1792), 4 Term Rep. 678; 100 E. R. 1241.

*Annotations:—**Consd. Gregg v. Taylor* (1828), 5 Russ. 19. *Refd. R. v. Bathwick* (1831), 9 L. T. O. S. M. C. 103; *Stapleton v. Crofts* (1852), 18 Q. B. 367.

**4761. — Conspiracy.]**—Indictment against the wife of S. & others, for a conspiracy in procuring S. to marry:—*Held*: (1) S. was not a competent witness in support of the prosecution; (2) in all cases where husband & wife are admissible witnesses against each other, they are also admissible for each other.—*R. v. SERJEANT* (1826), Ry. & M. 352, N. P.

*Annotation:—**Refd. Reeve v. Wood* (1864), 5 B. & S. 364.

**4762. — ]**—A wife is not an admissible witness against her husband in support of a charge of desertion of wife & children prepared by the parish under Vagrancy Act, 1824 (c. 83).

The general rule is that a wife is not admissible as a witness for or against her husband, except in civil cases. But in criminal matters, from an early period, beginning with *Lord Audley's Case*, No. 628, *ante*, there was an exception to the rule, which went on the principle that where the offence charged touches the person of the wife, & she must be cognisant of it, & may be the only person who is cognisant of it, then the wife is an admissible witness against her husband. That applies to all cases where there is personal violence inflicted by the husband on the wife (*BLACKBURN, J.*).—*REEVE v. WOOD* (1864), 5 B. & S. 364; 5 New Rep. 173; 34 L. J. M. C. 15; 34 L. J. Q. B. 24; 11 L. T. 449; 29 J. P. 214; 11 Jur. N. S. 201; 13 W. R. 154; 10 Cox, C. C. 58; 122 E. R. 867.

*Annotations:—**Consd. R. v. London Corp.* (1886), 16 Q. B. D. 772. *Refd. Public Prosecutions Director v. Blady* (1912), 106 L. T. 302.

**4763. — Larceny of husband's property.]**—Upon the trial of a married woman jointly with another person for larceny of the property

**PART XII. SECT. 12, SUB-SECT. 3.—**  
**A. (a).**

**4757 i. General rule—Not admissible.]**—On trial of deft. on an indictment, his wife cannot be admitted as a witness.—*R. v. HUMPHREYS* (1853), 9 U. C. R. 337.—CAN.

**4757 ii. — ]**—Evidence of a wife is inadmissible against her husband.—*R. v. BROWN*, [1920] C. P. D. 20.—S. AF.

**a. — Bigamy.]**—In a case of bigamy, the evidence of the first wife is not admissible, nor is that of the second wife until the first marriage is proved.—*R. v. TUBBEE* (1852), 1 P. R. 98.—CAN.

**r. — ]**—In an indictment for bigamy, the first wife cannot be allowed to testify either for or against prisoner.—*R. v. MCQUIGGAN* (1852), 2 L. C. R. 340.—CAN.

**s. — ]**—The first wife is not admissible as a witness to prove that her marriage with prisoner was invalid.—*R. v. MADDEN* (1857), 14 U. C. R. 588.—CAN.

**t. — Assault on constable.]**—An assault on a constable attempting to serve a summons issued by a magistrate on information charging violation of Canada Tempe-

rance Act, is an assault on a peace officer in the due execution of his duty, & indictable under R. S. C., c. 162, s. 31. On the trial of an indictment for such assault the wife of deft. is not a competent witness on his behalf.—*MACFARLANE v. R.* (1889), 16 S. C. R. 393.—CAN.

**a. — Assault occasioning bodily harm.]**—*R. v. NAN-E-QUIS-A-KA* (1889), 1 Terr. L. R. 211.—CAN.

**b. — False pretences.]**—In a prosecution for obtaining money by false pretences deft.'s wife is neither a competent nor a compellable witness for the Crown.—*R. v. ALLEN* (1913), 41 N. B. R. 516; 14 E. L. R. 40; 14 D. L. R. 825; 22 Can. Crim. Cas. 124.—CAN.

**c. — Murder.]**—On a trial for murder a woman was called as witness by the Crown, who had married accused according to Indian custom about 20 years previously & had several children by him. Accused had been married by Indian custom to two other women who were still living, but they had redeemed themselves, i.e., purchased their release from marriage by Indian custom before his marriage to witness. The witness gave evidence to the effect that a short time

before this trial she had redeemed herself & left her husband:—*Held*: her evidence was not admissible.—*R. v. WILLIAMS* (1921), 37 Can. Crim. Cas. 126; 30 B. C. R. 303.—CAN.

**d. — Adultery with native.]**—Where the adulterer & the wife are charged jointly with a contravention of Natives Adultery Ordinance the evidence of the husband is inadmissible against the wife.—*R. v. TSHALIANIKA & KETEKWA*, [1917] S. R. 32.—S. AF.

**e. — ]**—*R. v. ZINDE*, [1917] S. R. 30.—S. AF.

**f. — Rape on wife before marriage.]**—A wife is not a competent witness to prove a charge of rape committed upon her by her husband before her marriage, where the parties have voluntarily lived together as man & wife since the marriage.—*R. v. MCKAY*, 2 J. R. N. S. 71.—N.Z.

**g. — Indecent assault on wife before marriage.]**—A wife will not be compelled to give evidence against her husband where he is charged with indecently assaulting & carnally knowing her before marriage.—*R. v. GRIBICH* (1910), 29 N. Z. L. R. 1045.—N.Z.

**4763 i. — Larceny of husband's property.]**—A wife living separate from her husband was charged with theft

of her husband, the husband was called as a witness against his wife:—*Held*: the evidence of the husband was improperly received, & the conviction which had taken place founded upon it was bad as against both prisoners.—*R. v. BRITTON* (1884), 12 Q. B. D. 266; 53 L. J. M. C. 83; 276; 48 J. P. 295; 32 W. R. 463; 15 Cox, C. C. 431, C. C. R.

**4764.** ———.]—Deft. was charged before a ct. of summary jurisdiction under Vagrancy Act, 1898 (c. 39), s. 1, with knowingly living wholly or in part on the earnings of prostitution. The person on the earnings of whose prostitution he was alleged to be living was his wife, & the prosecution was commenced by her:—*Held*: the wife was not an admissible witness for the prosecution under Criminal Evidence Act, 1898 (c. 36), s. 4.—*PUBLIC PROSECUTIONS DIRECTOR v. BLADY*, [1912] 2 K. B. 89; 81 L. J. K. B. 613; 106 L. T. 302; 76 J. P. 141; 28 T. L. R. 193; 22 Cox, C. C. 715.

**4765. Exceptions to general rule—Treason.]—**GRIGGS'S CASE, No. 4758, *ante*.

**4766. ——— Where crime affects person of wife or husband—Crimes of violence.]—***R. v. AUDLEY (LORD)* (1631), Hut. 115; 3 State Tr. 402; 123 E. R. 1140; *sub nom.* CASTLEHAVEN'S (EARL) CASE, 1 Hale, P. C. 629.

*Annotations:—***N.F.** Griggs's Case (1660), T. Raym. 1. *Refd.* Brown's Case (1673), 1 Vent. 243; *R. v. Warden of the Fleet* (1699), 12 Mod. Rep. 337; *R. v. Azire* (1725), 1 Stra. 633; *R. v. Reading* (1734), Cunn. 140; *R. v. Serjeant* (1826), Ry. & M. 352; *R. v. Story* (1849), 13 J. P. 766; *Reeve v. Wood* (1864), 5 B. & S. 364. *Mentd.* Manby v. Scot (1662), 1 Keb. 383; *R. v. Morley* (1666), 6 State Tr. 770; *R. v. Clarence* (1888), 22 Q. B. D. 23.

**4767. ———.]—***R. v. AZIRE* (1725), 1 Stra. 633; 93 E. R. 746.

**4768. ———.]—**Wife's evidence against husband allowed only for security of the peace; but she cannot sustain indictment against him.—*SEDGWICK v. WALKINS* (1789), 1 Ves. 49; 3 Bro. C. C. 11; 30 E. R. 224, L. C.

**4769. ———.]—***R. v. JAGGER* (1796), 1 East, P. C. 455.

*Annotation:—**Refd.* *R. v. Wakefield* (1827), 2 Town. St. Tr. 112.

**4770. ———.]—**A married woman who consents to her husband's committing an unnatural offence with her is an accomplice in the felony, & as such, her evidence requires confirmation, although consent or nonconsent is quite immaterial to the offence.—*R. v. JELLYMAN* (1838), 8 C. & P. 604.

**4771. ———.]—**A man was indicted for shooting at his wife with intent to murder her. Previous to the commencement of his trial he applied to the judge to know whether his wife was to be produced as a witness for the prosecution. Counsel for the prosecution stated that he

should not call her; & the judge told prisoner, that, although she was a competent witness against him, yet her presence was not indispensable.

The charge is one of personal violence to the wife, she is, therefore, a competent witness. But it is not indispensable that she should be called (*BOSANQUET, J.*).—*R. v. PEARCE* (1840), 9 C. & P. 667.

**4772. ——— Abduction.]—***R. v. BROWN* (1673), 3 Keb. 193; 1 Vent. 243; 84 E. R. 671.

*Annotations:—**Refd.* *R. v. Fezas* (1690), 4 Mod. Rep. 8; Public Prosecutions Director v. Blady (1912), 106 L. T. 302.

**4773. ———.]—**Prisoner was indicted for a forcible marriage:—*Held*: the evidence of the wife was admissible on behalf of the husband to prove that the elopement & marriage were voluntary & not forced.—*R. v. PERRY* (1794), 2 Hawk. P. C. 8th ed. 601.

*Annotations:—**Consd.* *R. v. Serjeant* (1826), Ry. & M. 352. *Refd.* *R. v. Wakefield* (1827), 2 Lew. C. C. 279.

**4774. ———.]—**A wife is competent against her husband in all cases affecting her liberty & person. Our law recognises witnesses *ex necessitate* (*HULLOCK, B.*).—*R. v. WAKEFIELD* (1827), 2 Lew. C. C. 279; 2 Town. St. Tr. 112; Mood. & M. 197, n.

*Annotations:—**Distd.* *R. v. Barratt* (1840), 9 C. & P. 387. *Refd.* *R. v. London Corp.* (1886), 16 Q. B. D. 772; Public Prosecutions Director v. Blady (1912), 106 L. T. 302. *Mentd.* Field's Marriage Annulling Bill (1848), 2 H. L. Cas. 48.

**4775. ——— Dying declaration in murder.]—***R. v. WOODCOCK* (1789), 1 Leach, 500.

*Annotations:—**Folld.* *R. v. Dingle* (1791), 2 Leach, 561; *R. v. Quigley* (1868), 18 L. T. 211. *Apprvd.* *R. v. Perry*, [1909] 2 K. B. 697. *Refd.* *R. v. Perkins* (1840), 2 Mood. C. C. 135; *R. v. Dalmis* (1844), 9 J. P. 120; *R. v. Colclough* (1882), 15 Cox, C. C. 92; *R. v. Gloster* (1888), 16 Cox, C. C. 471.

**4776. ———.]—***R. v. JOHNS* (1790), 1 Leach, 504, n.

**4777. ———.]—***R. v. WELBOURN* (1792), 1 East, P. C. 358; 1 Leach, 505, n.

*Annotation:—**Refd.* *R. v. Colclough* (1882), 15 Cox, C. C. 92.

**4778. Rule restricted to persons legally married.]—**The point at least doubtful, whether a woman living with a man as his wife, & having children by him, be admissible evidence to prove the fact of her never having been actually married to him.—*CAMPBELL v. TWEMLOW* (1814), 1 Price, 81; 145 E. R. 1337.

*Annotations:—**Refd.* *Batthews v. Galindo* (1828), 4 Bing. 610. *Mentd.* *Wade v. Malpas* (1834), 2 Dowl. 638; *Wilson v. King* (1834), 2 Cr. & M. 689; *Wilson v. Martin* (1834), 3 L. J. C. P. 180; *Armstrong v. Marshall* (1836), 1 Har. & W. 643.

**4779. ———.]—**A kept mistress is not incompetent to give evidence for her protector, although she has passed by his name, & has appeared in the world as his wife.—*BATTHEWS v. GALINDO* (1828), 4 Bing. 610; 3 C. & P. 238;

29 N. Z. L. R. 371.—**N.Z.**

*k. Statement by wife to third person—Whether admissible against husband.]—*It is incompetent to examine the sister of the wife of accused

the wife, in reference to the alleged commission of the crime of incest upon the panel's daughters, unless the statements were made on the day of the occurrence libelled, or as part of the

—*H.M. ADVOCATE v. KEMP* (1891), 3 White, 17.—**SCOT.**

*m. Evidence of wife in civil action.]—*A conviction for perjury was quashed & a new trial ordered, on the ground

from her husband, & her husband was examined as a witness against her:—*Held*: the husband was not a competent witness against her & conviction quashed.—*MUIRHEAD v. M'INTOSH* (1886), 13 R. (Ct. of Sess.) 59, 93

wife is charged with wounding with intent to murder her husband, the husband is a competent, but not a compellable witness against the wife.—*R. v. PHILLIPS*, [1922] S. A. S. R. 276.—**ATIS**

**4766 i. Exceptions to general rule—Where crime affects person of wife or husband—Crimes of violence.]—**Prisoner was charged with feloniously & unlawfully wounding M. with intent

*Held*: her evidence was rightly admitted.—*R. v. JONES* (1877), Knox, 170.—**AUS.**

**4766 ii. ———.]—****RIDDLE** v. R., [1911] 12 C. L. R. 622.—**AUS.**

**4766 iii. ———.]—**Where a

Indictment for administering poison to wife:—*Held*: the wife might be a witness for the prosecution.—*R. v. WASSON* (1796), 1 Craw. & D. 197.—**IR.**

*h. Rule restricted to persons legally married—Customary marriage.]—*The rule of evidence to the effect that a wife cannot be compelled to give evidence against her husband has no appln. to a Maori customary marriage, & a Maori woman married according to native custom to a Maori man is a compellable witness against him in a criminal prosecution.—*R. v. KINGI* (1909),

**Sect. 12.—Competent and compellable witnesses:**  
*Sub-sect. 3, A. (a) & (b) & B.; sub-sect. 4, A. & B.]*

1 Moo. & P. 565; 6 L. J. O. S. C. P. 138; 130 F. R. 904, N. P.

*Annotation:—Consd. Edwards v. Farebrother* (1828), 2 Moo. & P. 293.

**4780.** —[*Qu.*: whether a woman who has gone through the ceremony of marriage with a man, can be allowed to prove the invalidity of the marriage & that she is not his wife. *Semble*: she may be examined upon the *voir dire*.—*PEAT'S CASE* (1838), 2 Lew. C. C. 288.

**4781.** —[*J.*—A woman cohabiting with prisoner, & passing as his wife, is a competent witness for him.—*R. v. YOUNG* (1847), 9 L. T. O. S. 497; 2 Cox, C. C. 291.

**4782.** —[*J.*—One of two prisoners had married his deceased wife's sister:—*Held*: she was a competent witness against him upon his trial.

A witness for the prosecution was examined on the part of the prisoners on the *voir dire*, & deposed that she was married to one of them:—*Held*: she might be further examined on the *voir dire*, on the part of the prosecution, to prove that same prisoner had been previously married to her sister.—*R. v. YOUNG & MUEZZELL* (1851), 5 Cox, C. C. 296; *sub nom. R. v. MUZZELL*, 15 J. P. 597.

**4783. Wife or husband must be actually charged.** [*J.*—*R. v. AST* (1794), Car. C. L. 3rd ed. 66.

**4784.** —[*J.*—A. being tried for sheepstealing, it was proposed to call the wife of B. to prove that A. & B. had jointly stolen the sheep, B. having been convicted of it at the previous quarter sessions:—*Held*: the wife of B. was a competent witness.—*R. v. WILLIAMS* (1838), 8 C. & P. 284.

*Annotation:—Consd. Hawkesworth v. Showler* (1843), 12 M. & W. 45.

**4785.** —[*J.*—Prisoner was charged in the first count of an indictment with obtaining money from the trustees of a savings bank, by falsely pretending that a document presented to the bank by the wife of D. had been filled up by the authority of D.; & in the third count of the same indictment, prisoner was charged with conspiring with the wife of D. to cheat the bank. The evidence of D. was received, in proof of the first count, to show that he had given no authority to fill up the document or to withdraw the deposit:—*Held*: the evidence of D. was properly received in proof of the first count, his wife not being indicted, although she was alleged to be one of the parties to the conspiracy charged in the third count.—*R. v. HALLIDAY* (1860), Bell, C. C. 257; 29 L. J. M. C. 148; 2 L. T. 254; 24 J. P. 341; 6 Jur. N. S. 514; 8 W. R. 423; 8 Cox, C. C. 298.—C. C. R.

that in the cross-examination of accused at the trial counsel for the Crown was permitted to bring before the jury, in the form of cross-examining questions, evidence that was alleged to have been given by the wife of accused on an examination for discovery in a civil action.—*R. v. RUTHERFORD*, [1923] 2 W. W. R. 963.—*CAN.*

**PART XII. SECT. 12, SUB-SECT. 3.—**  
**A. (b).**

**4786 i. As against co-defendant of husband or wife—Whether admissible.**—[A., B. & C. were arraigned upon an indictment for murder, A. & B. as principals, & C. as accessory before the fact. At the spring assizes, A. pleaded guilty, & sentence of death was recorded. At the summer assizes, B. & C. were put upon trial on the same indictment:—*Held*: the wife of A. was a competent witness in support of the prosecution.—*R. v. CALLANAN &*

*CARBOY* (1840), 2 Craw. & D. 73.—*IR.*

**4786 ii.** —[*J.*—Where a prisoner is indicted jointly with prosecutor's wife who had eloped with him, for stealing clothes & money, the property of the husband, the wife should be acquitted, as no indictment lies against her, but the husband's evidence is admissible against the male prisoner.—*R. v. GLASSIE & COONEY* (1854), 7 Cox, C. C. 1.—*IR.*

**4786 iii.** —[*J.*—The wife of one of several persons on their trial at the same time on a joint indictment for theft is not a competent witness against any of them.—*R. v. MAPATASSA* (1912), T. P. D. 91.—*S. AF.*

**4786 iv.** —[*J.*—Where the adulterer & the wife are tried under separate remittals, charged with a contravention of Natives' Adultery Ordinance, the evidence of the husband is admissible against the adulterer.—

**(b) For or against Co-defendant.**

**4786. Against co-defendant of husband or wife**  
 —[*Whether admissible.*]*—R. v. SERJEANT*, No. 4761, ante.

**4787.** —[*J.*—The wife of one prisoner, can in no case be a witness for the prosecution, to implicate another prisoner tried with her husband.—*R. v. BAKER & DRAY* (1838), 2 J. P. 166.

**4788.** —[*J.*—A., B. & C. were indicted for conspiring falsely to charge D. with assaulting A., to cheat D. of his goods, & to ruin him in his business. D. was the husband of A.:—*Held*: D. was not admissible as a witness to support the indictment.—*R. v. STORY* (1849), 13 J. P. 766.

**4789.** —[*J.*—Where two prisoners are tried for a joint offence, & one pleads guilty, & it was proposed to call the wife of prisoner who had pleaded guilty on the part of the prosecution to give evidence against the other prisoner:—*Held*: the evidence should be admitted.—*R. v. THOMPSON & SIMPSON* (1863), 3 F. & F. 824.

**4790. For co-defendant of husband or wife—**  
**Whether admissible.**—[The wife of one defft. against whom material evidence has been given cannot be a witness for the other on an indictment against two.—*R. v. FREDERICK & TRACY* (1737), 2 Stra. 1095; 93 E. R. 1054.

**4791.** —[*J.*—In an indictment for a conspiracy, the wife of one of defts. cannot be called as a witness for the other.—*R. v. LOCKER & WAINWRIGHT* (1804), 5 Esp. 107, N. P.

*Annotations:—Refd. R. v. Serjeant* (1826), Ry. & M. 352; *R. v. Story* (1849), 13 J. P. 766; *Reeve v. Wood* (1864), 5 B. & S. 364.

**4792.** —[*J.*—On an indictment against several prisoners, the wife of one of them is inadmissible as a witness for another.—*R. v. SMITH, COBBREY, BRISTERS & DRAPER* (1826), 1 Mood. C. C. 289, C. C. R.

*Annotations:—Folld. R. v. Hood* (1830), 1 Mood. C. C. 281. *Distd. R. v. Bartlett* (1844), 3 L. T. O. S. 22. *Folld. R. v. Denslow & Newbury* (1847), 8 L. T. O. S. 559; *R. v. Brittleton* (1884), 12 Q. B. D. 266.

**4793.** —[*J.*—The wife of one of several prisoners is inadmissible as a witness for another.—*R. v. HOOD* (1830), 1 Mood. C. C. 281, C. C. R.

*Annotations:—Mentd. Hoyle v. Bush* (1840), Drinkwater, 15; *Howard v. Gosset* (1845), 10 Q. B. 359.

**4794.** —[*J.*—In trespass against two defts. for taking plff.'s goods, the wife of one of them, against whom the case is clearly proved, is not a competent witness for the other, to prove that he did not authorise the taking of the goods.—*HAWKESWORTH v. SHOWLER* (1843), 12 M. & W. 45; 13 L. J. Ex. 86; 2 L. T. O. S. 103; 152 E. R. 1105.

*Annotations:—Refd. Stapleton v. Crofts* (1852), 18 Q. B. 367. *Mentd. White v. Hill* (1844), 9 Jur. 129; *R. v. Hinks, Williams & Waywood* (1845), 1 Den. 84.

*R. v. ZINDE*, [1917] S. R. 30.—*S. AF.*

**4786 v.** —[*J.*—*R. v. TSHALI-NIKA & KETEKWA*, [1917] S. R. 32.—*S. AF.*

**4790 i. For co-defendant of husband or wife—Whether admissible.**—[A. & B. were tried together on a joint indictment for assault on a peace officer, & the wife of A. was offered as a witness to disprove the charge against B.:—*Held*: her evidence was properly rejected, but had the husband not been on his trial she would have been a competent witness.—*R. v. THOMPSON & CONROY* (1870), 2 Han. 71.—*CAN.*

**4790 ii.** —[*J.*—A. & B. were indicted for rape, A. as a principal in the first degree, & B. as a principal in the second degree. A. was put upon his trial alone, B. not being in custody:—*Held*: the wife of B. was a competent witness on behalf of A. *R. v. ALLEN* (1839), 1 Craw. & D. 104.—*IR.*

**4795.** ———.]—When two prisoners are jointly indicted the wife of one of them is a competent witness for the other.—*R. v. MOORE & TURNER* (1843), 1 L. T. O. S. 480; 1 Cox, C. C. 59.

**4796.** ———.]—A. & B. were indicted for burglary & stealing. A part of the stolen property was found in the house of each of the prisoners:—*Held*: the wife of A. was a competent witness to prove that she took to B.'s house the stolen property that was found there.—*R. v. SILLS* (1844), 1 Car. & Kir. 494.

**4797.** ———.]—The wife of one of two prisoners jointly indicted for a joint larceny is admissible, under the circumstances, as a witness for the other prisoner.

The point is a very nice one, but I am inclined, though with considerable doubt, to admit the evidence, & upon these grounds; that although prisoners are jointly indicted, the offence is distinct & severable. It differs in its circumstances from *R. v. Smith, Cobbey, Bristers & Draper*, No. 4792, *ante*, for here, evidence that one prisoner did honestly obtain the potatoes found in his apartments does not necessarily benefit the other prisoner, the husband of the witness. The defence of each is distinct, & it would be hard to say that one should be precluded from his defence because it might, by some remote possibility, benefit the other. I shall receive the evidence, but with considerable doubt (*WIGHTMAN, J.*).—*R. v. BARTLETT & ANDERSON* (1844), 3 L. T. O. S. 22; 8 J. P. 329; 1 Cox, C. C. 105.

*Annotation*:—*Distd. R. v. Denslow & Newbury* (1847), 1 L. T. O. S. 559.

**4798.** ———.]—Evidence was given by the wife of one of two prisoners called to prove an *alibi* by the other:—*Held*: on the authority of *R. v. Smith, Cobbey, Bristers & Draper*, No. 4792, *ante*, inadmissible.—*R. v. DENSLOW & NEWBURY* (1847), 8 L. T. O. S. 559; 2 Cox, C. C. 230.

**4799.** ———.]—Where two prisoners are indicted & tried together, the wife of one is not a competent witness for the other.—*R. v. THOMPSON* (1872), L. R. 1 C. C. R. 377; 41 L. J. M. C. 112; 26 L. T. 667; 36 J. P. 532; 20 W. R. 728; 12 Cox, C. C. 202, C. C. R.

*Annotation*:—*Folld. R. v. Brittleton* (1884), 12 Q. B. D. 266.

#### B. By Statute.

**4800. Effect of Criminal Evidence Act, 1898 (c. 36), s. 4—General rule.**—Under the above Act, the wife of a person charged with an offence to which the sect. applies is not compellable to give

evidence against her husband.—*LEACH v. R.*, [1912] A. C. 305; *sub nom. LEACH v. PUBLIC PROSECUTIONS DIRECTOR*, 81 L. J. K. B. 616; 106 L. T. 281; 76 J. P. 203; 28 T. L. R. 289; 56 Sol. Jo. 342; 22 Cox, C. C. 721; 7 Cr. App. Rep. 158, H. L.; *reusg. S. C. sub nom. R. v. ACASTER, R. v. LEACH*, [1912] 1 K. B. 488, C. C. A. *Annotations*:—*Consd. R. v. Acaster* (1912), 106 L. T. 384. *Refd. Public Prosecutions Director v. Blady* (1912), 28 T. L. R. 193.

**4801.** ——— Whether compellable—Offence by father against daughter—Offence under Criminal Law Amendment Act, 1885 (c. 69, s. 5).—*R. v. DUNNING* (1899), 34 L. Jo. 33.

**4802.** ——— Though competent—Offence under Criminal Law Amendment Act, 1885 (c. 69), s. 7].—*R. v. ELLIS* (1898), 34 L. Jo. 646.

**4803.** ———.]—*R. v. BRAZIL* (1899), 63 J. P. Jo. 138.

*Annotation*:—*Refd. R. v. Acaster, R. v. Leach*, [1912] 1 K. B.

**4804.** ——— Offence under Vagrancy Act, 1898 (c. 39), s. 1].—PUBLIC PROSECUTIONS DIRECTOR *v. BLADY*, No. 4764, *ante*.

**4805.** ——— Warning by wife—Offence under Criminal Law Amendment Act, 1885 (c. 69), s. 4].—Applt. was charged with an offence under the above Act. When before the justices applt.'s wife said, "I wish to shield my husband." The wife was unable to attend the trial at the assizes on account of illness, & her depositions were read on behalf of the prosecution. No point was taken by the defence as to her unwillingness to give evidence:—*Held*: although the wife was not a compellable witness, her declaration before the justices did not amount to a statement that she was unwilling to give evidence, & therefore her deposition was properly admitted.—*R. v. ACASTER* (1912), 106 L. T. 384; 76 J. P. 263; 28 T. L. R. 321; 22 Cox, C. C. 743; 7 Cr. App. Rep. 187, C. C. A.

**Bigamy.**—See Criminal Justice Administration Act, 1914 (c. 58), s. 28 (3).

#### SUB-SECT. 4.—EVIDENCE OF CHILDREN.

##### A. In General.

See EVIDENCE.

##### B. Evidence not on Oath.

**4806. Formerly not admissible.**—An infant cannot, under any circumstances be admitted to give

sched. to the Act specifies a number of statutory offences, & concludes, "any other offence involving bodily injury to a child under the age of sixteen years":—*Held*: the concluding words of the sched. included the crime of culpable homicide, & the wife of a man charged with the culpable homicide of his child aged twelve months, or alternatively with a contravention of sect. 1 of the Act, was a competent witness under sect. 12 of the Act.—*LORD ADVOCATE v. FRASER* (1901), 3 F. (Ct. of Sess.) 67; 38 Sc. L. R. 511; 8 S. L. T. 416.—*SCOT.*

#### PART XII. SECT. 12, SUB-SECT. 4.—B.

**t. Admissible where complaint involves minor offence.**—Unsworn testimony of children under the age of 10 years can be received on a complaint which involves merely a minor offence.—*SLAPE v. BYRNE*, [1918] S. A. L. 11. 313.—*AUS.*

**a. Whether admissible—Charge of indecent assault—Conviction for simple assault.**—In support of a prosecution against deft., under 53 Vict. c. 37, s.

#### PART XII. SECT. 12, SUB-SECT. 3.—B.

**n. Crimes Act, 1900—Whether compellable—Personal injury on wife.**—Crimes Act, 1900 (N.S.W.), s. 407, provides that husband or wife of any accused person in a criminal proceeding shall be competent but not compellable to give evidence in such proceeding in every ct.—*RIDDLE v. R.*, [1911] 12 C. L. R. 622.—*AUS.*

**o. Evidence Act, 1906—Whether compellable.**—*Held*: Evidence Act, 1906 (No. 28), s. 8 (1), should be read by disregarding the words "for the defence," & should be thus construed as making the wife or husband a competent, but not compellable, witness in criminal cases both for the prosecution & for the defence.—*R. v. BISHOP* (1913), 15 W. A. L. R. 70.—*AUS.*

**p. 32 & 33 Vict. c. 20—Whether competent—Refusal to support wife.**—The evidence of a wife is inadmissible, on the prosecution of her husband for refusal to support her, under 32 & 33 Vict. c. 20, s. 25 (D).—*R. v. BISSELL* (1882), 1 O. R. 514.—*CAN.*

**q. Canada Evidence Act, 1893—Whether compellable.**—Under Canada Evidence Act, 1893, the husband & wife of a person charged with an indictable offence is not only a competent witness for or against accused, but may also be compelled to testify.—*GOSSELIN v. R.* (1903), 23 C. L. T. 210; 33 S. C. R. 255.—*CAN.*

**r. 40 & 41 Vict. c. 41—Whether compellable—Obstruction of navigable river.**—Under 40 & 41 Vict. c. 41, in a prosecution for obstruction of a navigable river, deft. & the husband or wife of such deft. are competent & compellable witnesses.—*R. v. HALLETT* (1911), 45 L. T. 84.—*IR.*

**s. Prevention of Cruelty to Children Act, 1894—Whether compellable—Culpable homicide of child.**—Prevention of Cruelty to Children Act, 1894, s. 12, enacts: "In any proceeding against any person for an offence under this Act, or for any of the offences mentioned in the sched. to this Act . . . the wife or husband of such person . . . shall be competent but not compellable to give evidence." The

**Sect. 12.—Competent and compellable witnesses:**  
**Sub-sect. 4, B.]**

evidence except upon oath.—*R. v. POWELL* (1775), 1 Leach, 110.

**Annotations:—***Refd.* *Maden v. Catanach* (1861), 5 L. T. 288; *R. v. Paul* (1890), 25 Q. B. D. 202.

**4807. —**—[An infant witness under seven years of age, if apprised of the nature of an oath, must be sworn; for no testimony is legal except it be given upon oath.—*R. v. BRASIER* (1779), 1 Leach, 199; 1 East, P. C. 443, C. C. R.

**Annotations:—***Refd.* *R. v. Guttridge* (1840), 9 C. & P. 471; *R. v. Paul* (1890), 25 Q. B. D. 202; *R. v. Lillyman*, [1896] 2 Q. B. 167.

**4808. —**—[Upon a charge of gross indecency committed with a boy, eight years of age, & of assault on the same boy, the boy cannot give evidence except upon oath.—*R. v. COX* (1898), 62 J. P. 89.

**4809. Admitted in special circumstances.]—***R. v. LOVE* (1687), 12 State Tr. 523.

**4810. Admissibility under the Criminal Law Amendment Act, 1885 (c. 69), s. 4—Charge of carnal knowledge.]—**The above Act, after enacting that any person who unlawfully & carnally knows any girl under the age of thirteen shall be guilty of felony, provides that upon the hearing of such a charge the evidence of the girl in respect of whom the offence is charged to have been committed may in certain cases be received, though not upon oath, subject to such evidence being corroborated by some other material evidence in support of the charge implicating the accused; but there is nothing in the statute to make the evidence of the girl admissible without oath upon a simple indictment for indecent assault. Prisoner was charged with a felony under the above Act, & the evidence of the prosecutrix received, not upon oath. The jury acquitted him of the felony, but convicted him of a misdemeanour:—*Held*: the conviction was right.—*R. v. WEALD* (1888), 20 Q. B. D. 827; 57 L. J. M. C. 44; 58 L. T. 782; 52 J. P. 582; 36 W. R. 576; 4 T. L. R. 483; 16 Cox, C. C. 402, C. C. R.

**Annotations:—***Distd.* *R. v. Paul* (1890), 25 Q. B. D. 202. *Refd.* *R. v. Wilde & Taylor* (1895), 59 J. P. 296.

**4811. — Charge of attempted carnal knowledge & indecent assault.]—**On an indictment in

12, for having committed an indecent assault upon a girl of the age of 13 years, the evidence of the girl, although not given upon oath, was admitted under the provisions of sect. 13 of the Act. The unsworn statement was corroborated by other sworn testimony. Deft. was acquitted of indecent assault, but convicted of simple assault:—*Held*: the conviction was valid, although the unsworn evidence of the girl, which would have been inadmissible if deft. had been tried for simple assault, was the chief evidence against him.—*R. v. GRANTYERS*, [1893] Q. R. 2 Q. B. 376.—**CAN.**

**b. Admissibility under Criminal Law Consolidation Act, s. 377—Conditions of reception.]—**The above sect. provides that in every prosecution for felony or misdemeanour, the testimony of a child under 10 years may be received without any formality except that the judge, before admitting such testimony, shall explain to the child that it must truthfully tell what it knows about the matter:—*Held*: under this sect. the evidence of a child who stated that she did not know the difference between the truth & a falsehood, was not admissible.—*R. v. MONTANA* (1885), S. A. L. R. 4.—**AUS.**

**c. Necessity for corroboration.]—**As Canada Evidence Act, s. 16, specially requires that a statement taken in ct. from a child of tender

years, not understanding the nature of an oath, must be corroborated by "some other material evidence," the testimony so taken from one child of tender years cannot constitute the kind of corroboration required by this sect. of the testimony similarly taken from another child of tender years. The unsworn testimony, whether of one child or of several children, is not to be acted upon unless fortified by other material evidence corroborating it of a different character, i.e., evidence which is legal evidence apart from this sect.—*R. v. MCINULTY* (1914), 19 B. C. R. 109.—**CAN.**

**d. —**—[Prisoner was tried & convicted of a criminal offence, alleged to have been committed upon the person of a child seven years of age. On a case reserved the majority of the ct. was of the opinion that the medical evidence offered in corroboration of the evidence of the child was not clear or satisfactory or within the requirements as to corroboration in such cases:—*Held*: the conviction must be set aside & the prisoner discharged.—*R. v. TURNICK* (No. 2) (1920), 54 N. S. R. 69; 33 Can. Crim. Cas. 340.—**CAN.**

**e. — What amounts to corroboration.]—**Deft. was convicted of the offence of attempting to commit incest with his daughter, aged 7 years, upon the evidence of the daughter & another girl aged 4 years:—*Held*: the evidence

two counts, the first charging prisoner under the above Act, with an attempt to have carnal knowledge of a girl under thirteen, the second charging him with indecent assault, the evidence of the girl, though not given on oath, was received in accordance with the above Act, & was corroborated by other material evidence as therein required. The judge held that there was no evidence of the offence charged in the first count, but that with respect to the charge of indecent assault, though the sworn evidence was in itself insufficient, the unsworn evidence, if admissible, & the sworn evidence taken together, constituted sufficient evidence to be left to the jury, & he directed the jury to take into consideration both the unsworn & the sworn evidence. The jury convicted the prisoner:—*Held*: the unsworn evidence of the girl received as above stated was not admissible in support of the charge of indecent assault, & the conviction must be quashed.—*R. v. PAUL* (1890), 25 Q. B. D. 202; 59 L. J. M. C. 138; 62 L. T. 845; 54 J. P. 677; 38 W. R. 704; 17 Cox, C. C. 111, C. C. R.

**Annotation:—***Refd.* *R. v. Stoddart* (1909), 73 J. P. 348.

**4812. — Statement before justices.]—**On a charge preferred under the above Act for carnally knowing a girl under the age of thirteen years, the magistrates before whom the preliminary investigation took place, being of opinion that the prosecutrix did not understand the nature of an oath, received as evidence her unsworn statement as provided for by sect. 4 of the above Act, & signed & returned her statement so made, with the depositions, to the assizes.

At the trial it was proposed, after proving that the prosecutrix was so ill as to be unable to travel or to attend to give evidence at the assizes, to tender in evidence her statement so made before the magistrates, as being a deposition within the meaning of Indictable Offences Act, 1848 (c. 42), s. 17:—*Held*: the latter Act only applies to depositions taken upon oath or affirmation; & therefore it was not admissible as evidence in the absence of the prosecutrix.—*R. v. PRUNTEY* (1888), 16 Cox, C. C. 344.

**4813. Dying declarations.]—**A declaration, *in articulo mortis*, made by a child only four years

of the girls was admissible, & was sufficiently corroborated.—*R. v. PAILLEUR* (1909), 15 O. W. R. 73; 20 O. L. R. 207; 15 Can. Crim. Cas. 339.—**CAN.**

**f. —**—[Where the evidence of an indecent assault upon a boy of five was the statement of complainant himself, corroborated only by the evidence of his sister, aged 8, & the latter evidence was, in the circumstances, unsatisfactory:—*Held*: there was no real corroboration of complainant's evidence, & the conviction based thereon should be set aside.—*R. v. SIDEROPoulos* (1910), C. P. D. 15; 20 C. T. R. 397.—**S. AF.**

**g. — Criminal Law Amendment & Evidence Act, 1891.]—**On the trial of a prisoner for an assault on a child under the age of ten years with intent carnally to know her, the child gave evidence—not upon oath—under sect. 7 of the above Act. The evidence of the child was conclusive as to prisoner's guilt, but it was contended that her evidence was not corroborated by some material evidence. The evidence given by the Crown was as follows: The child, immediately after she had been assaulted, made a complaint to her mother. Shortly afterwards the mother said to prisoner, "How dare you assault my little girl?" Prisoner said, "It wasn't me, it was my cousin." The little girl said, "Yes, mummy, it



old, is not admissible in evidence, on the trial of an indictment for the murder of such child, because a child of such tender years could not have had that idea of a future state which is necessary to make such a declaration admissible.—*R. v. PIKE* (1829), 3 C. & P. 598.

*Annotation*:—*Refd.* *R. v. Perkins* (1840), 2 Mood. C. C. 135.

**4814.** ———.]—A boy between ten & eleven years of age was mortally wounded, & died the next day. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover. The boy made no reply, but appeared dejected. It appeared from his answers to questions put to him that he was aware that he would be punished hereafter if he said what was untrue:—*Held*: a declaration made by him at this time was receivable in evidence on the trial of a person for killing him, as being a declaration *in articulo mortis*.

There is no rule as to the age of children to be examined as witnesses. A child, who has sufficient knowledge, may be examined (*PARKE, B.*).—*R. v. PERKINS* (1840), 9 C. & P. 395; 2 Mood. C. C. 135, C. C. R.

**4815. Complaints.**—*R. v. NICHOLAS*, No. 4196, *ante*.

—.]—*See, generally*, Sect. 4, sub-sect. 6, *ante*.

**4816. Admissibility under Children Act, 1908 (c. 67), s. 30—Conditions of reception.**—Before admitting the testimony of an unsworn child, the judge is bound to satisfy himself that the child is possessed of sufficient intelligence to justify the reception of the evidence & understands the duty of speaking the truth within Children Act, 1908 (c. 67), s. 30, as amended by Criminal Justice Administration Act, 1914 (c. 58), s. 28 (2), & to warn the jury that the child's evidence must be corroborated by some other material evidence in support thereof implicating accused.—*R. v. LYONS* (1921), 15 Cr. App. Rep. 144, C. C. A.

**4817. Necessity for corroboration—Direction to jury.**—*R. v. PITTS* (1912), 8 Cr. App. Rep. 126, C. C. A.

*Annotation*:—*Refd.* *R. v. Dossi* (1918), 87 L. J. K. B. 1024.

was this man." This was within half an hour of the offence, & there was no suggestion that prisoner had been told by any one that his cousin had assaulted the child. When arrested the constable took him to the mother's house, & the child, on seeing said, "That's him." Prisoner said nothing. When asked by the constable about the conversation with the mother, he said he had not seen her on the day the offence was committed, though when giving evidence at the trial he admitted having seen her that day:—*Held*: there was sufficient corroborative evidence to support conviction.—*R. v. PUCKERIDGE* (1893), 14 N. S. W. L. R. 61; 9 N. S. W. W. N. 61.—*AUS.*

*h.* ———.]—*Crimes Act, 1891.*—The unsworn testimony of a child given under sect. 33 of the above Act must be corroborated by other material evidence as to the commission of the offence. Such corroboration is not limited to the mere identification of accused as the person who was present on the occasion.—*R. v. SMITH* (1901), 26 V. L. R. 683.—*AUS.*

*k.* ———.]—In all cases, of the nature provided by sect. 33, sub-sect. 1, of the above Act, the testimony admitted by virtue of that sect. must, notwithstanding Evidence Act, 1890, s. 50, be corroborated by some other material evidence in support thereof implicating accused. Such implication of accused ought to be by evidence of some direct kind, which would show that he was more probably than any

other person the man who committed the offence charged.—*R. v. O'BRIEN*, [1912] V. L. R. 133.—*AUS.*

*l.* ———.]—*Crimes Act, 1900.*—E. was charged with having indecently assaulted a girl five years of age. At the trial the child gave evidence against him but not on oath, & said that when she was on a bed in E.'s bedroom he touched her private parts with his hand & wiped them with a wet cloth. Medical evidence was to the effect that E. was at the time of the alleged assault suffering from gonorrhoea, that the child when examined shortly afterwards was suffering from that disease, & that the disease might have been communicated by the child's private parts being wiped with a cloth on which was some of the discharge from the disease. E., having been convicted, appealed to the Ct. of Criminal Appeal of New South Wales, on the ground that the child's evidence was not "corroborated by some other material evidence in support thereof implicating accused," as is required by sect. 418, sub-sect. 2, of the above Act:—*Held*: the appeal would be dismissed.—*EATHER v. R.* (1914), 19 C. L. R. 409.—*AUS.*

*m.* ———.]—*Infant Protection Act, N.S.W., 1904 (No. 27).*—The corroborative evidence required by sect. 4 of the above Act is evidence given by some person other than the person whose statement is to be corroborated.—*RIDLEY v. WHIFF* (1916), 22 C. L. R. 381.—*AUS.*

**4818.** ———.]—*R. v. CRATCHLEY* (1913), 9 Cr. App. Rep. 232, C. C. A.

*Annotations*:—*Refd.* *R. v. Dossi* (1918), 87 L. J. K. B. 1024; *R. v. Warren* (1919), 14 Cr. App. Rep. 4.

**4819.** ———.]—Where on a criminal prosecution the prosecutrix is a child of tender years & evidence is given by her under Children Act, 1908 (c. 67), s. 30, without being sworn, the judge ought to point out to the jury that they must not act on the evidence of the child unless it is corroborated.—*R. v. MURRAY* (1913), 30 T. L. R. 196; 9 Cr. App. Rep. 248, C. C. A.

**4820.** ———.]—Where at a trial the evidence of a child of tender years, which is given under Children Act, 1908 (c. 67), s. 30 & Criminal Justice Administration Act, 1914 (c. 58), s. 28 (2), is of importance, the judge should direct the jury not to convict upon it, unless it is corroborated by some other material evidence in support of it implicating accused. In the absence of such a direction a conviction of accused must be quashed.

*Semble*: If the evidence in corroboration is so ample & so clear that the ct. is bound to come to the conclusion that, despite a proper direction as to the necessity for corroboration, the jury must have returned a verdict of guilty, the absence of such a direction will not vitiate the conviction.—*R. v. DAVIES* (1915), 85 L. J. K. B. 208; 114 L. T. 80; 25 Cox, C. C. 225; 11 Cr. App. Rep. 272; 79 J. P. Jo. 556, C. C. A.

*Annotations*:—*Follis, R. v. Lyons* (1921), 15 Cr. App. Rep. 144. *Refd.* *R. v. Schiff* (1920), 15 Cr. App. Rep. 63.

**4821.** ———.]—*R. v. Dossi* (1918), 87 L. J. K. B. 1024; 34 T. L. R. 498; 13 Cr. App. Rep. 158, C. C. A.

*Annotation*:—*Mentis, R. v. James* (1923), 17 Cr. App. Rep. 116.

**4822.** ———.]—The Ct. of Criminal Appeal will not quash a conviction merely because there has not been a specific direction to the jury that the evidence of a child who is not sworn under Children Act, 1908 (c. 67), s. 30, must be corroborated, if, in fact, there has been corroboration. But such a direction should be given.—*R. v. SCHIFF* (1920), 15 Cr. App. Rep. 63, C. C. A.

*n.* ———.]—*Criminal Code, s. 1003.*—Where, under the above sect., the testimony of children of tender years is taken without the administering of an oath, the testimony of one child cannot corroborate the testimony of another so as to satisfy the sect. There must be corroborative evidence other than that so taken.—*R. v. WHISTNANT* (1912), 22 W. L. R. 762; 6 D. L. R. 468; 3 W. W. R. 486.—*CAN.*

*o.* ———.]—Accused was convicted of an indecent assault upon a girl of six years of age. The child was in charge of her grandmother, who, in washing the child, noticed that something was wrong, & asked the child if she had hurt herself, to which the child replied that she had not; but about two weeks after the event, not in answer to a question, made a statement to her grandmother, as the grandmother testified, describing an indecent assault by accused. She made no earlier complaint. The child herself testified to the assault by accused; accused & his wife testified that the child was at their house on the day on which the offence was alleged to have been committed; the wife of accused admitted that the child was on that day in & out of a room in which accused was lying in bed, & the doctor who examined the child testified as to the development of the disease which ensued, & which was consistent with the time at which the offence was alleged to have been committed:—



*Sect. 12.—Competent and compellable witnesses:*  
*Sub-sect. 4, B. Sect. 13: Sub-sects. 1 & 2.]*

**4823.** ———.]—*R. v. LYONS*, No. 4816, *ante*.

**4824.** ——— **What amounts to corroboration.**—Deft. was indicted for attempting to carnally know a girl under the age of thirteen years. When deft. was accused by the child's mother of indecency towards the child he denied it & said he had done nothing to her, but when told that the child said he had fastened the door of the room, where the offence was committed, with a towel-horse, he said he put the towel-horse at the door because it blew open. The door had a lock on & had not blown open since. The child was suffering from a venereal disease. When charged at the police station deft. refused to be examined by a doctor till he had consulted his friends:—*Held*: the evidence as to the towel-horse was some corroborative evidence implicating accused within the meaning of Criminal Law Amendment Act, 1885 (c. 69), s. 4, but the refusal to be examined by a doctor was not such evidence.

*Semle*: the question whether there was corroborative evidence was really not a point of law, but a question of fact.—*R. v. GRAY* (1904), 68 J. P. 327, C. C. R.

statement made by the grandmother was properly admitted in evidence, & there was sufficient corroborative evidence, under the above sect., to justify the conviction of accused.—*R. v. MCGIVNEY* (1914), 26 W. L. R. 602.—**CAN.**

**p.** *All evidence to be considered to find corroboration.*—In a prosecution for indecent assault, in order to find corroboration of the evidence of a boy too young to take an oath, the judge may consider the whole of the evidence, including that adduced for accused.—*R. v. IMAN DIN* (1910), 15 B. C. R. 476.—**CAN.**

## PART XII. SECT. 13, SUB-SECT. 1.

**q.** *Question for jury.*—The question of whether a witness is an accomplice or not is a question for the jury.—*R. v. ABIGAIL & MACNAMARA* (1893), 14 N. S. W. L. R. 72; 9 N. S. W. W. N. 141.—**AUS.**

**r.** ———.]—Where the question arises on the evidence as to whether the witness is an accomplice or not, the judge should leave that as a question of fact to the jury.—*R. v. REEVE* (1917), 17 S. R. N. S. W. 81; 34 N. S. W. W. N. 123.—**AUS.**

**s.** ——— *Person present at commission of crime through fear.*—A witness having sworn that he was not an accomplice & that he had been present at the commission of the crime through fear, it was properly left to the jury to say whether he was or was not an accomplice.—*R. v. WEBSTER & WELLS* (1880), 1 N. S. W. L. R. 331.—**AUS.**

**4828 i.** *Police spy.*—The mere undertaking to tell fortunes constitutes an offence, & a conviction was affirmed where it was obtained upon the evidence of a person who was not a dupe or victim, but a decoy.—*R. v. MILFORD* (1890), 20 O. R. 306.—**CAN.**

**4828 ii.** ———.]—The evidence of "spotters" sent by the morality department to a disorderly house for the purpose of procuring the necessary evidence to convict the keeper is entitled to no higher respect than that of ordinary accomplices, & corroboration will be required.—*R. v. SANDS* (1915), 32 W. L. R. 418; 9 W. W. R. 129, 496; 25 Man. L. R. 690.—**CAN.**

**4828 iii.** ———.]—A detective or decoy is not an "accomplice," & his evidence does not require corroboration.—

*AMSDEN v. ROGERS* (1916), 34 W. L. R. 1174.—**CAN.**

**4828 iv.** ———.]—A detective or spy, who participates in the offence for the purpose of obtaining evidence is not an accomplice.—*R. v. McCRAKOR* (1919), 44 O. L. R. 482; 15 O. W. N. 260; 47 D. L. R. 237.—**CAN.**

**4828 v.** ———.]—The act of a detective in supplying marked money for the detection of a crime cannot be treated as that of an accomplice.—*R. v. JAVECHARAM* (1894), 1 I. L. R. 19 Bom. 363.—**IND.**

**4828 vi.** ———.]—A person who makes himself an agent for the prosecution with the purpose of discovering & disclosing the commission of an offence, either before associating with wrongdoers or before the actual perpetration of the offence, is not an accomplice, but a spy, detective or decoy whose evidence does not require corroboration, though the weight to be attached to it depends on the character of each individual witness in each case.—*R. v. CHATURBHUI SARRU* (1910), 1 I. L. R. 38 Calc. 96.—**IND.**

**4828 vii.** ———.]—There is no rule of law that the evidence of an informer in a criminal prosecution must be corroborated, & although, where the informer is a probationary police officer, who is to some extent earning promotion by his success in detecting offences against the law, it is the duty of the magistrate to scrutinise his evidence closely & weigh it carefully before acting upon it, if in the opinion of the magistrate the witness is trustworthy, there is no rule of practice which requires his evidence to be corroborated. Such evidence is not in the same category as that of an accomplice, or of an informer who has a direct pecuniary interest in the result.—*SMITH v. O'DONOVAN* (1908), 28 N. Z. L. R. 94.—**N.Z.**

**4828 viii.** ———.]—Certain persons not licensed to sell were employed as traps by the police to sell a rough uncut diamond to another person not duly licensed to buy:—*Held*: the traps were not accomplices.—*R. v. POUND* (1882), 2 S. C. 2.—**S. AF.**

**4828 ix.** ———.]—Where a person had been convicted of an illicit sale of liquor on the uncorroborated evidence of a constable employed as a trap, & two men, who by special arrangement, had accompanied the trap had not

**4825.** ———.]—*R. v. COOPER* (1914), 10 Cr. App. Rep. 195, C. C. A.

*Annotation*:—*Refd.* *R. v. Baskerville*, [1916] 2 K. B. 658.

**4826.** ———.]—*R. v. CHRISTIE*, No. 3811, *ante*.

*See, also, Sect. 13, post.*

## SECT. 13.—EVIDENCE OF ACCOMPLICE.

### SUB-SECT. 1.—WHO IS AN ACCOMPLICE.

**4827. Co-defendant implicating accused.**—A co-prisoner by giving evidence implicating applt. does not necessarily become an accomplice.—*R. v. MARTIN* (1910), 5 Cr. App. Rep. 4, C. C. A.

**4828. Police spy.**—*R. v. MULLINS*, No. 3836, *ante*.

**4829.** ———.]—A person who enters into a conspiracy for the sole purpose of detecting & betraying it, does not strictly require confirmation as an accomplice, although his evidence should be received by the jury with caution.—*R. v. DOWLING* (1848), 7 State Tr. N. S. 381; 12 J. P. 678; 3 Cox, C. C. 509.

*Annotation*:—*Mentd.* *R. v. Meany* (1867), 15 W. R. 1082.

**4830.** ———.]—A police spy or agent provocateur is not an accomplice, & the practice that a jury

been called as witnesses, & their absence was not explained:—*Held*: the conviction must be quashed.—*R. v. GOLDBERG* (1888), 5 H. C. 64.—**S. AF.**

**4828 x.** ———.]—A "trap" is not an accomplice.—*R. v. LOVE* (1892), 6 E. D. C. 186.—**S. AF.**

**4828 xi.** ———.]—A conviction for selling liquor without a licence set aside, when the sole evidence of the sale was that of a trap, & the circumstances were such as to render this evidence unreliable.—*R. v. MAHLAMENI* (1895), 10 E. D. C. 9.—**S. AF.**

**4828 xii.** ———.]—Where a person had been convicted of an illicit sale of liquor on the evidence of two native traps, & the police failed to supply such corroborative evidence, as, had they performed their duties properly, ought to have been available, & the evidence of the natives, contained substantial discrepancies, & accused denied the offence on oath:—*Held*: there existed reasonable doubt as to his guilt, & the conviction must therefore be quashed.—*R. v. JACKSON* (1899), 9 H. C. 383.—**S. AF.**

**4828 xiii.** ———.]—The European detectives in charge of trapping an illicit dealer in liquor should watch the native traps to see that they have no opportunity of obtaining the liquor elsewhere than on the premises which they are seen to enter, & in the absence of such watching or other corroboration an accused ought not to be convicted on the evidence of the traps unless the same is free from doubt.—*MYERS v. R.* (1907), T. S. 760.—**S. AF.**

**4828 xiv.** ———.]—*CHARLIE v. R.* (1908), T. S. 1144.—**S. AF.**

**4828 xv.** ———.]—In cases which depend on the evidence of traps who are agents for the purpose of causing a crime to be committed the greatest caution should be exercised before accepting their evidence, & it is of the greatest possible importance that their evidence should be corroborated & free from doubt.—*BENNETT v. R.* (1918), 39 N. L. R. 344.—**S. AF.**

**t.** *Person advising as to execution of crime—Though not actually participating.*—Certain persons were engaged in a scheme for forging banknotes & sought assistance of L., who knew something of photolithography, for preparation of a plate from which to print notes. L. was told all details

should not act on the uncorroborated evidence of an accomplice does not apply to the case of such a person.—*R. v. BICKLEY* (1909), 73 J. P. 239; 53 Sol. Jo. 402; 2 Cr. App. Rep. 53, C. C. A.

**4831.** —[Police officers who assent to an informer's entrapping an offender do not thereby become accomplices.—*R. v. HEUSER* (1910), 6 Cr. App. Rep. 76, C. C. A.

**4832. Innocent agent.**—[Applt. assisted several other persons in the removal of the prosecutor's furniture from own town to another. Three days later J. S. was found attempting to pawn a watch belonging to the prosecutor, which was missed at the time of the removal. J. S. told the police at once, & subsequently gave evidence that she had met applt. the night before in a common lodging-house, & that he had asked her to pawn the watch for him:—*Semle*: on the trial of applt. for larceny, the evidence of J. S. need not be treated as that of an accomplice.—*R. v. KIRKHAM* (1909), 73 J. P. 406; 25 T. L. R. 656; 2 Cr. App. Rep. 253, C. C. A.

**4833. Patient in abortion.**—*R. v. TINCKLER* (1921), 1 Cr. App. Rep. 354.

*Annotations*:—*Reffd.* *R. v. Gibson* (1887), 18 Q. B. D. 537. *Mentd.* *R. v. Oldroyd* (1805), Russ. & Ry. 88; *Doe d. Sutton v. Ridgway* (1820), 4 B. & Ald. 53.

**4834.** —[*R. v. CRAMP*, No. 4143, *ante*.

**4835.** —[*R. v. BOTTOMLEY*, *R. v. EARNSHAW* (1903), 115 L. T. Jo. 88.

**4836. Incest.**—*R. v. STONE*, No. 4012, *ante*.

**4837.** —[If, on an indictment for rape, the verdict found is that of guilty under Punishment of Incest Act, 1908 (c. 45), s. 4 (3), it is not necessarily implied that the prosecutrix was a consenting party so as to make her an accomplice.—*R. v. DIMES* (1911), 76 J. P. 47; 7 Cr. App. Rep. 43, C. C. A.

*Annotation*:—*Reffd.* *R. v. Crane* (1912), 7 Cr. App. Rep. 113.

**4838.** —[*R. v. BLOODWORTH*, No. 4014, *ante*.

**4839. Wife consenting to unnatural offence.**—

**4840. Person living on earnings of prostitution.**—[On a charge of living upon the earnings of prostitution the women concerned are not in the position of accomplices. Corroboration of their evidence is not, therefore, essential as a matter of law, but the jury should be expressly warned against accepting such evidence without some corroboration.—*R. v. KING* (1914), 111 L. T. 80; 30 T. L. R. 476; 24 Cox, C. C. 223; 10 Cr. App. Rep. 117, C. C. A.

**4841.** —[Applt. was convicted on an indictment charging him with living in part on the earnings of prostitution. The woman's evidence was not corroborated:—*Held*: in a case of this kind corroboration is not essential; there

may be instances where it is plain that the woman is an accomplice & then what has been called "a rule of prudence & direction" should be allowed & the jury warned by the judge.—*R. v. PICKFORD* (1914), 10 Cr. App. Rep. 269, C. C. A.

**4842. Person present at indecent assault.**—*R. v. CRATCHLEY*, No. 4818, *ante*.

**4843. Persons present at prize-fight.**—[Although all persons present at & sanctioning a prize-fight, where one of the combatants is killed, are guilty of manslaughter, as principals in the second degree; yet they are not such accomplices as require their evidence to be confirmed, if they are called as witnesses against other parties charged with manslaughter.—*R. v. HARGRAVE* (1831), 5 C. & P. 170; 1 Nev. & M. M. C. 299.

*Annotations*:—*Reffd.* *R. v. Boyes* (1861), 1 B. & S. 311. *Mentd.* *R. v. O'Brian* (1844), 1 Den. 9; *R. v. Coney* (1882), 8 Q. B. D. 534.

**4844. Persons present at sparring match.**—[The spectators of a sparring match are not *participes criminis* so that their evidence, touching what occurred at the match, requires corroboration.—*R. v. YOUNG* (1866), 31 J. P. 215; 10 Cox, C. C. 371.

*Annotation*:—*Mentd.* *R. v. Coney* (1882), 30 W. R. 678.

**4845. Receiver of bribe.**—[Upon the trial of an information by the A.-G. for bribery at a parliamentary election, a witness who was called to prove the fact of his having received a bribe from deft., objected to give evidence on the ground that the effect of the evidence would be to criminate himself. Other witnesses were called to prove the fact of their having received bribes from deft.

*Qu.*: whether the witnesses were accomplices within the rules of practice that the evidence of an accomplice requires confirmation.—*R. v. ROVES* (1861), 1 B. & S. 311; 30 L. J. Q. B. 301; 5 L. T. 147; 25 J. P. 789; 7 Jur. N. S. 1158; 9 Cox, C. C. 32; 121 E. R. 730.

*Annotations*:—*Reffd.* *R. v. Christie*, [1914] A. C. 545; *R. v. Cohen* (1914), 10 Cr. App. Rep. 91. *Mentd.* *R. v. Hamilton*

*Munster* (1882), 10 Q. B. D. 110; *Re Reynolds*, *Reynolds* (1882), 20 Ch. D. 294; *Re Genese, Ex p. G.* (1886), 3 Morr. 223; *Evans v. Evans*, [1904] P. 378.

#### SUB-SECT. 2.—COMPETENCY AS WITNESS.

**4846. General rule.**—[A principal felon may be witness against the accessory.—*R. v. CROSS* (1761), 12 Mod. Rep. 520; 88 E. R. 1491; *subsequent proceedings* (1702), 12 Mod. Rep. 634.

**4847.** —[*R. v. WILD* (1725), 1 Leach, 17, n.

**4848.** —[*R. v. MURPHY* (1753), 19 State Tr. 693.

*Annotations*:—*Reffd.* *R. v. Lyons* (1840), 9 C. & P. 555. *Mentd.* *R. v. Coogan* (1787), 1 Leach, 449.

—*R. v. HUGHES* (1839), 1 Craw. & D. 13.—*IR.*

*Person not liable to be charged with same crime.*—[A man cannot be regarded as an accomplice who is not liable to be charged with the same crime as that with which the alleged principal is charged.—*R. v. BHULA* (1910), T. P. D. 70.—*S. AF.*

#### PART XII. SECT. 13, SUB-SECT. 2.

**4846. General rule.**—[Though an accomplice, who has been admitted as an approver, may give evidence, no matter how great his own criminality, it is a wise observation that, without corroboration, a jury should be slow to convict on such evidence.—*R. v. DUNNE* (1852), 5 Cox, C. C. 507.—*IR.*

*I.* —[Judge may promise recommendation for pardon.]—[A trial judge

of the scheme & promised £50 if he could reproduce a certain drawing on a plate so that prints could be made from it, & £2,500 when the notes were printed. L. said he would like to make some experiments & was given £10 for the purpose. He made no experiment & did not return the money nor inform the police. Some months afterwards another man supplied the necessary plate & the forgeries were printed & uttered. At the trial of appls. for forging & uttering a £5 note, L. was called as witness for the Crown & gave evidence implicating accused:—*Held*: there was ample evidence that L. was an accomplice.—*R. v. FERGUSON & KING* (1916), 17 S. R. N. S. W. 69.—*AUS.*

*a. Accessory after the fact.*—*R. v. SMITH* (1876), 38 U. C. R. 218.—*CAN.*

*b. Indecency with male person.*—

*R. v. WILLIAMS* (1914), 23 Can. Crim. Cas. 339; 7 O. W. N. 426; 19 D. L. R. 676.—*CAN.*

*c. Person present on occasion of giving bribe.*—[The mere presence of a person on the occasion of the giving of a bribe, & his omission to promptly inform the authorities, do not constitute him an accomplice, unless it can be shown that he somehow co-operated in the payment of the bribe, or was instrumental in the negotiations for the payment.—*R. v. DEODHAR SINGH* (1899) 1 L. R., 27 Calc. 144.—*IND.*

*d. Harboured felon.*—[Indictment for harbouring M., well knowing him to have committed a felony:—*Held*: testimony of M., who was produced as a witness for the prosecution, partook of the nature of that of an approver giving evidence against his accomplices, & required corroboration.

*Sect. 13.—Evidence of accomplice: Sub-sects. 2 & 3.]*

**4849.** —.]—An accomplice may give evidence before a grand jury to support an indictment against a *particeps criminis*.—*R. v. DODD* (1777), 1 Leach, 155, C. C. R.

**4850.** —.]—A principal felon is a competent witness on 22 Geo. III. c. 58 against an accessory for receiving stolen goods.—*R. v. HASLAM* (1786), 1 Leach, 418, C. C. R.

**4851.** —.]—The principal may be admitted as a witness against the accessory under 22 Geo. III. c. 58 (HEATH, J.).—*R. v. PRICE & COLLINS* (1786), 1 Leach, 419, n.

**4852.** —.]—*R. v. PATRAM* (1787), 1 Leach, 419, n.; 2 East, P. C. 782, C. C. R.

**4853.** —.]—The persons who are supposed to have been seconds at a duel, may refuse to give evidence on the trial of the principals; but their testimony may be received as the testimony of persons admitted witnesses for the Crown, & if once sworn, they must disclose the whole truth, although they may thereby involve themselves in the guilt of the transaction.—*R. v. ENGLAND* (1796), 2 Leach, 767.

**4854.** —.]—There are two reasons why accomplices are allowed to be called; one is, that without them great crimes might pass undiscovered; & another, the fact that the knowledge that an accomplice may betray him tends to prevent a person from engaging in crime. But interests of innocence require that the evidence of an accomplice should not be acted upon without great caution; juries must not trust to it unless it receives such confirmation as to satisfy them that it is true, & that they can trust it as a faithful account (GURNEY, B.).—*R. v. JORDAN* (1836), 7 C. & P. 432; 3 Nev. & M. C. 443.

*Annotations:—Mentd.* *R. v. Tuckwell* (1841), Car. & M. 215; *Saqui & Lawrence v. Stearns* (1910), 103 L. T. 583.

**4855. Effect of pardon.**—*R. v. LANGHORN* (1679), 7 State Tr. 418.

**4856. Effect of promise of pardon.**—Some of those persons who are equally culpable with the rest but not yet pardoned or indicted may be made use of as witnesses against their fellows.—*R. v. TONGE* (1662), Kel. 17; 6 State Tr. 225; 84 E. R. 1061.

*Annotation:—Mentd.* *Mulcahy v. R.* (1867), 15 W. R. 446.

**4857. Effect of promise of reward.**—*R. v. LOVE* (1651), 5 State Tr. 43, 238.

**4858.** —.]—*R. v. LANGHORN*, No. 4855, *ante*.

**4859. When accomplice indicted.**—A. was committed for having received stolen iron. B. being committed as the thief, B. was admitted as a witness for the Crown against A.—*R. v. WALFORD* (1829), 8 C. & P. 767.

**4860.** — **Necessity for consent of judge.**—

may, even after a *prima facie* case has been made out, direct that an accomplice be examined on the understanding that if he gives his evidence in an unexceptionable manner he shall be recommended for pardon.—*R. v. ROBINSON* (1921), 70 D. L. R. 755; 38 Can. Crim. Cas. 30.—**CAN.**

**4859 i. When accomplice indicted.**—Where a witness, although accused of having been a party to the crime, has not been indicted jointly with prisoner at the bar, & is not being tried jointly with the latter, his evidence is admissible for the prosecution.—*R. v. VIAU* (1898), Q. R. 7 Q. B. 362.—**CAN.**

**4860 i. — Necessity for consent of judge.**—Certain persons were accused of night poaching, & at the trial counsel proposed to call as witnesses for them several companions, in whose company the indictment alleged they had committed the offence & who were

indicted for the same offence on a separate indictment at the same circuit. The ct. refused to allow the proposed witnesses to be examined.—*H.M. ADVOCATE v. MITCHELL* (1887), 1 White, 321.—**SCOT.**

**g. — Plea of guilty—Postponement of sentence to allow evidence.**—In a trial for receiving stolen lead evidence was given by four thieves who had pleaded guilty but upon whom sentence had been postponed until the day fixed for the trial for reset of the person to whom they sold the lead for the purpose of their giving such evidence. In a suspension accused contended that his trial was vitiated by the magistrate's improper postponement of sentence, as it operated as an inducement to the thieves to give evidence against him.—*Held:* the course followed by the magistrate was within his discretion & objection re-

The ct. will not, in general, admit an accomplice as king's evidence, though applied to for that purpose, in the usual way, by the counsel for the prosecution, if it appear that such accomplice is charged with any other felony than that on the trial of which he is to be a witness.—*ANON.* (1826), 2 C. & P. 411.

**4861.** — —.]—Three persons were indicted for a rape, & were also indicted for the murder of the party alleged to be ravished. Before the trial on the indictment for the rape, the counsel for the prosecution asked to have one of the prisoners acquitted, that he might call him as a witness against the others. This was opposed by prisoner's counsel:—*Held:* in cases of this kind the ct. will, if it sees no cause to the contrary, intrust it to the discretion of the counsel for the prosecution to determine whether he will have a prisoner acquitted before the trial commences to enable him to call such prisoner as a witness against the other prisoners.—*R. v. OWEN* (1839), 9 C. & P. 83.

**4862.** — —.]—Where principal & accessory before the fact in a felony have been committed for trial, & it is proposed to make one of them a witness against the other, an application must be made to the judge for that purpose.—*R. v. STURGES & SHARP* (1846), 6 L. T. O. S. 486; *sub nom.* *R. v. SHARP*, 10 J. P. 220.

**4863. When accomplice jointly indicted—Competency before conviction or acquittal.**—*Qu.*: whether a person charged as a principal in the same indictment with a person charged as accessory, is a competent witness against the accessory, without being first either acquitted or confessing & suffering his punishment.—*R. v. LYONS* (1840), 9 C. & P. 555.

**4864.** — —.]—Two prisoners were jointly indicted for stealing a pair of boots. Both of them pleaded not guilty:—*Held:* one of them could not be called as a witness against the other.—*R. v. NUNN & PAYNTER* (1849), 13 J. P. 254.

**4865.** — —.]—*Qu.*: whether two prisoners are jointly indicted & have pleaded not guilty, one can, at the commencement of the case for the prosecution, be acquitted & called against the other.—*R. v. PEACOCK & CRAWLEY* (1849), 13 J. P. 254.

**4866.** — —.]—A., B., C. & D. were indicted together. After plea, & before they were given in charge to the jury, the ct. allowed D. to be removed from the dock & examined as a witness against his associates.—*R. v. GERBER* (1852), T. & M. 647.

**4867.** — —.]—Two prisoners having been arraigned & put upon trial at a former assizes on an indictment for murder, & the jury having

pollled.—*BROWN v. MACPHERSON*, [1918] 1 S. C. (J.) 3.—**SCOT.**

**4863 i. When accomplice jointly indicted—Competency before conviction or acquittal.**—Confessed accomplice upon whom sentence has not been passed may be called as a witness, if otherwise competent, against the principal offender.—*R. v. MCCLAIN* (1915), 30 W. L. R. 388; 7 W. W. R. 1134; 8 Alta. L. R. 73.—**CAN.**

**4863 ii. — —.]—**A man jointly indicted with others, & who has pleaded not guilty, cannot be a witness for the prosecution whilst his plea stands.—*R. v. RYAN* (1822), Jebb, Cr. & Pr. Cas. 5.—**IR.**

**h. — Competency after conviction & sentence.**—Where prisoners, who are being jointly tried before a magistrate, have pleaded not guilty, it is not competent for the magistrate to close the prosecution against one of them,

been discharged, & the prisoners being again brought to trial on the same indictment, one of them, without being acquitted, was admitted as a witness for the Crown.—*R. v. WINSOR* (1865), 1 F. & F. 363; *subsequent proceedings, sub nom. WINSOR v. R.* (1866), L. R. 1 Q. B. 289, Ex. Ch.

**4868.** — *After acquittal.*—In an indictment against several persons, the counsel for the prosecution has a right, before opening his case, to the acquittal of any deft. he intends to call as a witness.—*R. v. ROWLAND* (1826), Ry. & M. 401.

**4869.** — — —.—*R. v. OWEN*, No. 4861, ante.

**4870.** — *After nolle prosequi.*—Any one of several defts. who have been indicted for misdemeanour & put on their trial together, is a competent witness against the rest, provided that at any time before verdict *nolle prosequi* in regard to him be entered or a verdict of acquittal taken.—*R. v. O'CONNOR* (1843), 4 State Tr. N. S. 935; *subsequent proceedings*, 5 Q. B. 16.

*Annotations:—Mentd. R. v. Albert* (1843), 7 Jur. 741; *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *R. v. Martin* (1849), 13 J. P. 282.

**4871.** — *After plea of guilty.*—*R. v. READ*, No. 4510, ante.

**4872.** — — —.—*R. v. DRURY & BENSON*, No. 4512, ante.

**4873.** — — —.—*A prisoner jointly indicted with another, and pleading guilty, may be called as a witness for the prosecution.*—*R. v. KING & BRADDON* (1845), 5 L. T. O. S. 392; 1 Cox, C. C. 232.

**4874.** — — —.—*A., B. & C., were jointly indicted, A. & B. for stealing tea, & C. for receiving it scienter, etc., A. & C. pleaded not guilty, & B. pleaded guilty, & the trial proceeded against A. & C., no judgment having been pronounced against B.:—Held: B. was a competent witness for the prosecution on the trial of A. & C.*—*R. v. HINKS* (1845), 2 Car. & Kir. 462; 1 Den. 84; 10 J. P. 690, C. C. R.

**4875.** — — —.—*R. v. DRURY* (1848), 3 Car. & Kir. 190.

**4876.** — — —.— *Conspiracy.*—Two prisoners were jointly charged in an indictment with obtaining money by conspiracy & false pretences. On being arraigned, one pleaded guilty & the other not guilty. On the trial of the indictment, prisoner who had pleaded guilty, was admitted as a witness against the other although it was objected, that the evidence of a co-conspirator could not be received on the count for conspiracy. The jury found prisoner not guilty on the count for conspiracy, but guilty on the counts for

false pretences:—*Held: the co-conspirator was admissible as a witness, & the conviction was right.*—*R. v. GALLAGHER* (1875), 32 L. T. 406; 39 J. P. 502; 13 Cox, C. C. 61, C. C. R.

**4877.** — — —.—*R. v. GALLAGHER*, No. 6713, post.

**4878.** — — —.—*A co-prisoner who has pleaded not guilty may be allowed to plead guilty, & may then be sentenced & called against co-prisoners jointly indicted.*—*R. v. TOMEY* (1909), 2 Cr. App. Rep. 329, C. C. A.

**4879.** — — —.— *Corroborating evidence must first be given.*—One prisoner who has pleaded guilty not allowed to be called as a witness against another, until the judge had heard the evidence necessary to corroborate that of an accomplice.

The evidence of an accomplice uncorroborated will not suffice to justify a jury in finding a man guilty (HILL, J.).—*R. v. SPARKS* (1858), 1 F. & F. 388.

#### SUB-SECT. 3.—EFFECT OF GIVING EVIDENCE ON PROSECUTION FOR OTHER OFFENCES.

**4880. Effect of giving evidence by accomplice—Prosecution for other offences.**—A king's evidence is not entitled as matter of right, to be exempt from being prosecuted for other offences at the same assizes at which he has been a witness for the Crown.—*R. v. LEE* (1818), Russ. & Ry. 361, C. C. R.

**4881.** — — —.—*A king's evidence is not entitled, as matter of right, to be exempt from being prosecuted for other offences.*—*R. v. BRUNTON* (1821), Russ. & Ry. 454, C. C. R.

**4882.** — — —.—*A person who has discovered his accomplices in a felony, under a promise of favour, ought not to be prosecuted for another felony of the same kind, which he disclosed under an impression that, by the course he had previously taken, he had delivered himself from the consequences.*—*R. v. GARSIDE* (1838), 2 Lew. C. C. 38.

**4883.** — *Prosecution for same offence.*—An accomplice, who in a case out of the statutes, is under the practice allowed, admitted by the justices of peace, as a witness, & is afterwards prosecuted; has only a claim to the mercy of the Crown, founded on an express or implied promise of the magistrate, on a condition performed: & it depends on his conduct in fully & fairly disclosing the joint guilt of himself & his companions whether the ct. will admit him to

convict & sentence him, & then have him called as a witness for the Crown against his co-prisoner.—*R. v. RAZAK* (1917), C. P. D. 255.—S. AF.

**k.** — — —.—*The evidence of a co-prisoner tried jointly with applt. before a resident magistrate, called for the Crown after such co-prisoner had been already convicted & sentenced:—Held: to be admissible according to established practice in the cts. of the Cape.*—*R. v. SIMOKOTWANA* (1914), E. D. L. 166.—S. AF.

**4868 i.** — *After acquittal.*—A. & B. were indicted for having feloniously & corruptly received money from the owner of stolen goods, on account of helping him to same, without causing the apprehension of the thief. The judge, at the trial, directed B. to be acquitted, & received his evidence against A., who was convicted of the offence:—*Held: having been acquitted B. was a competent witness against A., although they had been jointly indicted.*—*R. v. O'DONNELL* (1857), 9 Ir. Jur. 210.—IR.

**4868 ii.** — — —.—*Where a witness has been rightly, by direction of the ct., acquitted, he may be examined for the prosecution.*—*R. v. O'DONNELL* (1857), 7 Cox, C. C. 337.—IR.

**4871 i.** — *After plea of guilty.*—When two defts. are jointly indicted for conspiracy & one of them pleads guilty & the other not guilty, deft. who has pleaded guilty is admissible as a witness against the other deft.—*R. v. GALLAGHER* (1883), 15 Cox, C. C. 291.—IR.

**l. W.** — — —.—*In a abortion:—Held: the evidence of the woman on whom the act was said to have been committed was competent, though she was not charged with the crime.*—*H.M. ADVOCATE v. LAE* (1888), 15 lt. (Ct. of Sess.) 80.—SCOT.

**m. Conspiracy to procure escape of prisoner—Competency of prisoner—Necessity for consent of judge.**—Accused being on trial on a charge of conspiring with a prisoner & others to assist the prisoner to escape from

prison, the prisoner not being named as a Crown witness on the back of the indictment nor included in the list of witnesses intended to be called by the Crown; & application was made to the trial judge for an order directing that the prisoner be called as a witness for the Crown, or, in the alternative, called by a judge & examined witness, & was refused, counsel for the Crown undertaking that counsel for accused should have full opportunity to interview the prisoner in order to decide whether or not to call him as a witness for the defence.—*R. v. HAGEL & WESTLAKE* (1914), 27 W. L. R. 271.—CAN.

#### PART XII. SECT. 13, SUB-SECT. 3.

**4883 i. Effect of giving evidence by accomplice—Prosecution for same offence.**—A. & B. were tried together for the theft of a cow, C. being called as a witness for the Crown against them. As the trial proceeded the magistrate convicted & sentenced A. & then called him as a witness against

*Sect. 13.—Evidence of accomplice: Sub-sects. 3 & 4, A. & B.]*

ball, that he may apply for a pardon.—*R. v. RUDD* (1775), 1 Cowp. 331; 1 Leach, 115; 98 E. R. 1114.  
*Annotation:—Reid. R. v. Garside & Mosley* (1834), 2 Ad. & El. 266.

**4884.** ———.—*R. v. BURLEY* (1818), 2 Starkie on Evidence 2nd ed. p. 12, n., C. C. R.  
*Annotation:—Reid. R. v. Gillis* (1866), 11 Cox, C. C. 69.

**4885.** ———.—*Approver turning round after giving evidence before the grand jury—tried & convicted.—R. v. MOORE* (1838), 2 Lew. C. C. 37.

**4886.** ———.—*Co-prisoners pleading guilty—Information given by accomplice.*—Where one of several persons charged with an offence gives, under hopes of acquittal, such information to the prosecutor against the other offenders as to induce them, on hearing of the circumstance, to determine on pleading guilty, the ct. will direct his acquittal.—*R. v. HEMINGWAY* (1843), 1 L. T. O. S. 623.

#### SUB-SECT. 4.—CORROBORATION.

##### A. In General.

**4887. Definition of corroboration.**—*R. v. KAMS* (1910), 4 Cr. App. Rep. 8, C. C. A.  
*Annotation:—Reid. R. v. Landow* (1913), 8 Cr. App. Rep. 218.

B. In the course of his evidence A. implicated C. as being concerned in the theft. Thereupon C. was placed in the dock as a prisoner along with B., & the magistrate continued the evidence of A. against both B. & C., who were convicted & sentenced:—*Held:* the procedure adopted by the magistrate against C. was wholly irregular, & his conviction must be quashed.—*R. v. POOYA* (1917), C. P. D. 110.—S. AF.

#### PART XII. SECT. 13, SUB-SECT. 4.—A.

**4887 i. Definition of corroboration.**—Evidence in corroboration of the evidence of an accomplice must be independent testimony which affects accused by connecting him or tending to connect him with the crime. It must be evidence which implicates him, that is, which confirms in some material particulars not only the evidence that the crime has been committed but also that accused committed it.—*R. v. DODGNEY & SHORRILL* (1916), 33 N. S. W.

W. N. 180.—AUS.

**4887 ii.** ———.—*Mere corroboration of details in the account amounting only to the probability that an offence has been committed, will not be sufficient. Where corroboration is sought for, the law requires evidence which connects accused with the crime.—R. v. NAUGHTON* (1920), 20 S. R. N. S. W. 259; 37 N. S. W. W. N. 40.—AUS.

**4887 iii.** ———.—*Evidence in corroboration must be independent testimony which affects accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that prisoner committed it.—R. v. FIDLER*, [1921] 3 W. W. R. 871; 66 D. L. R. 537; 36 Can. Crim. Cas. 239; 31 Man. L. R. 358.—CAN.

**4887 iv.** ———.—*Where a statute requires that evidence shall be corroborated in some material particular, the corroboration required is in some material respect that will fortify & strengthen the credibility of the main witness & justify the evidence being accepted & acted upon.—R. v. DAUN* (1906), 12 O. L. R. 227; 8 O. W. R. 173.—CAN.

**4888. Depends on nature of charge.**—*R. v. WINKEL*, No. 4348, ante.

**4889. May depend on nature of defence.**—*R. v. BLATHERWICK* (1911), 6 Cr. App. Rep. 281, C. C. A.

*Annotations:—Consd. R. v. Willis*, [1916] 1 K. B. 933.  
*Reid. R. v. Crane* (1912), 7 Cr. App. Rep. 113; *R. v. Landow* (1913), 8 Cr. App. Rep. 218; *R. v. Cohen* (1914), 111 L. T. 77; *R. v. Christie*, [1914] A. C. 545; *Bradshaw v. Waterlow*, [1915] 3 K. B. 527; *R. v. Baskerville*, [1916] 2 K. B. 658.

**4890. Slight corroboration may suffice.**—*Slight corroboration of an accomplice is sufficient to support a conviction.*

The evidence against applt. was conclusive, but it was the evidence of one of the burglars himself. Although in strict point of law that evidence was sufficient, yet it is customary for the judge to tell the jury that it needs corroboration. In this case, however, having regard to the decided cases, we think there was sufficient corroboration of the evidence given by S. (DARLING, J.).—*R. v. JACOBS* (1908), 1 Cr. App. Rep. 215, C. C. A.

##### B. Necessity for.

**4891. Corroboration not essential in law.**—*If the jury believe the testimony of an accomplice they may convict of a capital offence, though such*

were the question whether there was any evidence anywhere in the case of that corroborative nature required by the statute, & evidence was to be found in the testimony of a witness called for the defence.—*R. v. WAKELYN* (1913), 23 W. L. R. 807; 10 D. L. R. 455; 4 W. W. R. 170; 21 Can. Crim. Cas. 111.—CAN.

#### PART XII. SECT. 13, SUB-SECT. 4.—B.

**4891 i. Corroboration not essential in law.**—*The judge had power to convict a prisoner on the evidence of an accomplice alone.—R. v. FRANK* (1910), 16 O. W. R. 50; 21 O. L. R. 196.—CAN.

**4891 ii.** ———.—*Accused wastried on a charge of having committed an act of gross indecency with another male person:—Held:* corroboration of the evidence of the accomplice was not necessary to the validity of the conviction.—*R. v. WILLIAMS* (1914), 23 Can. Crim. Cas. 339; 7 O. W. N. 426; 19 D. L. R. 676.—CAN.

**4891 iii.** ———.—*There is no rule of law or practice that a jury must be instructed that they should not convict on the evidence of an accomplice or that such evidence should be viewed with suspicion.—R. v. KELLY* (1916), 35 W. L. R. 46; 11 W. W. R. 46.—CAN.

**4891 iv.** ———.—*A conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, & to hold that corroboration is necessary is to refuse to give effect to this provision. Though the evidence of an accomplice should be carefully scanned & received with caution, & may be treated as unworthy of credit, yet if the jury or the ct. credits the evidence, a conviction proceeding upon it is not illegal.—R. v. RAMANJANI PADAYACHI* (1878), 1 L. R. 1 Mad. 394.—IND.

**4891 v.** ———.—*The testimony of an accomplice, although altogether uncorroborated, is evidence to go to a jury. A conviction upon such evidence is legal, & there can be no general rule as to the cautionary directions to be given to the jury respecting his evidence.—R. v. SHERHAN* (1826), Jebb, Cr. & Pr. Cas. 54.—IR.

**4891 vi.** ———.—*The evidence of an accomplice is admissible, & a conviction is not illegal because it proceeds upon the uncorroborated testimony of an*

**4887 v.** ———.—*The corroboration required to support the evidence of a confederate should be independent from the latter & immediately connect accused with the crime. It should show not only that the crime was committed but that accused committed it.—R. v. DUMONT*, [1918] Q. R. 54 S. C. 9; 29 Can. Crim. Cas. 442.—CAN.

**4887 vi.** ———.—*There must be some corroboration independent of the accomplice, or of a co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him.—R. v. RAM SARAN* (1885), 1 L. R. 8 All. 306.—IND.

**4888 i. Depends on nature of charge.**—*The nature & extent of the corroboration required depend a great deal upon the character of the crime charged.—R. v. TOWER* (1880), 20 N. B. R. 168.—CAN.

*n. Slight corroboration may suffice*  
*Untrue denial of accomplice by prisoner.*—*The denial by a prisoner of his acquaintance with the approver, which was proved to be untrue, is evidence to corroborate the approver.—R. v. FARRELLY* (1832), 1 Craw. & D. 161, n.—IR.

*o. May depend on whether accomplice voluntary.*—*Where complainant did not willingly offer the bribe, but accused, a police officer, demanded it before taking up the charge lodged by complainant & made use of his official position to enforce his demand:—Held:* the circumstances were such

testimony of accomplices with a much slighter degree of corroboration than would be the case if the accomplices were entirely voluntary accomplices.—*DEO NANDAN PERSHAD v. R.* (1906), 1 L. R. 33 Calc. 649.—IND.

*p. — Depends on evidence of accomplice.*—*The amount of corroboration depends upon the evidence of the accomplice in each particular case.—R. v. MUNCHIN* (1917), T. P. D. 549.—S. AF.

*q. Corroboration may be looked for anywhere in case.*—*Upon a question reserved whether there was any evidence adduced by the prosecution corroborating the evidence of complainant implicating accused:—Held:* the question should be treated as if it

estimony stands totally uncorroborated.—*R. v. ATWOOD & ROBBINS* (1788), 1 Leach, 464.

*Annotations* :—*Refd.* *Jordaine v. Lashbrooke* (1798), 7 Term Rep. 601; *R. v. Jones* (1809), 2 Camp. 131; *R. v. Wilson, Lewis & Havard* (1911), 6 Cr. App. Rep. 125; *R. v. Christie*, [1914] A. C. 545; *R. v. Baskerville*, [1916] 2 K. B. 658; *R. v. Crocker* (1922), 92 L. J. K. B. 428.

**4892.** —.]—The practice of not calling upon a prisoner to defend himself against the single uncorroborated testimony of accomplice, is rather a matter of discretion with the ct. than a general rule of law; a prisoner may be convicted on such testimony, if the jury believe the witness.—*R. v. DURHAM & CROWDER* (1787), 1 Leach, 478.

*Annotation* :—*Refd.* *R. v. Jones* (1809), 2 Camp. 131.

**4893.** —.]—A person indicted for a misdemeanour or a felony may be legally convicted upon the uncorroborated evidence of an accomplice.—*R. v. JONES* (1809), 2 Camp. 131; 31 State Tr. 251.

*Annotations* :—*Appld.* *R. v. Baskerville*, [1916] 2 K. B. 658. *Refd.* *R. v. Stubbs* (1855), 7 Cox, C. C. 48. *Mentd.* *R. v. Rowton* (1865), Le. & Ca. 520; *R. v. Roberts* (1878), 38 L. T. 690; *Castro v. R.* (1881), 6 App. Cas. 229.

**4894.** —.]—By the law of this country accomplices are witnesses competent to be heard: the credit that is to be given to them must depend, in a great degree, on the probability of the story they tell, or on the confirmation that may be given to them from other & pure sources, so far as what they say is capable of confirmation, & upon the absence of that contradiction which may be adduced if the story related be not true. There is no rule of law which says that the testimony of accomplices must be credited; there is no rule of law, or of practice, that has said it must be rejected (*ABBOTT, C.J.*).—*R. v. THISTLEWOOD* (1820), 33 State Tr. 681, 921.

*Annotations* :—*Refd.* *R. v. Tate* (1908), 77 L. J. K. B. 1043; *R. v. Bloodworth* (1913), 9 Cr. App. Rep. 80; *R. v. Watson* (1913), 8 Cr. App. Rep. 219. *Mentd.* *R. v. Cumming* (1848), 7 State Tr. N. S. 485; *R. v. Martin* (1848), 6 State Tr. N. S. 925; *R. v. Mitchell* (1848), 6 State Tr. N. S. 599; *R. v. O'Dogherty* (1848), 5 Cox, C. C. 348; *O'Brien v. R.*, etc. (1849), 3 Cox, C. C. 360; *R. v. Duffy* (1849), 7 State Tr. N. S. 795; *R. v. Smith O'Brien* (1849), 7 State Tr. N. S. 1; *Mulcahy v. R.* (1867), 15 W. R. 446.

**4895.** —.]—A jury may, if they please, act upon the evidence of an accomplice, without any confirmation of his statement.—*R. v. HASTINGS & GRAVES* (1835), 7 C. & P. 152; 3 Nev. & M. M. C. 396.

*Annotation* :—*Refd.* *R. v. Baskerville*, [1916] 2 K. B. 658.

**4896.** —.]—A prisoner who employed another person to harbour the principal felons may be convicted as accessory after the fact, though he himself did no act of relieving, etc., & prisoner may be found guilty on the uncorroborated testimony of the person who actually harboured.—*R. v. JARVIS, LANGDON & STEAR* (1837), 2 Mood. & R. 40, N. P.

**4897.** —.]—The evidence of an accomplice, though uncorroborated, is evidence to go to the jury.

My own opinion is, that I have no right to withdraw any case from the jury where there is even one competent witness for the prosecution, although he be an accomplice, & uncorroborated. That is my view of the law (*ERLE, J.*).—*R. v. AVERY* (1845), 4 L. T. O. S. 493; 1 Cox, C. C. 206.

*Annotation* :—*Refd.* *R. v. Baskerville*, [1916] 2 K. B. 658.

accomplice.—*R. v. MAGANLAL* (1889), 1 L. R. 14 Boin. 115.—*IND.*

**4891 vii.** —.]—An accomplice is a competent witness & there is no absolute rule of law which enacts that the conviction on the evidence of an accomplice is bad.—*SIAR NONTA v. R.* (1913), 18 C. W. N. 550.—*IND.*

**4891 viii.** —.]—A judge or jury is

entitled to convict upon the uncorroborated evidence of *socii criminis*, if the judge or jury believe their evidence.—*BROWN v. MACPHERSON*, [1918] S. C. (J.) 3.—*SCOT.*

**4891 ix.** —.]—A prisoner may be convicted on the uncorroborated evidence of an accomplice, provided there

**4898.** —.]—Where the case for the prosecution is supported by the unconfirmed testimony of an accomplice, the ct., since Evidence Act, 1843 (c. 85), will not withdraw it from the consideration of the jury, but leave it to them, with a recommendation that they should not act upon it.—*R. v. SKILLER* (1845), 9 J. P. 314.

**4899.** —.]—*Qu.* : whether the confirmation of the evidence of an accomplice against one of two prisoners jointly indicted is sufficient.

The ct. has no right to withdraw the evidence of an accomplice, even though unconfirmed, from the consideration of the jury.

I do not think it necessary that there should be a confirmation as to each of the prisoners; a confirmation as to one would be sufficient. It is a question for the jury. I think it right to say that in my opinion the necessity for the confirmation of an accomplice has been stated too strongly in some of the cases. I do not wish it to be understood that I am overruling any of the decided cases; but it appears to me that even the testimony of an accomplice, though entirely unconfirmed, must go to the jury, accompanied, of course, by such recommendations as the judge in such case would feel it his duty to make. If a witness be admissible at all, I have no right to withdraw his testimony from the consideration of the jury, & the law having admitted the evidence of an accomplice, it is the province of the jury to determine its value (*COLERIDGE, J.*).—*R. v. ANDREWS & PAYNE* (1845), 5 L. T. O. S. 23; 1 Cox, C. C. 183.

*Annotation* :—*Refd.* *R. v. Baskerville*, [1916] 2 K. B. 658.

**4900.** —.]—The rule that a jury should not convict on the unsupported evidence of an accomplice is a rule of practice only, & not a rule of law. *Semble* : a judge should advise the jury to acquit, unless the testimony of the accomplice be corroborated, not only as to the circumstances of the offence, but also as to the participation in it by accused, & where there are several prisoners, & the accomplice is not confirmed as to all, the jury should be directed to acquit prisoners as to whom he is not confirmed :—*Held* : this being a rule of practice only, if a jury choose to act on the unconfirmed testimony of the accomplice, the conviction cannot be quashed as bad in law.—*R. v. STUBBS* (1855), Dears. C. C. 555; 25 L. J. M. C. 16; 26 L. T. O. S. 109; 19 J. P. 760; 1 Jur. N. S. 1115; 4 W. R. 85; 7 Cox, C. C. 48, C. C. R.

*Annotations* :—*Expld.* *R. v. Boyes* (1861), 1 B. & S. 311; *R. v. Baskerville* (1916), 25 Cox, C. C. 524. *Refd.* *R. v. Christie*, [1914] A. C. 545; *R. v. Cohen* (1914), 111 L. T. 77.

**4901.** —.]—*R. v. GALLAGHER*, No. 6713, *post*.

**4902.** —.]—M. was charged with causing two explosions in France, one of which caused loss of life. On an appln. for a writ of *habeas corpus* it was objected that the charges depended on the uncorroborated evidence of an accomplice :—*Held* : the evidence of the accomplice was corroborated & even if it were not the magistrate had discretion as to whether the evidence was sufficient for committal.—*Re MEUNIER*, [1894] 2 Q. B. 415; 63 L. J. M. C. 198; 71 L. T. 403; 42 W. R. 637; 18 Cox, C. C. 15; 10 R. 400, D. C.

*Annotations* :—*Consd.* *R. v. Tate*, [1908] 2 K. B. 680. *Refd.*

is evidence *alunde* that the crime has been committed.—*R. v. TWALATUNGA* (1903), 20 S. C. 425.—*S. AF.*

**4891 x.** —.]—Non-corroboration of accomplices is not a good ground in point of law for invalidating a conviction.—*R. v. WOODGATE* (1877), 3 C. A. 320; 2 J. R. N. S. 5.—*N.Z.*



**Sect. 13.—Evidence of accomplice: Sub-sect. 4, C. & D.]**

that accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

The uncorroborated evidence of an accomplice is admissible in law, but the jury should be warned of the danger of convicting on such evidence. Should no such warning be given by the judge, the Ct. of Criminal Appeal will quash the conviction.—*R. v. BASKERVILLE*, [1916] 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. 453; 80 J. P. 446; 60 Sol. Jo. 696; 25 Cox, C. C. 524; 12 Cr. App. Rep. 81, C. C. A.

**Annotations:—***Consd.* *Thomas v. Jones*, [1921] 1 K. B. 22. *Refd.* *R. v. Wyman* (1918), 13 Cr. App. Rep. 163; *R. v. Feigenbaum*, [1919] 1 K. B. 431; *R. v. Smith* (1919), 14 Cr. App. Rep. 74; *R. v. Schiff* (1920), 15 Cr. App. Rep. 63; *R. v. Howard* (1921), 15 Cr. App. Rep. 177; *R. v. Crocker* (1922), 92 L. J. K. B. 428; *R. v. Rudge* (1923), 17 Cr. App. Rep. 113. *Mentd.* *R. v. Wakeley* (1919), 84 J. P. 31; *R. v. Warren* (1919), 14 Cr. App. Rep. 4.

**4935.** ———.]—Indirect circumstantial evidence will be sufficient, if it is independent. It must implicate accused, that is, it must be evidence to show, not that the crime has been committed, but that accused committed it.

The uncorroborated evidence of an accomplice is undoubtedly admissible in law, but the judge should warn the jury of the danger of convicting in his discretion, advise upon such evidence, but in their legal defence if they believe it (*LORD COLERIDGE, J.*).—*R. v. WYMAN* (1918), 13 Cr. App. Rep. 163, C. C. A.

**Annotation:—***Mentd.* *R. v. Adler* (1923), 17 Cr. App. Rep. 105.

**4936. Need not amount to independent evidence implicating accused.]**—Corroboration of an accomplice's evidence need not amount to independent evidence implicating deft.—*R. v. WILSON, LEWIS* 25 C. C. A.

**Annotations:—***Apprvd.* *R. v. Baskerville* (1916), 15 Cr. App. Rep. 281. *Consd.* *R. v. Watson* (1913), 109 L. T. 335. *Apprvd.* *R. v. Cohen* (1914), 111 L. T. 77. *Consd.* *Bradshaw v. Waterlow*, [1915] 3 K. B. 527; *R. v. Baskerville*, [1916] 2 K. B. 658. *Refd.* *R. v. Crane* (1912), 7 Cr. App. Rep. 113; *R. v. Christie*, [1914] A. C. 545; *R. v. Threlfall* (1914), 111 L. T. 168; *R. v. Willis*, [1916] 1 K. B. 933; *R. v. Wyman* (1918), 13 Cr. App. Rep. 163.

**4937. Equivocal corroboration.]**—*R. v. WATSON*, No. 4705, *ante*.

**4938. Not confirmed by finding stolen property on premises of person charged with receiving it—Evidence of thief.]**—On an indictment for receiving goods, knowing them to have been stolen, the mere fact that they were found on prisoner's premises is not sufficient to confirm the evidence

to show by circumstantial evidence that accused had a share in the perpetration of the offence.—*R. v. DUMONT* (1918), Q. R. 54 S. C. 9; 29 Can. Crim. Cas. 442.—*CAN.*

**h. Must point to acts of accused.]**—Corroboration is sufficient only when directed to acts of accused.—*R. v. STEFANIC*, [1921] 1 W. W. R. 1212; 16 Alta. L. R. 246; 34 Can. Crim. Cas. 319.—*CAN.*

**k. Statement by accused.]**—Applt. was charged with having had carnal knowledge of a girl under 16 years of age. He was convicted of having attempted to have unlawful carnal knowledge of the girl & was sentenced:—*Held:* there was sufficient corroborative evidence in that applt. had admitted he had performed indecent acts towards the girl.—*ABERNETHY v. R.* (1916), 18 W. A. L. R. 108.—*AUS.*

**l. ———.]**—*R. v. WYSE* (1895), 2 Terr. L. R. 103.—*CAN.*

**4941. Evidence of accused.]**—*R. v.*

of the thief, so far as to make it proper to convict.—*R. v. PRATT* (1865), 4 F. & F. 315.

**4939. Statement by accused—Refusal by accused to undergo medical examination.]**—*R. v. GRAY*, No. 4824, *ante*.

**4940. ———.]**—Applt. was convicted of shop-breaking. The ground of appeal was that there was no evidence to corroborate the statements made at the trial by an accomplice.

There was no evidence except that of the accomplice, that applt. was anywhere near the shop when it was broken into:—*Held:* the words "do you think I should be such a fool as to have the stuff here for you to get it?" spoken to the police when they came to arrest applt., were capable of being construed as an admission of guilt, & were some evidence to corroborate the accomplice & the conviction was proper.—*R. v. LUCY* (1910), 4 Cr. App. Rep. 165, C. C. A.

**4941. Evidence of accused.]**—*R. v. KENAWAY*, No. 3922, *ante*.

**4942. Non-denial of charge.]**—Evidence of the non-denial of an offence by prisoner when formally charged with it by the police on his arrest is not necessarily corroborative of evidence of the commission of the offence given by an accomplice. Where the judge at the trial has omitted to warn the jury that they ought not to convict prisoner on the uncorroborated evidence of an accomplice, the Ct. of Criminal Appeal will generally quash the conviction as being a miscarriage of justice unless there was in fact corroborative evidence before the jury.—*R. v. TATE*, [1908] 2 K. B. 680; 77 L. J. K. B. 1043; 99 L. T. 620; 72 J. P. 391; 52 Sol. Jo. 699; 21 Cox, C. C. 693; 1 Cr. App. Rep. 39, C. C. A.

**Annotations:—***Refd.* *R. v. Beauchamp* (1909), 2 Cr. App. Rep. 40; *R. v. Kams* (1910), 4 Cr. App. Rep. 8; *R. v. Cohen* (1914), 111 L. T. 77; *R. v. Baskerville*, [1916] 2 K. B. 658.

**4943. ———.]**—*R. v. FEIGENBAUM*, No. 4151, *ante*.

*v. BOVY* (1916), 12 Cr. App. Rep. 15, C. C. A.

**4945. Corroboration by wife.]**—In a case of felony the testimony of the wife of an accomplice is not such evidence as a jury ought to rely upon as confirmation of the statement of the accomplice.

Confirmation by the wife is, in a case like this, really no confirmation at all. The wife & the accomplice must be taken as one for this purpose (*PARK, J.*).—*R. v. NEAL & TAYLOR* (1835), 7 C. & P. 168; 3 Nev. & M. M. C. 398.

**Annotations:—***Consd.* *R. v. Payne* (1913), 8 Cr. App. Rep. 171; *R. v. Willis*, [1916] 1 K. B. 933.

**4946. ———.]**—*Qu.*: whether the testimony of the wife of an accomplice can be corroboration

(1837), Jebb, Cr. & Pr. Cas. 203.—*IR.*

**4945 ii. ———.]**—When there are several approvers, their respective testimonies are not corroborative of each other, unless it appears that they could have had no communication with each other subsequently to the commission of the crime.—*R. v. AYLMER & BEHAN* (1839), 1 Craw. & D. 116.—*IR.*

**4945 iii. ———.]**—The evidence of an accomplice, if uncorroborated, is not sufficient to support a conviction, & the number of the accomplices giving evidence makes no difference.—*MAGILL'S CASE* (1842), Ir. Cir. Rep. 418.—*IR.*

**4945 iv. ———.]**—If more than one accomplice gives independent evidence as to the commission of the offence, the testimony of one accomplice could be confirmed by the testimony of another.—*R. v. FREESTONE* (1913) T. P. D. 758.—*S. AF.*

**m. Must corroborate in point of time.]**—On the hearing of a charge

*FONTAINE* (1914), 23 Can. Crim. Cas. 159; 18 D. L. R. 275.—*CAN.*

**4944 i. Question of corroboration for jury.]**—*R. v. WYSE* (1895), 2 Terr. L. R. 103.—*CAN.*

**4944 ii. ———.]**—It is for the judge to decide whether there is corroboration of the evidence of an accomplice & for the jury to decide whether such corroboration is sufficient.—*R. v. FREESTONE* (1913), T. P. D. 758.—*S. AF.*

**4945 i. Corroboration by wife—Question for jury.]**—When there was no other corroboration of the testimony of an accomplice, with respect to the person of one of the prisoners, but the evidence of the accomplice's wife, who herself appeared to be implicated in the guilt of the transaction:—*Held:* the judge was right in not directing an acquittal, but in leaving the case to the jury, with observations upon the general objections to the credit of those witnesses, & a conviction under these circumstances was good.—*R. v. CASEY*



of his statements.—*R. v. PAYNE* (1913), 29 T. L. R. 250; 8 Cr. App. Rep. 171; 77 J. P. Jo. 64, C. C. A. Annotation:—*Refd. R. v. Willis* (1916), 32 T. L. R. 452.

**4947. Corroboration by wife of another accomplice.**—On the trial of an indictment one of several accomplices in the crime charged was called as a witness against accused. His evidence was corroborated by that of the wife of another accomplice who was not called. The wife was herself innocent of any connection with the crime:—*Held*: under those circumstances the jury were entitled to rely upon her evidence as good corroboration, & the mere fact that she was the wife of an accomplice, & that her evidence was not itself corroborated by an independent witness did not disentitle it to credit.—*R. v. WILLIS*, [1916] 1 K. B. 933; 85 L. J. K. B. 1129; 114 L. T. 1047; 80 J. P. 279; 32 T. L. R. 452; 60 Sol. Jo. 514; 25 Cox, C. C. 397; 12 Cr. App. Rep. 44, C. C. A.

Annotation:—*Refd. R. v. Baskerville*, [1916] 2 K. B. 658.

**4948. Corroboration by another accomplice insufficient.**—*R. v. NOAKES*, No. 4907, *ante*.

**4949.** —.]—*R. v. CUFFEY*, No. 6714, *post*.

**4950.** —.]—*R. v. GAY*, No. 4917, *ante*.

**4951.** —.]—A statement by a co-deft. who is an accomplice of another deft. is not corroboration of the evidence of other accomplices against that deft.—*R. v. HOWARD* (1921), 15 Cr. App. Rep. 177, C. C. A.

#### D. Where more than one Accused.

**4952. Effect of corroboration not touching all the accused.**—If the testimony of an accomplice be confirmed, so far as his testimony relates to one prisoner, but be not confirmed with respect to

involving unlawful carnal knowledge of a girl under 16 years of age, the corroboration required is not supplied by evidence tending to show that the offence took place at a time materially different to that alleged by the principal witness, *e.g.* by evidence indicating the commission of the offence in the afternoon where the principal witness deposed to its commission in the morning.—*SULLIVAN v. R.* (1913), 15 W. A. L. R. 23.—**AUS.**

**n. Corroborating evidence conflicting with principal evidence.**—An alleged admission or statement inconsistent with innocence made by accused person to the corroborating witness cannot be accepted as corroborative when such statement must have been made in the presence of the principal witness, who has not only given no evidence of it but has testified generally that accused always denied the offence.—*SULLIVAN v. R.* (1913), 15 W. A. L. R. 23.—**AUS.**

**o. Carnal knowledge of girl—Resemblance of child to accused.**—On the trial of a charge of carnal knowledge of a girl of previously chaste character under the age of sixteen & above the age of fourteen years:—*Held*: the production in ct. of an infant about three months old alleged to have been born as the result of the seduction, & the testimony of the mother & aunt of the girl that the infant resembled accused & one of his children, was not sufficient corroborative evidence.—*R. v. FIDLER*, [1921] 3 W. W. R. 871; 66 D. L. R. 537; 36 Can. Crim. Cas. 239; 31 Man. L. R. 358.—**CAN.**

**p. Possession of property taken from murdered person—Corroborative of theft—Not corroborative of murder.**—The possession of property taken from a murdered person is not adequate corroboration of the evidence of an accomplice charging such person in possession with participation in the murder, though it would, no doubt, be corroboration of evidence that prisoner participated in a robbery, or that he

another prisoner, the latter may be convicted on the testimony of the accomplice if the jury deem him to be worthy of credit.—*R. v. DAWBER* (1821), 3 Stark. 34, N. P.

Annotation:—*Refd. R. v. Stubbs* (1855), 7 Cox, C. C. 48.

**4953.** —.]—*R. v. FIELD* (1828), Dickinson's Guide to Quarter Sessions, 6th ed. 504.

**4954.** —.]—On an indictment against principal & accessories the case against the principal was proved by the testimony of an accomplice who was confirmed as to the accessories, but not as to the principal: the jury were directed to acquit prisoners.—*R. v. WELLS, HUDD & COLLEDGE* (1829), Mood. & M. 326, N. P.

**4955.** —.]—If A. is charged as a principal, & B. as a receiver, & A. plead guilty—an accomplice when called to give evidence against B. should be confirmed as to some matter affecting B., & a confirmation as to the guilt of A. does not advance the case against B.—*R. v. MOORES* (1836), 7 C. & P. 270, N. P.

**4956.** —.]—An approver ought to be confirmed as to each of the prisoners.—*R. v. FLETCHER* (1838), 2 Lew. C. C. 45, n.

**4957.** —.]—Where an accomplice, in giving evidence against two prisoners, is confirmed as to his statement against one of them, it ought not to operate as a confirmation of his testimony against the other.—*R. v. JENKINS* (1845), 1 Cox, C. C. 177.

Annotation:—*Apprvd. R. v. Baskerville*, [1916] 2 K. B. 658.

**4958.** —.]—*R. v. ANDREWS & PAYNE*, No. 4899, *ante*.

**4959.** —.]—*R. v. STUBBS*, No. 4900, *ante*.

had dishonestly received stolen property.—*R. v. RAM SARAN* (1885), 1 L. R. 8 All. 306.—**IND.**

**q. Production of stolen property by accused.**—Where accused was convicted of house-breaking by night with intent to commit theft, & the only evidence against him was the confession of a fellow-prisoner, & the fact that he pointed out the stolen property some months after the commission of the offence:—*Held*: the mere production of the stolen property by accused was not sufficient corroboration of the confession of the other prisoner.—*R. v. DOSA JIVA* (1885), 1 L. R. 10 Bom. 231.—**IND.**

**r. All surrounding circumstances must be considered.**—In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice, the cts. must exercise careful discrimination, & look at the surrounding circumstances in order to arrive at a conclusion whether the facts deposed to by the person alleged to be an accomplice are borne out by these circumstances, or whether the circumstances are of such a nature that the evidence purporting to be given by the alleged accomplice should be supported in essential & material particulars by evidence *aliunde* as to the facts deposed to by that accomplice.—*KAMALA PRASAD v. SITAI PRASAD* (1901), 1 L. R. 28 Calc. 339; 5 C. W. N. 517.—**IND.**

#### PART XII. SECT. 13, SUB-SECT. 4.—D.

**4952 i. Effect of 'corroboration not touching all accused.'**—The accomplice must be corroborated not only as to one but as to all of the persons affected by the evidence, & corroboration of his evidence as to one prisoner does not entitle his evidence against another to be accepted without corroboration.—*R. v. RAM SARAN* (1885), 1 L. R. 8 All. 306.—**IND.**

**4952 ii.** —.]—Criminal cts. dealing with an approver's evidence in a case

where several persons are charged should require corroboration of his statements in respect of the identity of each of the individuals accused.—*R. v. BALDEO* (1886), 1 L. R. 8 All. 509.—**IND.**

**4952 iii.** —.]—When several prisoners are tried together upon the same indictment, a verdict of guilty against all the prisoners, founded upon the testimony of an accomplice, corroborated as to one of the prisoners but uncorroborated as to the others, will be upheld.—*R. v. CURRIS* (1838), Craw. & D. Abr. C. 274.—**IR.**

**s. Confession of one prisoner cannot corroborate evidence of accomplice against other prisoners.**—The confession of one of the prisoners cannot be used to corroborate the evidence of an accomplice against the others, tainted evidence not being made better by being corroborated by other tainted evidence.—*R. v. MALAPA BIN KAPANA* (1874), 11 Bom. 196.—**IND.**

**t. Evidence of one accused not corroborative evidence against fellow accused.**—A woman was convicted along with a married couple of acting in concert & defrauding a relief fund, by obtaining relief for the husband upon false statements, including a false statement that the husband was out of work at the time of the application. The woman's part in the transaction was that she had filled up the necessary form for the husband, & had signed it for him, without having made any inquiry into the truth of the facts stated. The only evidence that she actually knew of the falsity of any statement in the form was that of the wife, who, in giving evidence on her own behalf at the trial, stated that she had told the woman that her husband was at work:—*Held*: as the evidence of the wife, assuming it to be competent against her fellow-accused, was uncorroborated, it was insufficient to prove complicity on the part of applt. in the fraud.—*TOWNSEND v. STRATHERN*, [1923] S. C. (J.) 66.—**SCOT.**

Sect. 13.—*Evidence of accomplice: Sub-sect. 4, E.**E. Direction on Corroboration.*

**4960. Caution to jury essential.**—*R. v. TATE*, No. 4942, *ante*.

**4961.** —.]—*R. v. WARNER*, No. 3852, *ante*.

**4962.** —.]—Conviction quashed on the ground that in the summing-up the jury were not cautioned that the evidence of a witness came from a tainted source & was uncorroborated, & on the further ground that there was no sufficient differentiation in the summing-up of the case against prisoner from that against prisoner indicted with him.—*R. v. BEAUCHAMP* (1909), 73 J. P. 223; 25 T. L. R. 330; 2 Cr. App. Rep. 20, 40, C. C. A.

**4963.** —.]—The ct. will quash a conviction unless the jury are expressly directed that there must be corroboration of an accomplice's evidence.—*R. v. MASON* (1910), 5 Cr. App. Rep. 171, C. C. A.

**4964.** —.]—Where on the trial of a charge of larceny the only evidence against deft. is that of a person who received the stolen property, & there is a suspicion that he knew that the property was stolen, his evidence must not be left to the jury as that of an untainted witness, but they should be warned that if they think that he was an accomplice there ought to be corroboration of his story.—*R. v. JENNINGS* (1912), 7 Cr. App. Rep. 242, C. C. A.

**4965.** —.]—*R. v. BLOODWORTH*, No. 4014, *ante*.

**4966.** —.]—*R. v. CHRISTIE*, No. 3811, *ante*.

**4967.** —.]—*R. v. BASKERVILLE*, No. 4934, *ante*.

**4968.** —.]—On a charge of receiving a pony knowing it to have been stolen, the jury, in

answer to questions put to them by the deputy chairman of quarter sessions, found that the explanation given by applt. was one which might reasonably be true, but returned a verdict of guilty against applt. An accomplice pleaded guilty to the theft, but there was no corroboration of his evidence against applt. on the charge of receiving. The jury were not properly directed as to knowledge by applt. that the pony was stolen, nor as to the necessity for corroboration of the evidence given against applt. by the accomplice:—*Held*: owing to their being no corroboration of the evidence given by the accomplice, the appeal must be allowed & the conviction quashed.—*R. v. NORRIS* (1916), 86 L. J. K. B. 810; 116 L. T. 160; 25 Cox, C. C. 601; 12 Cr. App. Rep. 156, C. C. A.

**4969.** —.]—*R. v. BRYANT* (1917), 13 Cr. App. Rep. 49, C. C. A.

**4970.** —.]—*R. v. WYMAN*, No. 4935, *ante*.

**4971.** —.]—Applt. was convicted on a charge of having had carnal knowledge of a girl under sixteen years of age. The girl gave evidence of being assaulted by prisoner at her aunt's house on two occasions. Although other persons were about the house at the time of the assaults, she made no complaint to anyone until five or six months afterwards, when finding herself pregnant, she accused prisoner. The judge in his summing up repeatedly warned the jury that the girl's evidence was uncorroborated:—*Held*: the evidence given by the girl was not that of an accomplice, & even if it had been, the judge having repeatedly warned the jury that her evidence was uncorroborated it was within their province to convict prisoner upon such uncorroborated evi-

## PART XII. SECT. 13, SUB-SECT. 4.—E.

**4960 i. Caution to jury essential.**—*PEACOCK v. R.*, [1911] 13 C. L. R. 619.—*AUS.*

**4960 ii.** —.]—It is not only a desirable practice that jurors should be warned against accepting uncorroborated evidence of an accomplice, but if it should appear at any trial that the warning has not been given, & there is an absence of corroborative evidence, the Ct. of Criminal Appeal should set aside the conviction & deal with the case under the provisions of the Act, which enables the ct., if it thinks a proper case appears, to direct a new trial.—*R. v. MOELLER* (1913), 13 S. R. N. S. W. 613.—*AUS.*

**4960 iii.** —.]—On a charge of receiving stolen property, the principal witness was an accomplice, who admitted having stolen the goods. To corroborate this evidence a witness was called whose evidence was sufficient to raise grave doubts whether he was not also an accomplice. He was cross-examined to show that he must have been aware both of the stealing & of the receiving, but neither party at the trial.

accomplice. The judge left his evidence to the jury as that of an independent witness. The judge should have accepted in corroboration of that of the principal witness:—*Held*: though there was ample independent evidence of corroboration, the judge ought in the circumstances to have warned the jury that there was evidence upon which they might find that the second witness was also an accomplice, & a new trial was granted.—*R. v. MALOUF* (1918), 18 S. R. N. S. W. 142.—*AUS.*

**4960 iv.** —.]—The evidence of an accomplice, even though uncorroborated, is legal evidence & sufficient to support a conviction, but the trial judge should advise the jury not to convict upon such evidence.—*R. v. REYNOLDS* (1906), 1 Sask. L. R. 80;

9 W. L. R. 299; 15 Can. Crim. Cas. 209.—*CAN.*

**4960 v.** —.]—A rule of practice & experience exists relative to the evidence of accomplices against accused, which requires that the jury be warned against the danger of convicting on such evidence without corroboration.—*R. v. FRECHETTE* (1920), 46 O. L. R. 610; 51 D. L. R. 246; 32 Can. Crim. Cas. 409; 17 O. W. N. 386.—*CAN.*

**4960 vi.** —.]—The judge should tell the jury that, although the law permits them to convict on the uncorroborated evidence of an accomplice, it is not the practice of our ct., which have consistently held that it was not safe or proper to convict on such evidence without some corroboration sufficient to connect each of the accused with the offence committed.—*JAMIRUDDI MASALI v. R.* (1902), 1 L. R. 29 Cal. 782; 6 C. W. N. 553.—*IND.*

**4960 vii.** —.]—In a criminal trial where the case for the prosecution depends wholly or in part on the testimony of an accomplice it is the duty of the presiding judge to warn the jury that it is unsafe to convict on the uncorroborated testimony of the accomplice, although it is competent for

*PETERSON* (1911), 30 N. Z. L. R. 801.—*N.Z.*

**a.** —.]—*Rule of discretion.*—The rule requiring the judge to direct juries not to convict on the uncorroborated testimony of an accomplice is a rule of discretion, & not of law.—*R. v. WEBSTER & WELLS* (1880), 1 N. S. W. L. R. 331.—*AUS.*

**b.** —.]—There is no rule of law requiring a judge to direct the jury as to corroboration of the evidence of an accomplice; it is a rule of prudence only.—*R. v. GRAHAM*, [1915] V. L. R. 402.—*AUS.*

**c.** —.]—*Rule of practice.*—The question whether or not a judge, in

charging a jury, should caution them that the evidence of an accomplice should be corroborated, is not a matter for a ct. to review on a case reserved, for it is not a question of law, but of practice, though a practice which should not be omitted.—*R. v. ANDREWS* (1886), 12 O. R. 184.—*CAN.*

**d.** —.]—Where the evidence of an accomplice is uncorroborated, the correct practice requires a judge not merely to tell the jury that it is unusual to convict on such evidence, but that he should also tell them that it is unsafe, & contrary both to prudence & practice, to do so, yet his omission to state this does not amount to an error in law.—*R. v. GANU BIN DHARJOI* (1869), 6 Bom. Cr. Ca. 57.—*IND.*

**e.** —.]—It is a rule of practice & not a rule of law for the presiding judge in a criminal trial to warn the jury that it is dangerous to rely upon the uncorroborated testimony of an accomplice.—*R. v. WESTON* (1912), 32 N. Z. L. R. 56.—*N.Z.*

**f.** —.]—*Effect of failure to caution.*—A conviction of a prisoner for horse-stealing, upon the uncorroborated evidence of an accomplice, was held legal, although the judge did not caution the jury as to the weight to be attached to the evidence.—*R. v. BECKWITH* (1859), 8 C. P. 274.—*CAN.*

**g.** —.]—There was no evidence to show that accused was one of the persons present & participating in the affair which led to the death of S., with the exception of that given by two persons who were in company with accused & participating with him in carrying out a common intention, & who, therefore, were accomplices:—*Held*: the case was one in which the trial judge should have warned the jury of the danger of convicting on the evidence given, & as he had failed to do so the conviction must be quashed.—*R. v. MORRISON* (1917), 51

—*R. v. CROCKER* (1922), 92 L. J. K. B. 428; 128 L. T. 33; 87 J. P. 44; 39 T. L. R. 105; 67 Sol. Jo. 248; 27 Cox, C. C. 325; 17 Cr. App. Rep. 46, C. C. A.

*Annotation*.—*Refd. R. v. Rudge* (1923), 17 Cr. App. Rep. 113.

## Part XIII.—Punishment and Prevention of Crime.

### SECT. 1.—PRINCIPLES THAT DETERMINE THE AMOUNT OF PUNISHMENT.

#### SUB-SECT. 1.—SENTENCE GENERALLY.

**4973.** —[*Sentence must be taken into consideration.*—*R. v. BAKER* (1908), 1 Cr. App. Rep. 9, C. C. A.

**4974.** —[*R. v. EDWARDS* (1909), 3 Cr. App. Rep. 59, C. C. A.

**4975.** *Sentence must not be fixed by rule of thumb.*—This is not a case of arbitrary doubling a previous sentence. There is not the slightest ground for the suggestion as to "a rule of thumb" (LORD ALVERSTONE, C.J.).—*R. v. THORNTON* (1909), 2 Cr. App. Rep. 315, C. C. A.

**4976.** *Sentence must be limited to offence proved & admitted.*—The maximum sentence warranted by law should be reserved for the worst cases of the particular offence.

Where, on a trial for rape, the prosecutrix is absent in suspicious circumstances, so that a conviction except for a minor offence, *e.g.* indecent assault, would be unsafe, the judge, in passing sentence, ought not to be influenced by the more serious charge.

Detention before trial ought to be taken into account in passing sentence.—*R. v. HARRISON* (1909), 2 Cr. App. Rep. 94, C. C. A.

*Annotation*.—*Fold. R. v. Boxall, Hammersley & Marston* (1909), 2 Cr. App. Rep. 175.

**4977.** —[*W. married I. in 1876. In 1878 his wife parted from him. In 1890 W. purported to marry B., describing himself as a bachelor in the register of marriage. In 1906 B. parted from him. In 1909 W. was indicted for bigamy, & for wilfully making in 1890 a false entry in a register*

**4972.** —[*When two persons are tried together & the evidence discloses a possibility that one of them may be an accomplice of the other or of a third person, the usual warning to the jury about corroboration must be given.*—*R. v. HEATHFIELD* (1923), 17 Cr. App. Rep. 80.

of marriage. The prosecution elected not to proceed on the indictment for bigamy on the ground that there was no evidence on the depositions that in 1890 W. was aware that his wife was alive. W. was convicted on the other indictment, & evidence having been given of bad conduct on his part to I. & to B., he was sentenced to two years' imprisonment with hard labour.—*Held*: it was plain that W. had not been sentenced to this term for what he had written in the marriage register in the year 1890, but by reason of the strong view the judge took of W.'s conduct. The sentence was one of which the Ct. could not for a moment approve. W. had been in prison for a few weeks & he should be immediately discharged.—*R. v. WELLS* (1909), 73 J. P. 415; 2 Cr. App. Rep. 259, C. C. A.

**4978.** —[*R. v. BROCKLESS* (1913), 9 Cr. App. Rep. 121, C. C. A.

**4979.** —[*On an indictment containing counts charging indecent & also common assault, a plea of guilty to the common assault was entered & a sentence of twelve months' imprisonment with hard labour was imposed. Applt. had been previously twice convicted, & three times charged with various offences but was acquitted:—Held*: the sentence of twelve months' imprisonment with hard labour, being the maximum sentence which could be imposed for a common assault, to which the accused had pleaded guilty, was under the circumstances too severe.

The proper thing is to disregard altogether the cases where applt. was acquitted (LORD READING, C.J.).—*R. v. JOSEPHSON* (1914), 110 L. T. 512;

N. S. R. 253; 29 Can. Crim. Cas. 6.—CAN.

**h.** —[*A judge should caution a jury not to accept the evidence of an approver unless it is corroborated; the omission to do so amounts to misdirection.*—*R. v. ARUMUGA* (1888), 1 L. R. 12 Mad. 196.—IND.

**k.** *Where caution given—Jury may convict.*—Where the jury were properly warned that they should not convict accused on the uncorroborated evidence of an accomplice, & they nevertheless convicted, Ct. of Criminal Appeal refused to quash the conviction.—*R. v. REVEE* (1917), 17 S. R. N. S. W. 81; 34 N. S. W. W. N. 123.—AUS.

**l.** —[*The jury were told that the testimony of accomplices was not sufficiently corroborated to warrant a conviction, whereupon they came into Ct. stating that they thought prisoner guilty, but that he ought not to be convicted on the evidence. They were then told that they ought to acquit; but after a short interval they returned a verdict of guilty. Before recording their finding, the presiding judge recommended them not to convict on the evidence, saying, however, that they could do so if they thought proper; they nevertheless adhered to their verdict:—Held*: no ground for a new trial.—*R. v. SEDDON* (1866), 16 C. P. 389.—CAN.

**m.** —[*Where a prisoner had been found guilty by the jury on the uncorroborated evidence of an approver, after the judge in his summing up had pointed out to them the desirability, under the circumstances, of such corroboration, the High Ct. on appeal refused to set aside the conviction on that ground.*—*R. v. MAHIMA CHANDRA DAS* (1871), 6 B. L. R. App. 108; 15 W. R. 37.—IND.

**n.** —[*The direction commonly given to the jury, is that they are not bound to convict on the unsupported testimony of an accomplice or even an accessory after the fact; that it is not safe to do it; that they should not give credit to such unsupported testimony; but that he cannot withdraw such evidence from their consideration; it is legal evidence, & being so they may act upon it or not as they please, bearing in mind the caution & advice which they have received.*—*R. v. SMITH* (1876), 38 U. C. R. 218.—CAN.

**o.** —[*The judge should caution the jury as to the danger of convicting, & advise them not to convict on the uncorroborated evidence of an accomplice; but if, notwithstanding such caution & advice, a verdict of "guilty" is rendered, such verdict is legal, & a conviction must be made.*—*R. v. BEROHL* (1912), 21 W. L. R. 665; 2 W. W. R. 624; 5 D. L. R. 497.—CAN.

### PART XIII. SECT. 1, SUB-SECT. 1.

**4976 i.** *Sentence must be limited to offence proved or admitted.*—In considering what sentence should be passed a judge has no right to impose a heavier sentence than he otherwise would have imposed or to refrain from reducing the sentence to what he otherwise would have reduced it because accused's sworn statement has not been accepted by the jury.—*R. v. RICHMOND* (1920), V. L. R. 9.—AUS.

**4976 ii.** —[*A judge, in determining what sentence he will impose or in determining whether he will suspend the execution of the sentence, is not entitled to take into consideration the fact that accused has made on oath in his defence statements which the jury regard as false, but he may take into consideration the demeanour & possibly also statements, considered apart from their falsity, of accused when giving evidence just as he may consider such matters when accused makes a statement from the dock.*—*R. v. TIMMS*, [1921] V. L. R. 503.—AUS.

**p.** *Measure of sentence—Discretion of court.*—A judge has a discretion as to whether he will pass sentence of death or not upon a prisoner guilty of murder. Such discretion should be exercised only in very special circumstances, on very special occasions, & for very cogent reasons.—

*Sect. 1.—Principles that determine the amount of punishment: Sub-sects. 1 & 2.]*

30 T. L. R. 243; 24 Cox, C. C. 128; 10 Cr. App. Rep. 8; 78 J. P. Jo. 40, C. C. A.

**4980.** —[—]—In calculating what sentence to pass upon a prisoner a judge may consider the motives which actuated prisoner in committing the act admitted by or proved against him, but he must not attribute to prisoner a motive which has been negatived by the jury, or guilt of a crime not charged in the indictment. He must not assume prisoner to be guilty of a statutory aggravation of an offence which might have been, & was not, charged in the indictment, so as to punish him for the offence with the addition of the aggravation.—*R. v. BRIGHT*, [1916] 2 K. B. 441; 85 L. J. K. B. 1638; 115 L. T. 488; 80 J. P. 407; 32 T. L. R. 600; 25 Cox, C. C. 540; 12 Cr. App. Rep. 69, C. C. A.

*Annotation:—***Refd.** *R. v. Wheeler*, [1917] 1 K. B. 283.

**4981.** —[—]—In imposing sentence the judge must accept the jury's finding.—*R. v. MARSHALL* (1917), 12 Cr. App. Rep. 208, C. C. A.

**4982.** —[—]—Sentence ought not to be mitigated in view of meritorious military service.

When the question of sentence is under consideration each case must be judged on its own merits, on nothing else.—*R. v. ANSELL* (1918), 13 Cr. App. Rep. 110, C. C. A.

**4983.** —[—]—When on a charge of a graver offence a plea of guilty to a lesser is accepted, care must be taken only to sentence for the latter.—*R. v. RAPER* (1922), 16 Cr. App. Rep. 195, C. C. A.

**4984.** — **Extraneous matters must not be considered—Perjury by accused.**—[—]*R. v. BOYD* (1908), 1 Cr. App. Rep. 64; 72 J. P. Jo. 352, C. C. A.

**4985.** —[—]—Sentence ought not to be increased because deft. after conviction persists in asserting his innocence.—*R. v. NEWMAN* (1913), 9 Cr. App. Rep. 134, C. C. A.

**4986.** — **Desire to promote habits of temperance.**—[—]Applt. was convicted of neglecting four children in a manner likely to cause them unnecessary suffering or injury to their health; she was also convicted of being an habitual drunkard; & she was sentenced to twelve months' imprisonment with hard labour, to be followed by three years' detention in an inebriate reformatory.—*Held:* the sentence was too severe, & it should be reduced to twelve months' imprisonment with hard labour, to be followed by twelve months' detention in a reformatory.—*R. v. PRINCE* (1908), 25 T. L. R. 197; 1 Cr. App. Rep. 252, C. C. A.

**4987.** —[—]—The ct. does not view with favour the imposition of a sentence on a prisoner addicted to drink severer than is usually passed for the given offence, merely to promote habits of temperance on his part.—*R. v. CRISP* (1912), 7 Cr. App. Rep. 173, C. C. A.

**4988. Sentence must be proportionate to offence.**—[—]*R. v. RAY & CARTER* (1909), 3 Cr. App. Rep. 189, C. C. A.

**4989.** —[—]*R. v. MOUNTFORD* (1910), 4 Cr. App. Rep. 224, C. C. A.

*Annotation:—***Mentd.** *R. v. Evans* (1912), 8 Cr. App. Rep. 15.

*R. v. SINNAH* (1900), 10 H. C. 387.—**S. AF.**

**q. Definite penalty imposed by statute—Other penalty irregular.**—[—]When an Act of the Legislature prescribes a definite penalty for an offence, the imposition of a penalty other than the one prescribed is irregular.—*Ex p. WILSON* (1877), 1

P. & B. 274.—**CAN.**

**r. Offence against provisions of statute—Under several sections.**—[—]Non-compliance with the provisions of a statute renders an offender liable to only one penalty for each act, though the act be a breach of more than one sect.—*SHAW v. PARDEY* (1900), 18 N. Z. L. R. 782.—**N.Z.**

**4990.** —[—]*R. v. WILLIAMS* (1911), 7 Cr. App. Rep. 51, C. C. A.

**4991.** — **Trifling offence—Previous convictions.**—[—]*R. v. BENNETT & HOLLOMAN* (1911), 6 Cr. App. Rep. 203, C. C.

**4992.** —[—]—The ct. discourages sentences of penal servitude for thefts of goods of small value, even when prisoner has been previously convicted.—*R. v. MARTIN* (1913), 9 Cr. App. Rep. 168, C. C. A.

**4993.** —[—]—Whatever may be his character, regard must always be had to the nature of the offence. He must not be sentenced to penal servitude for a trivial offence merely because he has been so sentenced before (*AVORY, J.*).—*R. v. BAKER* (1915), 11 Cr. App. Rep. 175.

**4994.** —[—]—The triviality of an offence may mitigate the effect of previous convictions.—*R. v. DOUGLAS* (1915), 11 Cr. App. Rep. 185.

**4995.** — **Maximum sentence intended for worst cases.**—[—]*R. v. HARRISON*, No. 4976, *ante*.

**4996.** — **Value of property stolen.**—[—]Severity of sentence not dependent on value of property stolen.—*R. v. MAURICE* (1908), 1 Cr. App. Rep. 176, C. C. A.

**4997.** —[—]—The value of property stolen is not the only measure of punishment.—*R. v. MCCREESE* (1910), 4 Cr. App. Rep. 72, C. C. A.

**4998.** —[—]—While the offence of larceny for which a prisoner is indicted may be a very bad one notwithstanding that the sum stolen is small, as, for instance, where prisoner has obtained small amounts from a number of different persons, nevertheless, in dealing with one particular case of larceny the small amount stolen may properly be taken into consideration on the question of sentence.—*R. v. MYLAND* (1911), 27 T. L. R. 256; 6 Cr. App. Rep. 135, C. C. A.

**4999. Remanet of previous sentence—Should be taken into consideration.**—[—]In passing sentence, any unexpired sentence should be taken into account.—*R. v. SMITH* (1909), as reported in 74 J. P. 13; 26 T. L. R. 23; 54 Sol. Jo. 137; 3 Cr. App. Rep. 40.

*Annotations:—***Refd.** *R. v. JACKSON* (1910), 4 Cr. App. Rep. 93. **Mentd.** *R. v. FRANKLIN* (1909), 3 Cr. App. Rep. 48; *R. v. SWEENEY* (1910), 74 J. P. Jo. 77.

**5000.** —[—]—Applt. was convicted of the larceny of a watch from his father & of 6s. from his sister. It appeared that there was a *remanet* of 270 days' imprisonment from his last sentence. He was now sentenced to six years' penal servitude. From this sentence he appealed. It is quite right to consider in such a case, when deciding what sentence should be imposed, that one effect of the commission of the particular offence would be that automatically by statute the appellant would have to serve this *remanet* of 270 days (*per CUR.*).—*R. v. DORRINGTON* (1910), 74 J. P. 392; 5 Cr. App. Rep. 119, C. C. A.

**5001.** —[—]*R. v. FISHER* (1910), 5 Cr. App. Rep. 269, C. C. A.

**5002.** —[—]*R. v. SAUNDERS* (1911), 7 Cr. App. Rep. 18, C. C. A.

**5003.** —[—]—In view of the fact that a convict has a *remanet* of a previous sentence to

**s. Cannot commence on future day—Except at expiration of a prior term.**—[—]The ct. has not power to award a sentence of imprisonment to commence at a future day except where it is to commence at the expiration of an imprisonment under a previous sentence.—*R. v. O'CONNELL* (1844), 3 L. T. O. S. 376.—**IR.**

serve a fresh sentence of penal servitude may be reduced.—*R. v. FOWLES* (1914), 11 Cr. App. Rep. 5, C. C. A.

**5004. Type of punishment may be considered.—Sentence of whipping.—Shortens length of term.]**—The infliction of flogging should diminish a term of penal servitude, part of the same sentence.—*R. v. ENTWISTLE* (1912), 8 Cr. App. Rep. 93, C. C. A.

**5005. — Borstal system—Requires adequate term.]**—Where a judge sentences a prisoner to a term of detention or imprisonment under some particular form of treatment, such as the Borstal system, & it appears that the treatment is considered useless unless undergone for a certain period, the judge ought to take that fact into his consideration in determining the length of the sentence he will impose.—*R. v. KIRKPATRICK* (1908), 73 J. P. 29; 25 T. L. R. 66, C. C. A.  
*Annotation* :—*Refd. R. v. Keating* (1910), 74 J. P. 452.

**5006. — Modified Borstal system—Term not to be lengthened for.]**—In sentencing a prisoner between the ages of 16 & 21, who for any reason cannot be sent to a Borstal institution, the judge ought not to impose a sentence for a longer term than is appropriate in the particular case in order that prisoner may get the benefit of the modified Borstal system as it is administered in prison.—*R. v. OXLADE*, [1919] 2 K. B. 628; 88 L. J. K. B. 1318; 83 J. P. 218; 122 L. T. 34; 26 Cox, C. C. 530; 14 Cr. App. Rep. 65, C. C. A.

**5007. Possibility of remission for good conduct.]**—The trial judge is entitled to take into consideration the possibility of part of a sentence being remitted for good conduct.—*R. v. WILSON* (1910), 5 Cr. App. Rep. 8, C. C. A.

#### SUB-SECT. 2. —STANDARDISATION OF SENTENCES.

**5008. No invariable standard.]**—Applt. was indicted for larceny. He pleaded guilty to obtaining £1 by a trick. He had been ten times previously convicted. Applt. had received three sentences of penal servitude, & was under police supervision when he committed the offence with which he was charged. He was sentenced to 8 years' penal servitude, followed by three years' police supervision :—*Held* : a sentence of five years' penal servitude with no police supervision to follow must be given in the place of the sentence passed at the trial.

It is one of the advantages of this tribunal that it tends to a standardisation of sentences. No invariable tariff can ever be fixed, for it is impossible to classify guilt so nicely as to indicate it, even approximately, by the names given to the various crimes. But, with time, it is to be expected that the revision of sentences by this ct. will tend to harmonise the views of those who pass them, & so to ensure that varying punishments are not awarded for the same amount of guiltiness (*per Cur.*)—*R. v. WOODMAN* (1909), 73 J. P. 286; 2 Cr. App. Rep. 67, C. C. A.

**5009. Felonious wounding.]**—The applicant was convicted for wounding with intent to do grievous bodily harm, & sentenced to fourteen years' penal servitude. The applicant, who was a dock labourer, having met his wife, from whom he had been judicially separated, in the street, followed her up, & got to the place where she lived, & then met her and stabbed her three times, & left the knife sticking in her back. The applicant pleaded not

guilty at the trial, he was undefended, & stated that he was so drunk that he had lost all recollection of the circumstances.

It is quite impossible to lay down any standard as to what is a proper punishment for the offence of wounding with intent to do grievous bodily harm, as little as in cases of manslaughter, the most difficult of all (*CHANNELL, J.*)—*R. v. GORMAN* (1909), 2 Cr. App. Rep. 187, C. C. A.

**5010. —.]**—D. was sentenced at the ct. of trial to five years' penal servitude for stabbing a woman. It appeared that the judge who sentenced him thought the prosecutrix was a respectable woman living with her husband, & that D. had broken up her home. Inquiries having been made, it appeared that this woman was a prostitute, living with a man who was not her husband. The injuries, which were not serious, were inflicted by applt. taking up a knife lying close to him in the midst of an altercation with the prosecutrix. The ct. passed in substitution a sentence of eighteen months' imprisonment with hard labour.—*R. v. DICKENSON* (1909), 73 J. P. 286; 2 Cr. App. Rep. 78, C. C. A.

**5011. Rape.]**—*R. v. WINT* (1909), 3 Cr. App. Rep. 204, C. C. A.

**5012. —.]**—The normal sentence for rape is five years' penal servitude.—*R. v. ROBINSON* (1914), 11 Cr. App. Rep. 4, C. C. A.

**5013. Bigamy.]**—There can be no standardisation of sentences for bigamy.

Sentence mitigated to save forfeiture.—*R. v. MORTIMER* (1918), 13 Cr. App. Rep. 146, C. C. A.

**5014. Receiving stolen property.]**—It is impossible to standardise sentences for receiving stolen property with guilty knowledge.—*R. v. CLAY, R. v. GRANT, R. v. VALE* (1918), 13 Cr. App. Rep. 193, C. C. A.

**5015. Incurable rogue.]**—E. was sentenced at quarter sessions to nine months' imprisonment with hard labour as a rogue & vagabond. It appeared that he had already been sentenced on nine or ten occasions under the Vagrancy Acts, & that on one of these occasions he had been sentenced to seven months' imprisonment with hard labour as a rogue & vagabond. It appeared that ten years ago before the dates of these convictions, he had left the army with a character that was marked "Very Good." He had then obtained employment & kept himself, until he was struck down by paralysis. He then commenced playing a penny whistle in the streets & begging, the conduct which led to his convictions. He had never been convicted of dishonesty or violence. The ct. passed in substitution a sentence of three months' imprisonment with hard labour.—*R. v. EDWARDS* (1909), 73 J. P. 286; 2 Cr. App. Rep. 79, C. C. A.

*Annotations* :—*Distd. R. v. Cooper* (1910), 75 J. P. 125.  
*Refd. R. v. Harrison* (1913), 30 T. L. R. 1.

**5016. —.]**—Applt. was sentenced to four months' imprisonment with hard labour, for the offence of begging & of being an incurable rogue. He contended that on his first conviction he had been wrongly sentenced on an alleged previous conviction of 14 days' imprisonment at Tower Bridge Police Ct., & consequently, all subsequent convictions had been based upon a conviction which, in fact, had never taken place :—*Held* : the chairman, rightly sentenced him to a term of four months.

**PART XIII. SECT. 1, SUB-SECT. 2.**  
**t. Forgery.]**—When passing sentence on a prisoner convicted of using certain materials for the purpose of forging bank-notes the judge passed

the maximum sentence of 14 years' penal servitude leaving it to the executors to determine where his history was known, the length he would have to serve :—*Held* : infliction of the

maximum penalty was contrary to the principles which have always guided judges in determining sentences.—*R. v. SELLING* (1913), 13 S. R. N. S. W. 628; 30 N. S. W. W. N. 169.—**AUS.**

*Sect. 1.—Principles that determine the amount of punishment: Sub-sects. 2 & 3. Sect. 2: Sub-*

Prisoner had a right of appeal to the quarter sessions which he might have exercised, when all the evidence could then have been gone into. He was then sentenced to four months' imprisonment, having been convicted of precisely the same offence as that for which he had previously been sentenced to nine months' imprisonment, which had been reduced by this ct. to one of three months'. We are not here as legislators, & we can only administer the law as we find it, but it does seem somewhat hard to have to pass such sentences. These sentences cannot be passed unless the same offence has been committed before.—*R. v. O'BRIEN* (1909), 2 Cr. App. Rep. 193, C. C. A.

**5017.** ———.]—*Semble*: the maximum sentence of twelve months' imprisonment with hard labour should not be imposed on a person convicted as an incorrigible rogue for begging, even though previously convicted on many occasions of begging, if the evidence shows that the offender merely begged without any aggravating circumstances, e.g. with menaces.—*R. v. COOPER* (1910), 75 J. P. 125; 5 Cr. App. Rep. 273, C. C. A.

**5018.** ———.]—This was an appeal against a sentence of eight months' imprisonment, with hard labour, on a conviction as an incorrigible rogue. It appeared that the appellant went up to persons at night & asked them for money. Applt. had been previously convicted for begging on many occasions. The ct. reduced the sentence to one of three months' imprisonment with hard labour.—*R. v. HARRISON* (1913), 30 T. L. R. 1; 9 Cr. App. Rep. 145; 77 J. P. Jo. 484, C. C. A.

**Habitual criminal.**—See Sect. 4, sub-sect. 4, *post*.

#### SUB-SECT. 3.—SENTENCES ON CO-PRISONERS.

**5019. Where both equally guilty—Sentences should be alike.**—If the ct. reduces on a previous application, a sentence passed on one of several prisoners jointly indicted, it will, on a subsequent application, in the absence of any reason for discrimination, reduce it in the case of the others.—*R. v. BOXALL, HAMMERSLEY & MARSTON* (1909), 2 Cr. App. Rep. 175, C. C. A.

**5020.** ———.]—Applt. was convicted of aiding & abetting bigamy & sentenced to nine months' imprisonment with hard labour. The principal offender, the woman, was only sentenced to three months. Applt.'s sentence was reduced to that of the woman.—*R. v. READ* (1915), 11 Cr. App. Rep. 89, C. C. A.

**5021.** ———.]—When offences & their circumstances are of a similar nature, the ct. tends to equalise sentences, even if there is no formal appeal against sentence.—*R. v. MONTRIOU, EMMOTT, HEWITT & HEATHCOTE* (1921), 16 Cr. App. Rep. 74, C. C. A.

**5022.** ———.]—Sentences may be affected by previous records.—Appls. were indicted for being found at night, having in their possession, without lawful excuse, certain implements of housebreaking. Both appls. were found guilty, H. being sentenced to eleven months' imprisonment with hard labour, & L. to fourteen months'. H. gave his name as T. As soon as the police-station was mentioned,

appls. tried to run away. L. was convicted in April, 1908, & received six months' imprisonment. H. had not been convicted since 1904:—*Held*: as regards L., the sentence must stand, but H.'s sentence must be reduced to six months' imprisonment.—*R. v. HILL & LE GRICE* (1909), 2 Cr. App. Rep. 74, C. C. A.

**5023.** ———.]—The sentence on a first offender with a previous good character should not, as a general rule, be so severe as that on a co-prisoner with a bad character.—*R. v. CANHAM* (1910), 5 Cr. App. Rep. 110, C. C. A.

**5024.** ———.]—*Remanet* sentences must be served after the fresh term of penal servitude.

The sentences of the ct. may discriminate between co-defts. who have been previously condemned to penal servitude & those who have not.—*R. v. MINTZ, ROBERTS & HARRIS* (1922), 17 Cr. App. Rep. 11, C. C. A.

**5025. Varying degrees of guilt—Discretion of judge at trial.**—*R. v. BALDWIN* (1909), 2 Cr. App. Rep. 117, C. C. A.

**5026.** ———.]—Disparity between the sentences of co-prisoners is not necessarily a ground for reducing sentence.—*R. v. STUTTER* (1910), 5 Cr. App. Rep. 64, C. C. A.

**5027.** ———.]—Similar sentences may be imposed.—To impose the same sentence on co-defts. guilty in different degrees is not necessarily improper.—*R. v. DENT* (1913), 9 Cr. App. Rep. 223; 77 J. P. Jo. 580, C. C. A.

#### SECT. 2.—MATTERS TO BE TAKEN INTO CONSIDERATION.

##### SUB-SECT. 1.—ANTECEDENTS OF PRISONER.

###### *A. In General.*

**5028. To be inquired into.**—In considering sentences it has been the invariable practice to inquire into prisoner's history, in his own interest, & if in the course of that inquiry, facts come out which damage him, the judge ought to take notice of it (LORD ALVERSTONE, C.J.).—*R. v. WEAVER* (1908), 1 Cr. App. Rep. 12, C. C. A.

**5029. Facts adverse to prisoner must be proved or admitted.**—After conviction there should be given to the judge by the police accurate information as to prisoner's condition & antecedents, even although legal evidence as to the whole of the information may not be available at the moment. Where prisoner does not challenge this information the judge can properly consider it, but where prisoner challenges any statement & says it is untrue, it is the duty of the judge to inquire into it, & if the judge considers the matter of such importance that it ought to be proved by legal evidence, to adjourn the case for that purpose. The judge, however, may properly adopt the course of disregarding altogether the statement that has been challenged.—*R. v. CAMPBELL* (1911), 75 J. P. 216; 27 T. L. R. 256; 55 Sol. Jo. 273; 6 Cr. App. Rep. 131, C. C. A.

**5030.** ———.]—Sentence of ten years' penal servitude reduced to six years' penal servitude on the ground that a statement by the police as to prisoner's antecedents was taken into consideration, & there was nothing to show that the prisoner admitted the accuracy of such statement.—*R. v. BROOKS* (1912), 29 T. L. R. 152; 8 Cr. App. Rep. 111, C. C. A.

#### PART XIII. SECT. 2, SUB-SECT. 1.—A.

**5028 1. To be inquired into.**—Evidence concerning the antecedents &

character of a person found guilty of a criminal offence is properly receivable for the purpose of determining the punishment to be inflicted, both in the

interests of the offender & in the interests of the community.—*R. v. MORRIS*, [1914] S. H. Q. 210.—**AUS.**



**5031. Facts not proved or admitted not to affect sentence.**—An officer of the ct. ought not to give informal information to the ct. in aggravation of deft.'s offence.—*R. v. KENDRICK* (1911), 6 Cr. App. Rep. 117, C. C. A.

**5032.** ———.]—Unsupported suggestions by the police of other offences ought not to influence sentence.—*R. v. COURT* (1911), 6 Cr. App. Rep. 121, C. C. A.

**5033.** ———.]—Statements against a prisoner after conviction must not be taken into account in the sentence, unless strictly proved.—*R. v. EVERITT* (1913), 8 Cr. App. Rep. 156, C. C. A.

**5034.** ———.]—Evidence of convictions & offences not strictly proved nor admitted must not be taken into account in sentence.—*R. v. PALMER* (1913), 8 Cr. App. Rep. 245, C. C. A.

**5035.** ———.]—In receiving evidence after conviction, of a deft.'s antecedents, the ct. is bound to exercise care in discriminating between the knowledge of the deponents & their hearsay information.—*R. v. ELLEY* (1921), 85 J. P. 144; 15 Cr. App. Rep. 143, C. C. A.

**5036. Previous acquittals must not influence adversely.**—*R. v. JOSEPHSON*, No. 4979, *ante*.

#### *B. Previous Convictions.*

**5037. Convictions proved—Only to be considered.**—*R. v. STUBBS* (1913), as reported in 8 Cr. App. Rep. 238, C. C. A.

**5038.** ———.]—Applt. was convicted of larceny. He had been previously convicted, but the convictions were not formally proved. The Recorder, addressing him, said:—"You have a long list against you," & applt. replied, "Yes, Sir":—*Held*: the way in which applt. was treated with regard to his previous convictions was irregular, & the sentence imposed upon him should be reduced.

The admission that there was a long list against applt. was not an admission by him that the list was true. The habit of acting on statements appearing in the calendar is irregular (*AVORY, J.*).—*R. v. METCALFE* (1913), 29 T. L. R. 512; 9 Cr. App. Rep. 7, C. C. A.

**5039.** ———.]—The ct. of trial cannot take cognisance of previous convictions unless they are duly proved by a witness, subject to cross-examination.—*R. v. SEYMOUR* (1923), 87 J. P. 148; 17 Cr. App. Rep. 128, C. C. A.

**5040. Convictions abroad—May be considered.**—*R. v. BENJAMIN* (1913), 8 Cr. App. Rep. 146, C. C. A.

**5041.** ———.]—Previous convictions in another country are properly taken into account in sentences here.—*R. v. FORD* (1921), 15 Cr. App. Rep. 176, C. C. A.

**5042. Nature of previous offences—Must be considered.**—The character of previous convictions must be taken into account in sentence.—*R. v. BOUCHER* (1909), 2 Cr. App. Rep. 177, C. C. A.

**5043.** ———.]—In passing sentence, regard should be had to the nature of previous offences.

—*R. v. PARSONS* (1911), 7 Cr. App. Rep. 76, C. C. A.

**5044.** ———.]—In passing sentence on a prisoner who has often been previously convicted, regard should be had to the last sentence inflicted on him.—*R. v. MORRIS* (1914), 11 Cr. App. Rep. 43, C. C. A.

**5045.** ———.]—For purposes of sentence the interval since a previous conviction & the nature of the previous offence must be taken into account.—*R. v. BIBBINGS* (1918), 13 Cr. App. Rep. 205, C. C. A.

**5046.** ———.]—In sentence regard must be had to the nature of previous offences.—*R. v. STAFFORD* (1920), 15 Cr. App. Rep. 7, C. C. A.

#### *C. Period since last Conviction.*

**5047. Should be taken into account.**—The interval between the last & the present conviction ought to be taken into account in sentence.—*R. v. NUTTALL* (1908), 73 J. P. 30; 25 T. L. R. 76; 53 Sol. Jo. 64; 1 Cr. App. Rep. 180, C. C. A.

*Annotation*:—*Refd.* *R. v. Haden* (1909), 2 Cr. App. Rep. 148.

**5048.** ———.]—*R. v. BIBBINGS*, No. 5045, *ante*.

**5049.** ———.]—*Efforts to lead an honest life.*—*R. v. SCRAGG*, [1920] W. N. 335, C. C. A.

**5050. When period is short—Ground for inflicting penal servitude.**—As a rule penal servitude should not be inflicted after previous convictions unless the offence has been committed soon after release from prison.—*R. v. CONNOR* (1913), 9 Cr. App. Rep. 131, C. C. A.

*Annotation*:—*Refd.* *R. v. Sanders* (1913), 9 Cr. App. Rep. 179.

**5051.** ———.]—*R. v. SANDERS* (1913), 9 Cr. App. Rep. 179, C. C. A.

**5052.** ———.]—*Offence is aggravated.*—An offence is aggravated by its commission after a recent release of the offender from prison.—*R. v. CONNOR* (1913), 9 Cr. App. Rep. 183, C. C. A.

**5053. When period is long—Sentence should not be severe.**—*R. v. CULLEN* (1910), 4 Cr. App. Rep. 7, C. C. A.

**5054.** ———.]—A period of honest work between the termination of a sentence & a subsequent conviction ought to be taken into account in passing sentence for the latter.—*R. v. GOODWIN & WILKINSON* (1910), 6 Cr. App. Rep. 85, C. C. A.

**5055.** ———.]—*R. v. ALDEN* (1913), 8 Cr. App. Rep. 175, C. C. A.

**5056.** ———.]—Sentence mitigated in view of lapse of time since last conviction & of there being no previous sentence of penal servitude.—*R. v. WHITE* (1916), 12 Cr. App. Rep. 53, C. C. A.

**5057.** ———.]—*R. v. JOLLY* (1920), 15 Cr. App. Rep. 15, C. C. A.

**5058.** ———.]—*But previous convictions must be considered.*—Where, after a long interval, there is a relapse into crime, all previous convictions may be taken into account in sentence.—*R. v. CRAWFORD* (1909), 2 Cr. App. Rep. 305, C. C. A.

#### **PART XIII. SECT. 2, SUB-SECT. 1.—B.**

*a. Previous convictions may be considered.*—Where there has been a previous conviction, within the recollection of the ct., but the Crown has failed to prove it & it has not been otherwise shown, the ct. may proceed upon his own initiative, & may inform itself at the same time as to the previous conviction, & the age, character, & antecedents of prisoner.—*R. v. BONNEVIE* (1906), 38 N. S. R. 560; 1 E. L. R. 48.—*CAN.*

*b.* ———.]—When a previous con-

viction is not charged in the indictment or information, neither a judge nor a magistrate has any right to ask a prisoner, after conviction, whether he has been previously convicted or not, either with the view of ascertaining whether the prisoner is liable to any increased punishment, or determining what the proper sentence, within the ordinary maximum provided by the statute in the particular case, should be.—*R. v. EDWARDS* (1907), 17 Man. L. R. 288.—*CAN.*

*c.* ———.]—Except in very special

circumstances, the proper object of using previous convictions is to determine the amount of punishment to be awarded.—*ROSHUN DOOSADH v. R.* (1880), 1 L. R. 5 Calc. 768; 6 C. L. R. 219.—*IND.*

*d.* ———.]—The proof of a previous conviction not contemplated by sect. 75 of the Indian Penal Code may be adduced after accused is found guilty, as an element to be taken into consideration in awarding punishment.—*R. v. ISMAIL AL BHAI* (1914), 1 L. R. 39 Bom. 326.—*IND.*



*Sect. 2.—Matters to be taken into consideration:*  
*Sub-sects. 2, 3, 4 & 5, A.]*

**SUB-SECT. 2.—DETENTION IN PRISON AWAITING TRIAL.**

**5059. Period of detention to be taken into consideration.]**—Period during which applt. is in custody before trial may be taken into account in sentence.—*R. v. GULSTON* (1908), 1 Cr. App. Rep. 165; 72 J. P. Jo. 556, C. C. A.

**5060. —.]**—*R. v. HARRISON*, No. 4976, *ante*.

**5061. —.]**—(1) Degree of guilt may be reduced by the drunken condition of the accused at the time of the offence.

(2) The time of detention before trial may be properly taken into account in passing sentence.—*R. v. HADEN* (1909), 2 Cr. App. Rep. 148, C. C. A.

**5062. —.]**—*R. v. COOPER* (1909), 3 Cr. App. Rep. 95, C. C. A.

**5063. —.]**—*R. v. McCULLOCH* (1914), 11 Cr. App. Rep. 51, C. C. A.

**5064. —.]**—Whether a period of detention before trial should be taken into account in the sentence is a matter of discretion for the judge.—*R. v. MACKINTOSH & HUGHES* (1916), 12 Cr. App. Rep. 41, C. C. A.

**5065. —.]**—(1) If a plea of guilty is wrongly recorded, the ct. may award a *venire de novo*.

(2) Where by the error of the ct. of trial a prisoner has been detained before trial for an unnecessarily long period, that period ought to be taken into account if he is convicted at the trial.—*R. v. LLOYD* (1923), 17 Cr. App. Rep. 184, C. C. A.

**SUB-SECT. 3.—CONSEQUENCES OF CONVICTION.**

**5066. Military penalties under King's Regulations.]**—*R. v. DANIELS* (1915), 11 Cr. App. Rep. 101, C. C. A.

**5067. Forfeiture of pension.]**—If a judge refrains from imposing hard labour, in order to save forfeiture of prisoner's pension under the Forfeiture Act, 1870 (c. 23), he is justified in making the term of imprisonment longer than he would otherwise have imposed.—*R. v. BRIGHT* (1910), 4 Cr. App. Rep. 194, C. C. A.

**5068. —.]**—*R. v. MORTIMER*, No. 5013, *ante*.

**5069. —.]**—Severity of sentence is justified by the frequency of the particular crime.

Sentence varied to avoid forfeiture by law.—*R. v. SMITH* (1918), 13 Cr. App. Rep. 188, C. C. A.

**SUB-SECT. 4.—OTHER CHARGES PENDING.**

**5070. Other charges may be taken into account—Second indictment not proceeded with.]**—Severity of sentence affected by allegations of indictment not proceeded with.—*R. v. BATES* (1908), 1 Cr. App. Rep. 47, C. C. A.

**5071. — Discretion of judge—Offences in other jurisdictions.]**—A judge in sentencing a prisoner convicted in indictment of one offence is entitled to take into consideration other offences which prisoner admits that he has committed, even though in other jurisdictions, & for which he has not yet been tried.—*R. v. SYRES* (1908), 73 J. P. 13; 25 T. L. R. 71; 1 Cr. App. Rep. 172, C. C. A.

*Annotations:—***Consd.** *R. v. Shapcote (alias Heathcote)* (1909), 3 Cr. App. Rep. 58; *R. v. Smith* (1921), 85 J. P.

**224. Refd.** *R. v. Jones (alias Spanler)* (1908), 1 Cr. App. Rep. 196; *R. v. Markham* (1909), 2 Cr. App. Rep. 160; *R. v. Taylor* (1909), 2 Cr. App. Rep. 158; *R. v. McLean*, [1911] 1 K. B. 332.

**5072. — —.]**—A judge is not bound, in passing sentence, to take into account other charges pending deft.—*R. v. SHAPCOTE (alias HEATHCOTE)* (1909), 3 Cr. App. Rep. 58, C. C. A.

**5073. — —.]**—The ct. in its discretion will take into account outstanding charges against a convicted prisoner, & may, to cover them, increase the sentence.—*R. v. BRADLEY* (1922), 16 Cr. App. Rep. 113, C. C. A.

**5074. — —.]**—A judge in passing sentence may take into account other charges pending against deft.—*R. v. ALERON* (1909), 2 Cr. App. Rep. 152, C. C. A.

**5075. — All pending charges should be included.]**—All pending charges against a prisoner should, if possible, be brought to the knowledge of the judge at the trial, & by him be taken into consideration on the sentence.

It is undesirable to tack a sentence of penal servitude on to one of hard labour.—*R. v. JONES (alias SPANIER)* (1908), 1 Cr. App. Rep. 196, C. C. A.  
*Annotation:—***Refd.** *R. v. Baumgarten* (1913), 9 Cr. App. Rep. 212.

**5076. — —.]**—Where possible, all pending charges against a deft. should be disposed of by one sentence.—*R. v. TAYLOR* (1909), 2 Cr. App. Rep. 158, C. C. A.

**5077. — —.]**—All pending charges against a deft. should be mentioned to the ct. upon the first conviction with a view to a comprehensive sentence.—*R. v. MARKHAM* (1909), 2 Cr. App. Rep. 160, C. C. A.

**5078. — —.]**—When a prisoner is on trial for a charge, he should, if it is possible, be indicted on any other pending charge at the same time.—*R. v. HIGSON* (1910), 5 Cr. App. Rep. 167, C. C. A.

**5079. — —.]**—Applt. was sentenced to three years' penal servitude for an offence committed by him. When charged with that offence he desired that certain other offences which he had committed should all be taken into consideration. This was done except as to one charge, which, at the request of the police, was not then dealt with. In respect of this latter charge applt. was at the subsequent sessions sentenced to four years' penal servitude to run concurrently with & to date from the commencement of the sentence of three years' penal servitude imposed at the previous sessions. The ct. reduced the sentence of four years' penal servitude to one of one day's imprisonment & expressed disapproval of the practice adopted by the police in holding over the one charge against applt.—*R. v. DAVIES* (1912), 28 T. L. R. 431; 7 Cr. App. Rep. 254, C. C. A.

**5080. — —.]**—Outstanding charges should be taken into account in sentences, if possible.—*R. v. MONKMAN* (1922), 16 Cr. App. Rep. 115, C. C. A.

**5081. — —.]**—Pending charges against a convicted person ought, if possible, to be dealt with at the time of conviction, or failing that, as soon as may be before sentence expires.—*R. v. CARTER* (1922), 17 Cr. App. Rep. 51, C. C. A.

**5082. — Whether consent of prosecution necessary.]**—Where a ct. before which a prisoner has been convicted on indictment of an offence is asked by prisoner to deal with another offence which he admits having committed but for which he has not yet been tried, the ct. may properly

**PART XIII. SECT. 2, SUB-SECT. 4.**

*e. Other charges may be taken into account.]*—In determining the

punishment to be inflicted, the circumstances connected with the trial & other criminal proceedings taken against prisoner on the same facts, &

the effect thereof on prisoner may be considered.—*R. v. WALKER* (No. 2), [1915] S. R. Q. 143.—**AUS.**

do so if the other offence is of the same character as the offence of which the prisoner has been found guilty, whether there has been a committal for the other offence or not. If there has been a committal for the other offence, the ct. before dealing with it should ascertain that the prosecution consents. If the prosecution does not agree, the ct. should not as a matter of course take the other offence into consideration. It may be that the prosecution desires for a sufficient reason that the other charge should be separately investigated.

If there is a committal in another county for an offence of a different character, the ct. should not take the other offence into consideration without the consent of the authorities prosecuting prisoner in respect of it, & even where the prosecution does consent the ct. ought still to consider whether in the circumstances it ought to take that course, or whether the public interest requires a separate investigation.

The ct. ought not to take another offence into consideration if it is not admitted by prisoner.—*R. v. McLEAN*, [1911] 1 K. B. 332; 80 L. J. K. B. 309; 103 L. T. 911; 75 J. P. 127; 27 T. L. R. 138; 22 Cox, C. C. 362; 6 Cr. App. Rep. 26, C. C. A.

*Annotation*.—*Refd. R. v. Lloyd* (1923), 17 Cr. App. Rep. 184.

**5083. — Consent of defendant necessary.**—Pending charges against applt. will not be taken into consideration in passing sentence, unless they consent.—*R. v. WERNER & COOKES* (1909), 3 Cr. App. Rep. 93, C. C. A.

**5084. — —**—*R. v. McLEAN*, No. 5082, *ante*.

**5085. — —**—*R. v. PONCHER* (1911), 75 J. P. Jo. 556, C. C. A.

**5086. — —**—*R. v. —*—On an appeal against sentence, the ct. will satisfy itself that applt. is, or was at the trial, willing that any other charges which may be pending should be dealt with, & if he desires that they should be, there is no ground for interfering with the sentence.—*R. v. HAGREEN* (1912), 7 Cr. App. Rep. 248, C. C. A.

**5087. — —**—*R. v. —*—In passing sentence the ct. should not take into account another indictment on which prisoner has not been tried when he does not admit the charge.—*R. v. COOPER* (1914), 10 Cr. App. Rep. 195, C. C. A.

*Annotation*.—*Mentd. R. v. Baskerville*, [1916] 2 K. B. 658.

**5088. — —**—*R. v. —*—Before outstanding charges can be taken into account in sentence, it must be clear that deft. consents.—*R. v. BELL* (1921), 16 Cr. App. Rep. 56, C. C. A.

**5089. — —**—*R. v. —*—Discretion of judge.—A judge is not bound, in passing sentence, to take into account outstanding charges against deft., though the latter may ask him to do so.—*R. v. SMITH* (1921), 85 J. P. 224; 15 Cr. App. Rep. 172, C. C. A.

*Annotation*.—*Refd. R. v. Lloyd* (1923), 17 Cr. App. Rep. 184.

**5090. Gravity of other charges.**—*R. v. BAKER*, No. 4973, *ante*.

**5091. — More serious charge cannot be considered.**—Not all pending charges should be taken into account in passing sentence for a less serious offence; when the pending charge is much more serious it should be tried separately.—*R. v. GREIG* (1910), 4 Cr. App. Rep. 151, C. C. A.

**5092. Court should make clear what charges have been considered in sentence.**—Upon sentencing prisoners convicted of some only out of several

charges preferred against them, no evidence being offered on the other charges, the ct. of petty or quarter sessions should state whether such other charges have or have not been taken into account.—*R. v. HYSLOP & STEVENSON* (1897), 61 J. P. 377.

**5093. When accused has already been sentenced for offence committed subsequently—Effect on sentence.**—*R. v. HAWES* (1908), 1 Cr. App. Rep. 42; 72 J. P. Jo. 328, C. C. A.

**5094. — —**—*R. v. RICHARDSON* (1910), 5 Cr. App. Rep. 278, C. C. A.

**5095. — —**—*R. v. —*—Where a deft. has been convicted for an offence committed before another for which he has been convicted & served his sentence, the ct. will, as far as possible, adjust the sentence at the later trial to that which would have been adequate for both offences, had they been considered at the earlier trial.—*R. v. BIRKETT* (1911), 6 Cr. App. Rep. 122, C. C. A.

**5096. — —**—*R. v. BARTRAM* (1914), 10 Cr. App. Rep. 74, C. C. A.

**5097. — —**—*R. v. —*—Applt. was convicted at the Winchester Assizes of larceny of a deed, forging & uttering a conveyance, & of false pretences. The indictment also charged him with a previous conviction. The ct. granted leave to appeal against sentence, the offences on which he was being tried having been committed prior to the previous conviction.—*R. v. JAMES* (1922), 154 L. T. Jo. 82, C. C. A.

**5098. When all charges have not been considered—Person already convicted may be tried in case of grave crime.**—In a grave case it may be proper to try a convict undergoing sentence, for a crime similar to that for which the sentence was inflicted but not taken into account in that sentence, & on conviction to impose a severer sentence.—*R. v. HILLIER* (1911), 6 Cr. App. Rep. 215, C. C. A.

**5099. — Further charge should be preferred as soon as possible.**—When a prisoner, convicted on one charge, is to be tried for an offence committed before he is convicted, he ought to be tried at the earliest possible moment, & the trial ought not to be delayed until his sentence has expired.—*R. v. SULLIVAN* (1910), 6 Cr. App. Rep. 4, C. C. A.

*Annotations*.—*Folld. R. v. Ward* (1912), 7 Cr. App. Rep. 180; *R. v. Bell* (1922), 16 Cr. App. Rep. 105. *Refd. R. v. Carter* (1922), 17 Cr. App. Rep. 51.

**5100. — —**—*R. v. —*—Charges against a person already convicted should be brought as early as possible.—*R. v. WARD* (1912), 7 Cr. App. Rep. 180, C. C. A.

**5101. — —**—*R. v. BELL* (1922), 16 Cr. App. Rep. 105, C. C. A.

**5102. — —**—*R. v. CARTER*, No. 5081, *ante*.

**5103. — —**—*R. v. —*—Where there are other charges against a prisoner under sentence, they should be proceeded with with all due speed & not be left to await prisoner's release.—*R. v. ROSE*, (1923), 129 L. T. 63; 87 J. P. 136; 27 Cox, C. C. 420; 17 Cr. App. Rep. 135, C. C. A.

#### SUB-SECT. 5.—MITIGATING CIRCUMSTANCES.

##### A. In General.

**5104. Drunkenness.**—The degree of guilt may be reduced by the drunken condition of the accused at the time of the offence.—*R. v. MORTON* (1908), 1 Cr. App. Rep. 255, C. C. A.

**5105. — —**—*R. v. HADEN*, No. 5061, *ante*.

**5106. Mental eccentricity.**—Mental eccentricity,

#### PART XIII. SECT. 2, SUB-SECT. 5.—A.

**5104 I. Drunkenness.**—*Re MANDRU GADABA* (1914), 1 L. R. 38 Mad. 479.—**IND.**

**1. Certificate of character inadmissible—After trial.**—Certificates of character refused to be received by the ct. in mitigation of punishment,

where a trial had taken place.—*R. v. DEWAR* (1842), 1 Broun, 233.—**SCOT.**  
**g. — —**—*R. v. —*—Certificate of character in mitigation of punishment:

*Sect. 2.—Matters to be taken into consideration:*  
*Sub-sect. 5, A., B. & C.; sub-sect. 6.]*

short of insanity, cannot be taken into account in sentence.—*R. v. KING* (1909), 2 Cr. App. Rep. 306, C. C. A.

**5107.** —.]—Applt. was convicted of house-breaking, & was sentenced to twelve months' imprisonment with hard labour. Applt.'s father was a well-known officer in the City police, & on his death applt. went to an orphanage school, where he had a distinguished career. In 1900 he went to Germany, where he taught English at the Berlitz school. On his return to England in 1905, all his friends noticed a great change in his demeanour; he had had various situations, but had lost them owing to his eccentricities. Applt.'s mother had been in a lunatic asylum for the last twenty-six years:—*Held*: a sentence of twelve months' imprisonment with hard labour, ought not to be passed on a man such as the applt. Sentence reduced to six months' imprisonment with hard labour.—*R. v. McQUEEN* (1912), 8 Cr. App. Rep. 89, C. C. A.

**5108. Foreigner's ignorance of law.**—]—It is no defence for a foreigner charged in England with a crime committed there that he did not know he was doing wrong, the act not being an offence in his own country. But though not a defence in law, it is a matter to be considered in mitigation of punishment.—*R. v. Esor* (1836), 7 C. & P. 456.

**5109. Matters affording incentive to crime committed.**—]—Applt. was convicted of incest, & was sentenced to seven years' penal servitude:—*Held*: having regard to the overcrowded state of the applt.'s home & the squalid conditions in which he lived, the sentence should be reduced from seven years' to three years' penal servitude.—*R. v. KEATS* (1913), 9 Cr. App. Rep. 214, C. C. A.

**5110.** —.]—Applt. had been previously convicted on several occasions. She was now convicted of obtaining goods by false pretences & credit by fraud & sentenced to three years' penal servitude. The sentence was thought too severe considering the ease with which credit was obtained & the temptations before her.—*R. v. MORRISON (alias RADFORD, alias RICHARDS)* (1915), 11 Cr. App. Rep. 278, C. C. A.

**5111. Giving evidence against accomplice.**—]—*R. v. JAMES, R. v. SHARMAN* (1913), 9 Cr. App. Rep. 142; 77 J. P. Jo. 484, C. C. A.

**5112. Assistance to police.**—]—*R. v. PORTER* (1913), 9 Cr. App. Rep. 213; 77 J. P. Jo. 557, C. C. A.

**5113.** —.]—Sentence mitigated in view of applt.'s giving information in the interests of justice.—*R. v. GREEN* (1918), 13 Cr. App. Rep. 200, C. C. A.

—.]—Applt., who was sentenced to penal servitude on conviction for housebreaking, had served in the army with a good record & had been badly wounded in action. On arrest he had informed the police where the stolen property was to be found, & by this means some of it had been recovered:—*Held*: such facts should be taken into consideration by the C. C. A., before whom the sentence came up for review, so as to encourage reparation by criminals, if they had not already

been dealt with by the judge passing sentence, & the sentence should be reduced accordingly.—*R. v. BELL* (1919), 14 Cr. App. Rep. 36; 83 J. P. Jo. 222, C. C. A.

**5115. Surrendering to police.**—]—*R. v. SIMPSON & BEAUCHAMP* (1908), 1 Cr. App. Rep. 53, C. C. A.

**5116. Restitution.**—]—When restitution for an offence has been made, the maximum sentence should not be inflicted.—*R. v. BRADBURY, R. v. EDLIN* (1920), as reported in 37 T. L. R. 88; 15 Cr. App. Rep. 76, C. C. A.

*B. Previous good Character—First Offences.*

**5117. Whether a ground for mitigation of sentence.**—]—Because a man had once a good character is not a reason why he should have a lighter sentence than a man with a bad one.—*R. v. GATHERCOLF* (1908), 1 Cr. App. Rep. 43, C. C. A.

**5118.** —.]—*R. v. HENDERSON* (1910), 5 Cr. App. Rep. 97, C. C. A.

**5119.** —]—**Previous convictions for less serious offence.**—]—Applt. was convicted of receiving a bicycle, knowing it to have been stolen, & sentenced to twelve months' imprisonment with hard labour. There was nothing previously against him of a serious nature:—*Held*: taking into account the fact that the only previous convictions were for being drunk & disorderly, that the sentence was too severe, & ought to be reduced.—*R. v. ROBERTS* (1910), 6 Cr. App. Rep. 3, C. C. A.

**5120.** —.]—Where the sentence is severe for a first offence, it will be reduced.—*R. v. EVELLY* (1911), 7 Cr. App. Rep. 98, C. C. A.

**5121.** —.]—*R. v. DAY* (1912), 7 Cr. App. Rep. 249, C. C. A.

**5122.** —.]—*R. v. BALDOCK & DAVIS* (1920), 15 Cr. App. Rep. 48, C. C. A.

**5123.** —.]—In view of good character a sentence, though quite proper & not excessive, may be reduced.—*R. v. MATTHEWS, ETC.* (1915), 11 Cr. App. Rep. 288, C. C. A.

**5124.** —.]—*R. v. DANIELS*, No. 5066, *ante*.

**5125.** —.]—Sentence reduced in view of previous good character.—*R. v. BURNINGHAM* (1918), 13 Cr. App. Rep. 169, C. C. A.

**5126. May justify imprisonment in second division.**—]—Applt. was convicted of stealing £80 & jewellery, the property of his step-daughter. He was sentenced to nine months' imprisonment with hard labour. He & the woman had been drinking together, & he undoubtedly stole the money & jewellery:—*Held*: having regard to applt.'s previous good character & the peculiar circumstances of the case a sentence of nine months' imprisonment in the second division should be substituted for that passed at the trial.—*R. v. ROUSE* (1909), 2 Cr. App. Rep. 74, C. C. A.

**5127.** —.]—Applt. embezzled three days' takings of a cinematograph theatre. He had been managing director of a large firm in the North of England. He went to the Boer War as an officer & was invalided home. Having lost his position in the firm, he obtained a position as manager of a cinematograph show in Richmond, but unfortunately gave way to drink, went off to

—*Held*: inadmissible where a trial had taken place.—*R. v. ROSENBERG* (1842), 1 Broun, 367.—**SCOT.**

**h. No felonious intent—Object to get own money.**—]—It is incompetent for a panel, who has pleaded guilty to a charge of forgery, to adduce evidence in mitigation of punishment to show

that he had no felonious intent but that his object was to get money which was his own.—*R. v. JOHNSTON* (1848), Arkley, 528.—**SCOT.**

**PART XIII. SECT. 2, SUB-SECT. 5.—B.**

**51171. Whether a ground for mitiga-**

**tion of sentence.**—]—The fact that a prisoner is a person of character, & of a respectable position in life, instead of being a reason for mitigating the punishment, adds to the criminality of the offence, & calls for a more severe sentence.—*R. v. —* (1854), 7 Cox, C. C. 4.—**IR.**

a race-meeting, where he lost the money. The money was forthcoming at the police ct., but the prosecution did not see their way to take it. Applt. disappeared for three weeks, during which he did not communicate with his employers.

Having regard to the fact that this was a first offence, & further to the fact that applt. is not an associate of criminals, we think that it is not necessary that he should associate with criminals, & therefore the sentence is altered to four months' imprisonment in the second division (*per CUR.*).—*R. v. HEAP* (1910), 6 Cr. App. Rep. 100, C. C. A.

**5128.** —.]—Applt. was convicted of gross indecency & sentenced to twenty months' imprisonment with hard labour. He had never before been convicted & the sentence was reduced to six months' imprisonment in the second division.—*R. v. BARTHOLOMEW* (1914), 10 Cr. App. Rep. 120, C. C. A.

**5129.** —.]—*R. v. JOWSEY* (1915), 84 L. J. K. B. 2118; 114 L. T. 241; 31 T. L. R. 632; 25 Cox, C. C. 277; 11 Cr. App. Rep. 241, C. C. A.

**5130. Not necessarily a ground for binding over.** —A person convicted of an offence for the first time is not necessarily allowed the benefit of the First Offenders Act.—*R. v. CHANDLER* (1912), as reported in 77 J. P. 80; 29 T. L. R. 83; 8 Cr. App. Rep. 82, C. C. A.

**5131. Penal servitude on first offenders—Should not be passed as a general rule.**—As a general rule, penal servitude ought not to be inflicted for a first offence.—*R. v. DENCH* (1910), 4 Cr. App. Rep. 26, C. C. A.

**5132.** —.]—Penal servitude should not, as a rule, be inflicted for a first offence.—*R. v. KERVORKIAN* (1911), 7 Cr. App. Rep. 96, C. C. A. *Annotation:—Reid. R. v. Caroubi* (1912), 7 Cr. App. Rep. 153.

**5133.** —.]—Sentence of five years' penal servitude passed upon the applt. for warehouse breaking reduced to one of 18 months' imprisonment with hard labour, on the ground that the case was an isolated one & was the first conviction of applt.—*R. v. TREWHOLM* (1913), 77 J. P. 344; 29 T. L. R. 530; 9 Cr. App. Rep. 18, C. C. A.

**5134.** —.]—Applt. was a man of good character, 23 years of age, & there were no previous convictions against him. He was sentenced to three years' penal servitude for forging & obtaining money on forged instruments. The sentence was reduced.—*R. v. WOOD* (1914), 11 Cr. App. Rep. 53, C. C. A.

**5135.** —.]—*R. v. AUSTIN* (1914), 10 Cr. App. Rep. 70, C. C. A.

**5136.** — **Substantial sentence in special circumstances.**—*R. v. SPENCER* (1908), 1 Cr. App. Rep. 37, C. C. A.

**5137. Social position not to be considered.**—*R. v. HOLDER* (1911), 7 Cr. App. Rep. 59; 75 J. P. Jo. 569, C. C. A.

**5138. Meritorious military service.**—*R. v. ANSELL*, No. 4982, *ante*.

**5139.** —.]—*R. v. CASEY* (1919), 14 Cr. App. Rep. 100, C. C. A.

**5140.** —.]—*R. v. SAYE* (1919), 14 Cr. App. Rep. 123, C. C. A.

#### PART XIII. SECT. 2, SUB-SECT. 5.—C.

**51421. Youth.**—Where prisoner was convicted of manslaughter in killing a fellow school boy through throwing a stone, the ct. under its discretionary power, & viewing the recommendation of the jury—the character given by his teacher & the strong testimonial from his school-fellows—reduced the sentence to one month's imprisonment.—*R. v. FOOTE* (1855), 4 Nfld. L. R. 59.—**NFLD.**

**5141.** —.]—Applt., during a period of some eight & a half years previous to the offence of false pretences charged, had led an honest life & gained a good reputation. He had been promoted in the army, & had been decorated for courage in the performance of arduous & dangerous duties. There were seven old convictions against him, & charges made of money irregularities while in the army; & nine other charges of false pretences were taken into consideration when the sentence of three years' penal servitude appealed against was passed. Nevertheless the ct., in the circumstances, reduced it to one of nine months' imprisonment with hard labour.—*R. v. CARRUTHERS* (1920), 89 L. J. K. B. 1132; 84 J. P. 91; 64 Sol. Jo. 309; 14 Cr. App. Rep. 138, C. C. A.

#### C. Age of Prisoner.

**5142. Youth.**—*R. v. DEAN* (1910), 4 Cr. App. Rep. 155, C. C. A.

**5143.** —.]—*R. v. WRIGHT* (1911), 7 Cr. App. Rep. 52, C. C. A.

**5144.** —.]—*R. v. FENLON* (1914), 11 Cr. App. Rep. 12, C. C. A.

**5145.** —.]—*R. v. HAPPOPORT* (1915), 11 Cr. App. Rep. 205, C. C. A.

**5146.** —.]—Severity of sentence after previous convictions mitigated in view of youth.—*R. v. FOX* (1916), 12 Cr. App. Rep. 180, C. C. A.

**5147.** —.]—*R. v. MORTON* (OTHERWISE SHAW) (1919), 14 Cr. App. Rep. 37, C. C. A.

**5148.** —.]—*R. v. BRATHERTON* (1919), 14 Cr. App. Rep. 74, C. C. A.

**5149. Old age.**—*R. v. KENT* (1911), 6 Cr. App. Rep. 291, C. C. A.

**5150.** —.]—*R. v. MONTGOMERY* (1914), 10 Cr. App. Rep. 281, C. C. A.

**5151.** —.]—*R. v. KELLY* (1914), 11 Cr. App. Rep. 12, C. C. A.

**5152.** —.]—*R. v. BENNETT* (1919), 14 Cr. App. Rep. 35, C. C. A.

**5153.** —.]—*R. v. FERROA* (1919), 14 Cr. App. Rep. 39; 83 J. P. Jo. 267, C. C. A.

**5154.** —.]—*R. v. LANGLEY* (1919), 14 Cr. App. Rep. 58, C. C. A.

**5155.** —.]—*R. v. TUSSLER* (1920), 15 Cr. App. Rep. 59, C. C. A.

#### SUB-SECT. 6.—MATTERS CALLING FOR INCREASED SENTENCE.

**5156. Abuse of position of trust—Post office servant.**—*R. v. NOBLE* (1908), 1 Cr. App. Rep. 30, C. C. A.

**5157.** — **Solicitor.**—*R. v. MASON & SOPER* (1908), 1 Cr. App. Rep. 73, C. C. A.

**5158.** —.]—*R. v. CAUSTON* (1915), 11 Cr. App. Rep. 256, C. C. A.

**5159.** — **Member of police force.**—*R. v. MOORE* (1910), 4 Cr. App. Rep. 135, C. C. A.

**5160. Necessity for exemplary punishment—Even of first offender.**—It may be necessary to take into account in sentence the necessity of

#### PART XIII. SECT. 2, SUB-SECT. 6.

**k. General rule.**—The practice of criminal cts. is established to inquire into the antecedents of a prisoner, & to punish habitual offenders more seriously than those who have not been previously convicted or have not committed other crimes. But the ct. is not merely guided by previous convictions, & if the offence for which punishment is to be awarded does not indicate a deliberate return to crime,

& there are circumstances which do not show that the offence was planned beforehand, less weight is to be given to previous convictions for offences of the same character as that for which the offender is to be punished than to convictions for offences of a different character.—*GRAYSON v. R.* (1920), 22 W. A. L. R. 37.—**AUS.**

**1. Drunkenness.**—Intoxication should not be treated as an aggravation

*Sect. 2.—Matters to be taken into consideration: Sub-sect. 6. Sect. 3: Sub-sects. 1 & 2.]*

“making an example.”—*R. v. SPRAKE* (1909), 3 Cr. App. Rep. 63, C. C. A.

**5161. Prevalence of the particular crime.**—*R. v. BOYD*, No. 4984, *ante*.

**5162.** —.]—The ct. will not interfere with a sentence governed by a rule laid down in special circumstances.

*Qu.*: whether under Prevention of Crime Act, 1908 (c. 59), two consecutive sentences, each of a less term than five years, but together amounting to five years or more, may be converted into “preventive detention.”—*R. v. WARNER* (1909), 2 Cr. App. Rep. 177, C. C. A.

**5163.** —.]—*R. v. RICHMOND* (1911), 6 Cr. App. Rep. 204, C. C. A.

**5164.** —.]—*R. v. BRADSHAW, BEACHAM, & WILLIAMS* (1911), 6 Cr. App. Rep. 221, C. C. A.

**5165.** —.]—In passing sentence for an offence, the fact that the particular offence in respect of which prisoner is being sentenced is very prevalent in the neighbourhood where it was committed, & the necessity for taking steps to suppress it may legitimately be taken into consideration.—*R. v. GREEN* (1912), 76 J. P. 351; 28 T. L. R. 380; 7 Cr. App. Rep. 225, C. C. A.

**5166.** —.]—*R. v. CONNOR* (1913), 77 J. P. 247; 29 T. L. R. 212; 8 Cr. App. Rep. 152, C. C. A.

**5167.** —.]—*R. v. SMITH*, No. 5069, *ante*.

**5168.** —.]—The standard of sentence must be raised to meet the increasing prevalence of a particular offence.—*R. v. SPARGO* (1918), 13 Cr. App. Rep. 122, C. C. A.

**5169. Conduct of defence—Unjustified imputations on prosecutor.**—Sentence may take into account a defence making unjustified imputations on the prosecutor.—*R. v. LUCAS* (1908), 1 Cr. App. Rep. 234, C. C. A.

*Annotations:—Mentd.* *R. v. Stratton* (1909), 3 Cr. App. Rep. 255; *Ibrahim v. R.*, [1914] A. C. 599.

**5170. Evil motive.**—*R. v. BRIGHT*, No. 4980, *ante*.

### SECT. 3.—KINDS OF PUNISHMENT.

#### SUB-SECT. 1.—CONSECUTIVE AND CONCURRENT SENTENCES.

**5171. Consecutive sentences—Should be imposed sparingly.**—*R. v. CLARKE* (1913), 9 Cr. App. Rep. 116, C. C. A.

**5172.** — When sentence of penal servitude imposed.—*R. v. HINDLEY* (1920), 15 Cr. App. Rep. 31, C. C. A.

**5173.** — When sentence of hard labour imposed.—This ct. thinks that when a prisoner is sentenced to two years' hard labour no consecutive sentence of further imprisonment with hard labour ought to be imposed (LORD READING, C.J.).—*R. v. GOLDSTEIN* (1914), 11 Cr. App. Rep. 27, C. C. A.

*Annotation:—Fold.* *R. v. Hughes* (1923), 87 J. P. 140.

of an offence.—*R. v. ZULFIKAR KHAN* (1871), 8 B. L. R. App. 21.—**IND.**

**m. Previous conviction for offence of same character—Warning of heavier sentence if charged again.**—In sentencing accused for an assault committed while under the influence of liquor the sheriff-substitute told accused that he would be sent to prison for six months if he was again found guilty in that ct. on a similar charge. Accused on a later occasion pleaded guilty to another similar charge & the sheriff-substitute then stated that after considering what had been said

for accused it was his duty after the warning that he had previously given, to implement the promise that he had given on the occasion of the last conviction:—**Held:** the sheriff-substitute had been unduly influenced by the promise which he had made on the former occasion.—*NEIL v. STEVENSON* (1919), 57 Sc. L. R. 101. **SCOT.**

**n. Good character—Respectable position in life.**—The fact that the prisoner is a person of character, & of a respectable position in life, adds to the criminality of the offence, &

**5174.** —.]—The ct. leans against consecutive sentences of hard labour for a total term of more than two years.—*R. v. BORHAM* (OTHERWISE DAVISON) (1918), 13 Cr. App. Rep. 191, C. C. A.

**5175.** —.]—Applt. had been convicted of housebreaking & common assault & had been sentenced to consecutive sentences of twenty months' imprisonment with hard labour, for the two offences:—**Held:** consecutive sentences of hard labour should not amount to more than two years in all.—*R. v. HUGHES* (1923), 87 J. P. 140; 17 Cr. App. Rep. 127, C. C. A.

**5176.** — Penal servitude—Followed by imprisonment.—It is undesirable to inflict a term of imprisonment to follow upon a term of penal servitude.—*R. v. JOHNSON* (1911), 7 Cr. App. Rep. 97, C. C. A.

**5177.** — Imprisonment with hard labour—Followed by penal servitude.—*R. v. JONES* (alias SPANIER), No. 5075, *ante*.

**5178.** —.]—*R. v. ISLIP* (1909), 3 Cr. App. Rep. 96, C. C. A.

*Annotation:—Refd.* *R. v. Baumgarten* (1913), 9 Cr. App. Rep. 212.

**5179.** —.]—*R. v. BAUMGARTEN* (1913), 9 Cr. App. Rep. 212; 77 J. P. Jo. 556, C. C. A.

**5180.** —.]—A sentence of imprisonment with hard labour should not be passed to run consecutively to one of penal servitude.—*R. v. VEALE* (1915), 11 Cr. App. Rep. 114, C. C. A.

**5181. Concurrent sentences—Effect of.**—In the case of consecutive sentences the longer sentence is carried out & the shorter will have no effect. If one of the sentences is quashed on appeal, the other sentence takes effect. Certain exceptions are specially dealt with by the Secretary of State.—*R. v. PHILLIPS* (1921), 90 L. J. K. B. 508; 85 J. P. 188, C. C. A.

**5182.** — Imprisonment with hard labour & penal servitude.—Concurrent sentences of penal servitude & hard labour are to be avoided.—*R. v. MARTIN* (1908), 1 Cr. App. Rep. 209, C. C. A.

*Annotations:—Refd.* *R. v. Islip* (1909), 3 Cr. App. Rep. 96; *R. v. Baumgarten* (1913), 9 Cr. App. Rep. 212.

**5183.** —.]—Where it did not appear that the results to a prisoner of imposing concurrent sentences of a different character, seven years' penal servitude & twelve months' imprisonment with hard labour, were present to the mind of the judge when he passed the sentences, the Ct. of Criminal Appeal altered one of the sentences, that of twelve months' imprisonment, to a sentence of one day with hard labour. A ct. may pass such concurrent sentences on a prisoner for good reason shown.—*R. v. BRUCE* (1910), 75 J. P. 111; 27 T. L. R. 51; 5 Cr. App. Rep. 213, 233, C. C. A.

*Annotations:—Refd.* *R. v. Baumgarten* (1913), 9 Cr. App. Rep. 212. **Mentd.** *R. v. Johnston* (1916), 12 Cr. App. Rep. 137.

**5184.** —.]—Sentence of three years' penal servitude reduced to 21 months' imprisonment with hard labour on the ground that it was

calls for a more severe sentence.—*R. v. —* (1854), 7 Cox, C. C. 4.—**IR.**

#### PART XIII. SECT. 3, SUB-

**o. Consecutive sentences—Two misdemeanours charged.**—On an information containing two counts each charging a distinct misdemeanour, sentence may be passed on each count, the one cumulative on the other.—*R. v. JONES* (1862), 1 W. & W. 221.—**AUS.**

**p.** — Term of first sentence must be specified.—Ct. cannot direct the

undesirable that the sentence of penal servitude should run concurrently with a sentence of imprisonment which was being served by applt. at the time the sentence of penal servitude was imposed.—*R. v. HEMMING* (1912), 28 T. L. R. 402; 7 Cr. App. Rep. 236, C. C. A.

**5185.** ———.]—It is not desirable to prefix a sentence of imprisonment with hard labour to a sentence of penal servitude.—*R. v. JOHNSTON* (1916), 12 Cr. App. Rep. 137, C. C. A.

**5186.** ———.]—Concurrent sentences of penal servitude & imprisonment with hard labour should not, as a rule, be imposed.—*R. v. CHAPMAN & DOYLE* (1918), 13 Cr. App. Rep. 196, C. C. A.

**5187.** ———.]—The ct. disapproves of concurrent sentences of penal servitude & imprisonment with hard labour.—*R. v. JONES* (1919), 14 Cr. App. Rep. 70, C. C. A.

**5188.** ——— **With remanet of previous sentence.**]—When the holder of a licence under the Penal Servitude Act, 1853 (c. 99), is convicted of a fresh offence, there is no power under the Penal Servitude Act, 1864 (c. 47), to make the sentence for such fresh offence run concurrently with the remanet sentence of penal servitude.—*R. v. KING*, [1897] 1 Q. B. 214; 66 L. J. Q. B. 87; 75 L. T. 392; 61 J. P. 329; 13 T. L. R. 27; 41 Sol. Jo. 49; 18 Cox, C. C. 447, C. C. R.

*Annotation* :—**Mentd.** *R. v. Barron*, [1914] 2 K. B. 570.

**5189.** ———.]—*R. v. HAMILTON* (1908), 1 Cr. App. Rep. 87; 72 J. P. Jo. 365, C. C. A.

*Annotation* :—**Consd.** *R. v. Smith*, *R. v. Wilson*, [1909] 2 K. B. 756.

**5190.** ———.]—Where the holder of a licence to be at large during a remanet is subsequently convicted of an indictable offence, the ct. before which the subsequent conviction takes place has no power to order that the sentence which it inflicts shall commence after or run concurrently with the remanet which, upon conviction for the new offence, the convict becomes liable to serve under Penal Servitude Act, 1864 (c. 47), s. 9, inasmuch as that section provides that a term equal to the remanet shall be served after the convict has undergone the punishment for the subsequent offence. Therefore, in passing sentence for the subsequent offence, the ct. should make no reference to the remanet.—*R. v. SMITH*, *R. v. WILSON*, [1909] 2 K. B. 756; 79 L. J. K. B. 4; 101 L. T. 126; 73 J. P. 407; 22 Cox, C. C. 151; 2 Cr. App. Rep. 271, C. C. A.

*Annotations* :—**Refd.** *R. v. Collins* (1923), 17 Cr. App. Rep. 104. **Mentd.** *R. v. Rabjohns* (1913), 109 L. T. 414.

**5191.** ——— **Remanet sentence to be served after fresh sentence.**]—*R. v. MINTZ, ROBERTS & HARRIS*, No. 5024, ante.

**5192.** ———.]—A remanet term must be served after expiry of sentence.—*R. v. COLLINS* (1923), 17 Cr. App. Rep. 105, C. C. A.

punishment of a prisoner convicted of an indictable offence to commence at the end of a then pending term of imprisonment without stating the time of the expiry or otherwise indicating the term of the first sentence.—*R. v. DAVIS & HARRIS* (1862), 1 N. S. W. S. C. R. 233.—**AUS.**

### PART XIII. SECT. 3, SUB-SECT. 2.

**q. Computation of time**—Not interrupted by transfer to asylum.—*Ex p. ARMELLINI* (1886), 14 R. L. O. S. 311.—**CAN.**

**r.** ——— **Not interrupted by taking prisoner to hospital.**]—*R. v. PETERS* (1918), 29 Can. Crim. Cas. 298.—**CAN.**

**s.** ——— **Sentence runs from date sentence is passed.**]—A sentence of imprisonment begins to run from the day

sentence is passed & not from the date of incarceration.—*R. v. LITMAN*, [1922] 2 W. W. R. 169; 68 D. L. R. 439; 38 Can. Crim. Cas. 115.—**CAN.**

**t.** ——— **Release without bail.**]—*Ex p. GERVAIS* (1883), 6 L. N. 116.—**CAN.**

**5195 i. For misdemeanour—No limit of time at common law.**]—In the case of common law misdemeanours, where the term of imprisonment is not limited by statute the sentence is entirely in the judge's discretion.—*Re FORBES* (1887), 8 N. S. W. L. R. 68; 3 N. S. W. W. N. 111.—**AUS.**

**a. With hard labour**—**Not for common law misdemeanour.**]—For a common law misdemeanour hard labour cannot be imposed.—*R. v. WHITE* (1875), 13 N. S. W. S. C. R. 339.—**AUS.**

### SUB-SECT. 2.—IMPRISONMENT.

**5193. Computation of time.**]—Where a term of one calendar month's imprisonment begins in one month & ends in another, the month must be calculated from the day on which the imprisonment commences to the day before the numerically corresponding day in the following month. If there is no such numerically corresponding day, the term will end on the last day of the following month.—*MIGOTTI v. COLVILL* (1879), 4 C. P. D. 233; 48 L. J. M. C. 48; Q. B. 695; 40 L. T. 747; 43 J. P. 143, 620; 27 W. R. 74; *sub nom.* *NIGOTTI v. COLVILLE*, 40 L. T. 522; 14 Cox, C. C. 263, 305, C. A.

*Annotations* :—**Distd.** *Henderson v. Preston* (1888), 59 L. T. 334. **Mentd.** *Quartermaine v. Selby* (1889), 5 T. L. R. 223.

**5194.** ———.]—Pltf. who had been sentenced by the magistrates at R., on Aug. 24, to a term of imprisonment for seven days, sued deft., the governor of S. prison, for false imprisonment. Pltf. was taken into custody at R. on Aug. 24, & was received into the deft.'s custody on Aug. 25, under a warrant of commitment addressed to deft., which ordered that pltf. be imprisoned in H.M. prison at S., & there kept for the space of seven days. Pltf. was released on Sept. 1:—**Held**: the terms of the warrant protected deft., & he was justified in detaining pltf. in custody for seven days from the time when he was received into the prison.—*HENDERSON v. PRESTON* (1888), 21 Q. B. D. 362; 57 L. J. Q. B. 607; 59 L. T. 334; 52 J. P. 820; 30 W. R. 834; 4 T. L. R. 696; 16 Cox, C. C. 445, C. A.

*Annotation* :—**Refd.** *Demer v. Cook* (1903), 88 L. T. 629.

**5195. For misdemeanour—No limit of time at common law.**]—*R. v. THOMAS* (1736), *Lee temp. Hard.* 278; 95 E. R. 179.

**5196.** ———.]—The common law has not drawn a limit to the punishment which may be inflicted for a misdemeanour (*BRAMWELL, L.J.*).—*R. v. CASTRO* (1880), 5 Q. B. D. 490; 49 L. J. Q. B. 747; 43 L. T. 78; 44 J. P. 732; 14 Cox, C. C. 436, C. A.; *affd. sub nom. CASTRO v. R.* (1881), 6 App. Cas. 229, H. L.

*Annotations* :—**Mentd.** *R. v. Cox & Railton* (1884), 1 T. L. R. 181; *Dixon v. Farrer* (1886), 35 W. R. 95; *R. v. Thompson*, [1914] 2 K. B. 99.

**5197. In second division—Depends on class of person convicted.**]—Applt. was convicted under Prevention of Corruption Act, 1906 (c. 34). Applt. endeavoured to avoid payment by bribing a solr.'s clerk to represent that he was insolvent :—**Held**: the question as to whether a convicted person should be sent into the second division or not, depended upon the kind of person so convicted, & not upon the class of offence committed.—*R. v. HARRIS* (1909), 2 Cr. App. Rep. 50, C. C. A.

**5198.** ———.]—*R. v. BURDEE* (1916), 86

**b.** ——— **Judge of Superior Court—Criminal Code, s. 739.**]—Where an offender is convicted on indictment under Parts XVI. or XVIII. of the Criminal Code, or by a Superior Ct. judge in Saskatchewan or Alberta, a judge of the Territorial Ct. in the Yukon, or a stipendiary magistrate in the Territories, the imprisonment may be either with or without hard labour in the discretion of the ct. so long as the offender is not sentenced to a penitentiary or the prison or reformatory excepted, without regard to the terms of the statute. But if the conviction is made by a lower tribunal, then hard labour may be imposed only if the statute fixing the punishment says that it may, & the sentence given must in such case specifically mention "hard labour."—*R. v. DAVIDSON*

*Sect. 3.—Kinds of punishment: Sub-sects. 2, 3, 4 & 5.]*

*L. J. K. B. 871; 115 L. T. 904; 25 Cox, C. C. 598; 12 Cr. App. Rep. 153, C. C. A.*

**5199. With hard labour—Severity of.]—R. v. ARNOLD (1908), 1 Cr. App. Rep. 27, C. C. A.**

**5200. ———.]—A sentence of hard labour is not now so severe as formerly was the case. A prisoner is able to earn a remission of one-sixth of the sentence by good conduct, & the really severe period of the hard labour is quite short.—R. v. JENNER (1910), 6 Cr. App. Rep. 63, C. C. A.**

**5201. ———.]—A sentence of two years' imprisonment with hard labour is very severe; judges only impose it for very grave offences, because it is known that day for day it is harder than a similar period in a sentence of penal servitude.—R. v. WHITE (1912), 8 Cr. App. Rep. 3, C. C. A.**

**5202. ———. For Common law misdemeanour—Criminal Procedure Act, 1851 (c. 100), s. 29.]—**

Prisoner was tried for the common law misdemeanour of forging & uttering writings with intent to defraud. He had fraudulently misappropriated money which he had collected & received for one C. An order was made in a county ct. that he should render an account of the money received. He delivered papers in which the donors had entered their names & the amounts they had handed him. He had altered the entries so as to make it appear that smaller amounts had been given. It was not alleged that C. had been defrauded or prejudiced, except so far as it appeared that he had been deprived by prisoner's conduct of the evidence to support his claim. On a case stated, reserving the question, whether there was power to pass a sentence of imprisonment with hard labour:—*Held*: as the indictment charged only a common law forgery, without alleging that any one was thereby defrauded, the case did not come within the above Act, by which persons convicted of "any cheat or fraud punishable at common law" may be sentenced to hard labour.—*R. v. HAMILTON*, [1901] 1 K. B. 740; 70 L. J. K. B. 480; 84 L. T. 332; 65 J. P. 265; 49 W. R. 575; 17 T. L. R. 401; 45 Sol. Jo. 427; 19 Cox, C. C. 675, C. C. R.

**5203. ———.]—R. v. JACKSON (1909), 3 Cr. App. Rep. 192, C. C. A.**

**5204. ———.]—R. v. COSTELLO & BISHOP. [1910] 1 K. B. 28; 79 L. J. K. B. 90; 101 L. T. 784; 54 Sol. Jo. 13; 22 Cox, C. C. 215; sub nom. R. v. CONNOLLY & COSTELLO, 74 J. P. 15; 26 T. L. R. 31; 3 Cr. App. Rep. 27, C. C. A.**

**5205. ———. Criminal Justice Administration Act, 1914 (c. 58), s. 16 (1).]—Since the above Act, imprisonment with hard labour can be imposed for a common law misdemeanour.—R. v. SAUNDERS (1916), 12 Cr. App. Rep. 61, C. C. A.**

*Annotation:—Expld. Judicial Note, [1916] W. N. 232.*

**5206. ———.]—Hard labour may be imposed for a common law misdemeanour by virtue of the above Act.—R. v. GOULD (1918), 13 Cr. App. Rep. 144, C. C. A.**

#### SUB-SECT. 3.—PENAL SERVITUDE.

**5207. Not imposed as of course—After previous**

(No. 1), [1917] 2 W. W. R. 160; 28 Can. Crim. Cas. 41; 35 D. L. R. 82.—CAN.

*c. — British North America Act, 1867, s. 92, No. 15.]—"Imprisonment" in above Act means imprisonment with or without hard labour.—*

*HODGE v. R. (1883), 9 App. Cas. 117; 3 Cart. 144.—CAN.*

*d. Does not include hard labour—At common law cannot be added to.]—Ex p. LIEFEBVRE, Ex p. DUFRESNE (1881), 4 L. N. 253.—CAN.*

**award of penal servitude.]—A sentence of penal servitude is not necessarily to be imposed because it was imposed by the last previous sentence.—R. v. ROY (alias ELLISON) (1911), 6 Cr. App. Rep. 114, C. C. A.**

**5208. ———.]—R. v. BAKER, No. 4993, ante.**

**5209. Awarded when light sentences have failed.]—**

The ct. refused to reduce a sentence of penal servitude where short sentences had become useless & only a period of long detention could reclaim prisoner.—*R. v. REES* (1908), 1 Cr. App. Rep. 83, C. C. A.

**5210. ———.]—Appeal against sentence of 3 yrs.' penal servitude for obtaining goods by false pretences.**

Prisoner has been constantly convicted of small offences & it is plain that small sentences have had no effect. The learned recorder may well be justified in thinking that penal servitude should now be tried (LORD ALVERSTONE, C.J.).—*R. v. CURTIS* (1909), 3 Cr. App. Rep. 60, C. C. A.

**5211. ———.]—R. v. DOWLING (1909), 3 Cr. App. Rep. 63, C. C. A.**

**5212. Quantum when first awarded—Normally limited to three years.]—The ct. tends to limit a first term of penal servitude to the minimum—three years.—R. v. STREET (1910), 4 Cr. App. Rep. 88.**

**5213. ———.]—A first sentence of penal servitude should not exceed the term of three years.—R. v. MYERS (1915), 11 Cr. App. Rep. 115, C. C. A.**

*Annotation:—Distd. R. v. Walden (1917), 12 Cr. App. Rep. 207.*

**5214. ———.]—Without laying down any general rule, the ct. leans on a first sentence to penal servitude, to a term of three years.—R. v. JONES (1918), 13 Cr. App. Rep. 212, C. C. A.**

**5215. ———. May be five years.]—In certain cases the first term of penal servitude is properly five years.—R. v. WALDEN (1917), 12 Cr. App. Rep. 207, C. C. A.**

**5216. ———. Five years undesirable.]—It is undesirable that a first sentence of penal servitude should be for a term of five years.—R. v. WARRILLOW (1910), 5 Cr. App. Rep. 230, C. C. A.**

**5217. ———. No fixed rule.]—R. v. MAYES (1916), 12 Cr. App. Rep. 178, C. C. A.**

#### SUB-SECT. 4.—WHIPPING.

*See Criminal Justice Administration Act, 1914 (c. 58), s. 36.*

**5218. When awarded—Attempt to commit rape.]—**

Prisoner, who had five previous convictions against him for indecent assault, was convicted of attempting to choke & strangle a woman with intent to commit a rape on her. The ct. sentenced prisoner to seven years' penal servitude & to receive two whippings.—*R. v. SMALLBONES* (1898), 33 L. Jo. 124.

**5219. ———. Robbery with violence.]—R. v. RILEY (1908), 1 Cr. App. Rep. 93, C. C. A.**

**5220. ———.]—As a general rule robbery with violence should be punished by flogging.—R. v. SWENSON & CABA (1918), 13 Cr. App. Rep. 209, C. C. A.**

#### PART XIII. SECT. 3, SUB-SECT. 4.

*e. When awarded—Robbery in company.]—W. & L. were charged at the District Ct. of R. with robbery. The evidence showed that they had committed the offence in company & they were sentenced to*



**5221. — Incurrigible rogue—Vagrancy Act, 1824 (c. 83).—***R. v. ANTHONY* (1908), 1 Cr. App. Rep. 82, C. C. A.

**5222. — — — — —.]—**Upon a second conviction under Vagrancy Act, 1898 (c. 39), s. 1, the offender may be dealt with as an "incurrigible rogue" under Vagrancy Act, 1824 (c. 83), s. 10, & on being sent to the quarter sessions, may be ordered by them to be punished by whipping.—*R. v. HERION*, [1913] 1 K. B. 284; 82 L. J. K. B. 82; 108 L. T. 848; 29 T. L. R. 93; 23 Cox, C. C. 387; *sub nom. R. v. HERION, R. v. JACKSON*, 77 J. P. 96; *R. v. WILKIN*, 57 Sol. Jo. 130; 8 Cr. App. Rep. 99, C. C. A.

**5223. — — — — —.]—**Applt. was convicted of being an incurrigible rogue for that he being a person able wholly to maintain himself & his family by work or other means unlawfully & wilfully within six calendar months past did neglect so to do whereby his wife & child became chargeable to the union. There were a number of previous convictions against applt., six or seven of which were for neglect to maintain his family. He was convicted of this offence in June, 1913, & sentenced to one month's imprisonment. In September he was convicted again as set out above, & being sent for sentence to quarter sessions was sentenced to six months' imprisonment with hard labour & to receive twelve lashes with the whip. The ct. on appeal reduced the sentence to one of six months' imprisonment with hard labour, on the ground that applt. had not had much opportunity to provide for his family since his last release from prison.—*R. v. FIDLER* (1913), 78 J. P. 142; 9 Cr. App. Rep. 197, C. C. A.

**5224. — Offence under Criminal Law Amendment Act, 1885 (c. 69)—Effect of Criminal Law Amendment Act, 1912 (c. 20), s. 3.]—**A person against whom an offence was alleged under sect. 2 of 1885 Act was arrested & charged before, but tried & convicted after, the date when the 1912 Act came into force. A sentence of whipping was inflicted under sect. 3 of the 1912 Act:—*Held*: proceedings were pending at the commencement of the 1912 Act within the meaning of sect. 8 of the Act, & the ct. had no power to inflict a sentence of whipping in addition to a term of imprisonment.—*R. v. O'CONNOR*, [1913] 1 K. B. 557; 82 L. J. K. B. 335; 108 L. T. 384; 77 J. P. 272; 29 T. L. R. 245; 57 Sol. Jo. 287; 23 Cox, C. C. 334; 8 Cr. App. Rep. 167, C. C. A.

*Annotation:—Mentd. Re Boaler, Re Vexatious Action Act, 1896, [1914] 1 K. B. 122.*

**5225. — — — — — Age of offender at date of offence.]—**An offender against sect. 4 of the 1885 Act whose age exceeds sixteen years at the date of conviction, though he was under sixteen at the date of the offence, is not "an offender whose age does not exceed sixteen years" within the meaning of that section & cannot be sentenced to be whipped.—*R. v. CAWTHRON*, [1913] 3 K. B. 168; 82 L. J. K. B. 981; 109 L. T. 412; 77 J. P. 460; 29 T. L. R. 600; 23 Cox, C. C. 548; 9 Cr. App. Rep. 48, C. C. A.

**5226. — Offence under Vagrancy Act, 1898 (c. 39)—Effect of Criminal Law Amendment Act,**

**1912 (c. 20), s. 7 (5)—Subsequent conviction following summary conviction.]—**The conviction of an offence under the Vagrancy Act, 1898, preceding the "second or subsequent conviction . . . on indictment" under the same statute, referred to in sect. 7, sub-sect. 5 of the Criminal Law Amendment Act, 1912, need not be a conviction on indictment.

Therefore where a male person was convicted on indictment of trading on prostitution within sect. 1 of the Vagrancy Act, 1898, & it was also proved that he had been previously convicted under that Act by cts. of summary jurisdiction before the Criminal Law Amendment Act, 1912, had come into operation:—*Held*: the Ct. had power under sect. 7, sub-sect. 5 of the Act of 1912, in addition to any term of imprisonment awarded, to order the offender to be once privately whipped.—*R. v. AUSTIN*, [1913] 1 K. B. 551; 82 L. J. K. B. 387; 108 L. T. 574; 77 J. P. 271; 29 T. L. R. 245; 57 Sol. Jo. 287; 23 Cox, C. C. 346; 8 Cr. App. Rep. 169, C. C. A.

**5227. — — — — — Previous conviction before commencement of act.]—***R. v. AUSTIN*, No. 5226, *ante*.

**5228. — — — — — Pending proceedings.]—***R. v. BROWN* (1913), 8 Cr. App. Rep. 173, C. C. A.

**5229. — Male child sentenced to detention—Larceny Act, 1861 (c. 96), s. 4—Effect of Children Act, 1908 (c. 67).—**Larceny Act, 1861 (c. 96), s. 4, has not been impliedly repealed by Children Act, 1908 (c. 67). Where, therefore, a male child has been sentenced to detention in a place of detention, he may also be ordered to be whipped.

As in the Children Act, 1908 (c. 67), there is no person specifically charged with the duty of administering the punishment of whipping in the case of a child convicted on indictment & ordered to be whipped & sentenced to detention, the duty devolves upon the sheriff as the officer who has the general duty of executing the orders of cts. of justice. The sheriff may, however, depute the performance of this duty to a proper person.—*R. v. LYDFORD*, [1914] 2 K. B. 378; 83 L. J. K. B. 589; 110 L. T. 781; 78 J. P. 213; 30 T. L. R. 349; 58 Sol. Jo. 363; 24 Cox, C. C. 142; 10 Cr. App. Rep. 62, C. C. A.

**5230. — First offenders.]—***Semble*: the ct. leans against a sentence of flogging on first offenders.—*R. v. EVANS & IRETON* (1921), 15 Cr. App. Rep. 173, C. C. A.

*Annotation:—Expld. R. v. Wilder & Townsley* (1922), 17 Cr. App. Rep. 3.

**5231. — — — — —.]—**There is no general rule that first offenders should not be flogged.—*R. v. WILDER & TOWNSLEY* (1922), 17 Cr. App. Rep. 3, C. C. A.

**5232. By whom inflicted—On children.]—***R. v. LYDFORD*, No. 5229, *ante*.

#### SUB-SECT. 5.—FINE.

**5233. Must be absolute.]—**Fine must be absolute.—*ANON.* (1699), 12 Mod. Rep. 318; 88 E. R. 1348.

ment & to a whipping & flogging respectively.

Sect. 41 under which they were charged does not authorise whipping or flogging, though sect. 48 dealing with robbery in company does so. On a case stated:—*Held*: the sentences should be amended by striking out so much as directed the whipping & flogging.—*R. v. WISHER* (1896), 7 Q. L. J. 52.—*AUS.*

**f. — Robbery with violence — Time of whipping.]—**Deft. was convicted of robbery & violence, & sentenced to six months' imprisonment with hard labour & to receive twenty lashes, ten lashes six weeks after imprisonment, & ten lashes six weeks before the expiration of the term:—*Held*: the magistrate had no authority to fix the time or times of the whipping.—*R. v. BOARDMAN* (1914), 29

W. L. R. 176; 6 W. W. R. 1304; 18 D. L. R. 698; 23 Can. Crim. Cas. 191.—*CAN.*

**g. — — — — —.]—***R. v. BADRI PRASED* (1922), 1 L. R. 44 All. 538.—*IND.*

#### PART XIII. SECT. 3, SUB-SECT. 5.

**h. Imprisonment in default of payment—Jurisdiction of Quarter Sessions.]—**The ct. of quarter sessions

*Sect. 3.—Kinds of punishment: Sub-sects. 5, 6, 7 & 8. Sect. 4: Sub-sect. 1, A.]*

**5234. Must be proportionate to offence committed—Costs not to be considered.]**—Where, on conviction of a corpn. on an indictment removed by *certiorari* into the Crown side of the Q. B. Div. a fine is to be imposed, the fine is only to be commensurate with the offence committed, & the ct. in apportioning the fine will not take into consideration the amount of the costs incurred by the prosecution.—*R. v. LONDON & NORTH WESTERN RY. CO.* (1888), 58 L. T. 771; 52 J. P. 821; 16 Cox, C. C. 413, D. C.

**5235. Fine fixed by statute—Miscalculation of amount—Amendment.]**—Where a fixed fine, by statute, for a misdemeanour is miscalculated in the verdict & the judgment, the Ct. of K. B., upon a rule served on all parties interested, will alter the rule for the judgment against prisoner, & the entry roll, as to so much of the punishment, but they will not alter the judgment & verdict.—*R. v. STEVENS* (1806), 3 Smith, K. B. 366.

*Annotations:—***Reid.** *Douglas v. R.* (1848) 13 Q. B. 74. **Mentd.** *R. v. O'Connell* (1844), 3 L. T. O. S. 323; *Wilkinson v. Gaston* (1846), 9 Q. B. 137; *R. v. Duffy* (1848), 4 Cox, C. C. 294; *Bellhouse v. Mellor, Proudman v. Mellor* (1859), 4 H. & N. 116.

**5236. Receipt of fine—Imposed by court of King's Bench.]**—The King's Coroner has authority to receive fines imposed on defts. convicted on indictments or criminal informations in K. B.—*R. v. SHACKELL* (1825), *M'Cle. & Yo.* 514; 148 E. R. 516.

**5237. Fine & imprisonment—Writ of execution immediately issues.]**—Where a debt, in an indictment for a misdemeanour, has received judgment of fine & imprisonment:—**Held:** *a levavi facias* may issue immediately to take his goods in execution for the fine.—*R. v. WOOLF* (1819), 2 B. & Ald. 609; 1 Chit. 428; 106 E. R. 488.

*Annotations:—***Apprvd.** *R. v. Shackell* (1825), *M'Cle. & Yo.* 514. **Mentd.** *R. v. O'Connell* (1844), 3 L. T. O. S. 323; *Ex p. Kinning* (1847), 4 C. B. 507; *Douglas v. R.* (1848), 12 Jur. 974; *R. v. Winsor* (1866), 10 Cox, C. C. 276.

has power, in the case of an assault, to pronounce a sentence of fine & costs, & imprisonment in default of payment.—*OVENS v. TAYLOR* (1868), 19 C. P. 49.—**CAN.**

**k. — Distress necessary before imprisonment.]**—Where a person is ordered to pay a fine, or in default to be imprisoned, a distress must issue for the fine & be returned unsatisfied before he can be imprisoned.—*It. v. BLAKELEY* (1875), 6 P. R. 244.—**CAN.**

**l. — Not after distress issued.]**—Where debt. has been condemned to the payment of costs & fine, or to imprisonment in default of sufficient distress, if the prosecutor has once put the goods of debt. under distress, he cannot afterwards cause debt. to be imprisoned, even though the conviction remain unsatisfied.—*CUSSON, PETITIONER FOR HABEAS CORPUS* (1876), 14 R. L. O. S. 261.—**CAN.**

**m. — Distress warrant unnecessary—Municipal Act, 1896.]**—Under Municipal Act, 1896, an offender may be committed to gaol for non-payment of a fine without the previous issue of a distress warrant.—*It. v. PETERSKY* (1897), 5 B. C. R. 549.—**CAN.**

**n. Fine & imprisonment—Common law punishment for misdemeanour.]**—*Ex p. LEFEVRE, Ex p. DUFRESNE* (1881), 4 L. N. 253.—**CAN.**

**o. — Further imprisonment in default of distress.]**—A conviction for keeping a disorderly house & house of ill-fame:—**Held:** bad for awarding, after the adjudication of a penalty by fine & imprisonment, further imprisonment in default of sufficient distress or of non-payment of the fine.

—*R. v. RICHARDSON* (1882), 11 P. R. 95.—**CAN.**

**p. — Imprisonment till payment not ordered.]**—A. & B. were sentenced to imprisonment & fine. They fulfilled their terms of imprisonment, but were detained for non-payment of the fines:—**Held:** the judge, at the next ensuing assizes, should discharge them as their sentence did not include further imprisonment until payment of their fines.—*ANON.* (1814), 3 *Craw. & D.* 204.—**IR.**

**q. — Discretion of judge.]**—Where a statute prescribes both fine & imprisonment, the ct. is not bound to inflict both, but may inflict either one or the other.—*BRABANT v. ROBIDOUX* (1898), Q. R. 7 Q. B. 527.—**CAN.**

**r. Fine & costs—Imprisonment in default of distress.]**—A conviction, for keeping a house of ill-fame, ordered payment of a fine & costs, to be collected by distress, & in default of distress ordered imprisonment:—**Held:** good.—*It. v. WALKER* (1884), 7 O. R. 186.—**CAN.**

**s. —**—Where imprisonment is directed on non-payment of a penalty, the award of distress of the goods to levy it, & then imprisonment in case the distress proved insufficient, is invalid in law, & an excess of jurisdiction.—*It. v. LYNCH* (1886), 12 O. R. 372.—**CAN.**

**t. Fine fixed by statute—Miscalculation of amount.]**—32 & 33 Vict. c. 31, s. 17 (D.), provides that a magistrate may condemn a party accused to pay a fine not exceeding, with the costs in the case, \$100:—**Held:** the amount of the costs in the

**SUB-SECT. 6.—DETENTION IN BORSTAL INSTITUTION.**

*See Criminal Justice Administration Act, 1914 (c. 58), ss. 10, 11.*

**5238. Discretion of judge—Report of prison governor.]**—In this case the ct. directed attention to the terms of Prevention of Crime Act, 1908 (c. 59), s. 1, by which it appears that the responsibility of passing a sentence of detention under the Borstal system pursuant to that section lies upon the judge. He is to consider the report made by or on behalf of the Prison Comrs. as to the suitability of a prisoner for treatment in a Borstal institution; but he is not bound to come to the same conclusion as that stated in the report.—*R. v. WATKINS, R. v. SMALLWOOD, R. v. JONES* (1910), 74 J. P. 382; 5 Cr. App. Rep. 93; *sub nom. R. v. WILKINS, SMALLWOOD & JONES*, 26 T. L. R. 581, C. C. A.

**5239. —**—Sentence to detention in a Borstal institution is peculiarly within the discretion of the ct. of trial.—*R. v. STANTON* (1911), 6 Cr. App. Rep. 198, C. C. A.

**5240. Age limit—Proof of age.]**—The ct. requires strict proof that applt. sentenced to detention in a Borstal institution was 21 years of age on the date of his conviction.—*R. v. MCCANN* (1911), 6 Cr. App. Rep. 115, C. C. A.

**5241. When detention suitable or unsuitable—Benefit of training.]**—Youths should not be sent to a Borstal institution if there is a probability that they will not be able to get the full benefit of the training there.—*R. v. BEE & PEARCE* (1917), 12 Cr. App. Rep. 285, C. C. A.

**5242. — Physical fitness.]**—The ct. favours detention in a Borstal institution for convicted youths who are physically fit therefor.—*R. v. MONKHOUSE* (1919), 14 Cr. App. Rep. 38, C. C. A.

**5243. — First offence.]**—In the case of a first offence, the ct. leans against detention even in a Borstal institution.—*R. v. ELLING & WALLBRIDGE* (1919), 14 Cr. App. Rep. 24, C. C. A.

case should be deducted from \$100 & the balance or difference should be the utmost limit of the fine; & conviction to pay \$100 without costs, was bad.—*R. v. CYR* (1887), 12 P. R. 24.—**CAN.**

—*It. v. JOHNSON* (1913), 24 W. L. R. 468; 10 D. L. R. 822.—**CAN.**

**b. —**—For being the keeper of a disorderly house a magistrate cannot impose a fine of \$200 & costs, this being in excess of "a fine not exceeding with the costs in the case, \$200," authorised by sect. 781 of the Criminal Code.—*It. v. KUYARCHUK*, [1920] 1 W. W. R. 783; 32 Can. Crim. Cas. 312.—**CAN.**

**c. — Amount cannot be reduced.]**—A conviction is erroneous which imposes a penalty of an amount less than the sum fixed by the statute under which the conviction purports to have been made.—*BROPHY v. WARD* (1859), 11 Ir. Jur. 235.—**IR.**

**d. Fine or imprisonment—Execution prevented by serving sentence.]**—Where the sentence imposing the fine gives an alternative of imprisonment on "nonpayment" of the fine, accused may, in the absence of express provision to the contrary, prevent execution of the judgment for the fine, by electing to serve his full term of imprisonment.—*CONTAT v. CONTAT'S TRUSTEE* (1893), 10 S. C. 314; 3 C. T. R. 416.—**S. AF.**

**e. Person to be paid must be specified.]**—A conviction condemning a person to pay a fine ought to indicate to whom the fine should be paid.—*PREVOST v. DEMONTIGNY*, [1898] Q. R. 14 S. C. 208.—**CAN.**

**5244. — Good character.]**—Sentence of detention in a Borstal institution quashed in view of good character.—*R. v. MILNER & ATKIN* (1920), 15 Cr. App. Rep. 18, C. C. A.  
*Annotation:—Refd. R. v. Priestley* (1922), 16 Cr. App. Rep. 143.

**5245. Period of detention—Sentence sufficient for.]**—*R. v. KIRKPATRICK*, No. 5005, *ante*.

**5246. — Normal period three years.]**—Appeals by youthful offenders from the refusal of a judge to grant leave to appeal against sentence can only succeed if the Ct. of Criminal Appeal is clearly of opinion that applt. ought never to have been sent to a Borstal institution. In the absence of special circumstances a sentence of three years is the right term for detention in a Borstal institution because that period of time gives the lads a chance, which very often a short term does not afford.—*BORSTAL TREATMENT FOR JUVENILE OFFENDERS* (1919), 83 J. P. Jo. 471, C. C. A.

**5247. Modified Borstal treatment in prison—Meaning of.]**—*R. v. SMITH* (1913), 9 Cr. App. Rep. 117, C. C. A.

*Annotation:—Refd. R. v. Lee* (1913), 9 Cr. App. Rep. 144.

**5248. — Effect of undue sentence.]**—Sentence of two years' imprisonment under the modified Borstal system reduced to one of four months' imprisonment on the ground that the chairman of quarter sessions, in imposing the sentence of two years was under the croneous impression that if the authorities saw fit prisoner could be released on licence in the same way as under the Borstal system.—*R. v. LEE* (1913), 30 T. L. R. 1; 9 Cr. App. Rep. 144; 77 J. P. Jo. 484, C. C. A.

**5249. — —.]**—*R. v. OXLADE*, No. 5006, *ante*.

**5250. — Transfer to Borstal institution—Power of secretary of state.]**—*R. v. LEVERETT* (1917), 13 Cr. App. Rep. 1, C. C. A.

**5251. Transfer to ordinary imprisonment—Power of secretary of state—Right of appeal.]**—There is no appeal from the commutation by the Home Secretary of detention in a Borstal institution to ordinary imprisonment, under Prevention of Crime Act, 1908 (c. 59), s. 7.—*R. v. KEATING* (1910), 103 L. T. 322; 74 J. P. 452; 26 T. L. R. 686; 22 Cox, C. C. 343; 5 Cr. App. Rep. 181, C. C. A.

**5252. Power of release from.]**—Applt. was convicted of housebreaking, & was ordered to be detained for three years in a Borstal Institution. His age was nearly 21.

Detention in a Borstal Institution is the most appropriate punishment; he can be released at any time after six months if the authorities think proper (*AVORY, J.*).—*R. v. HANNAY* (1913), 9 Cr. App. Rep. 122, C. C. A.

### PART XIII. SECT. 3, SUB-SECT. 8.

**f. Conditions of probation.]**—A panel was sentenced to four months imprisonment, but allowed to be set at liberty at the expiry of one month, she & her husband coming under an obligation that she would return to prison to fulfil the remainder of her sentence in the event of the Crown calling upon her to do so.—*RE SHELLES* (1846), Arkley, 171.—*SCOT.*

**g. Discretion of court.]**—Judge refused to liberate the prisoner on recognisances as a first offender under Crimes Act, 1915, s. 532:—*Held: ct.* would not interfere with exercise of judge's discretion.—*R. v. RICHMOND*, [1920] V. L. R. 9.—*AUS.*

**h. Under First Offenders' Probation Act, 1886.]**—A person convicted of an offence, who has already been indicted upon a charge in respect of which he was acquitted, & against whom no previous conviction has been

recorded, may be admitted to probation under First Offenders' Probation Act, 1886.—*R. v. TURNER* (1893), 11 N. Z. L. R. 831.—*N.Z.*

**k. —.]**—First Offenders' Probation Act, 1886, is not applicable to a prisoner who has embezzled several sums of money extending over a considerable period, & has falsified his accounts, even though he admits his defalcations & offers to make restitution.—*R. v. ROWE* (1902), 20 N. Z. L. R. 590.—*N.Z.*

**l. — First offender.]**—Where there were separate embezzlements committed by prisoner at different periods of time, not so connected as to constitute practically one charge, & prisoner was a person in a position of trust & mature years:—*Held: (1)* there was an "established criminal intention" shown, within "The First Offenders' Probation Act, 1886," which precluded the application of the

### SUB-SECT. 7.—PREVENTIVE DETENTION.

**Sentence on habitual criminal.]**—*See Sect. 4, sub-sect. 4, post.*

### SUB-SECT. 8.—PROBATION.

*See Probation of Offenders Act, 1907 (c. 17), & Criminal Justice Administration Act, 1914 (c. 58).*

### SECT. 4.—HABITUAL CRIMINALS.

*See Prevention of Crime Act, 1908 (c. 59).*

#### SUB-SECT. 1.—PROCEDURE BEFORE TRIAL.

##### A. In General.

**5253. Whether person under thirty can be charged.]**—Exceptionally it may be proper to charge a person under thirty years of age with being a habitual criminal.—*R. v. SAUNDERS* (1912), 7 Cr. App. Rep. 271, C. C. A.

**5254. —.]**—There is no law which prevents a person from being convicted as a habitual criminal before he is thirty, but it is a matter on which we ought to be careful (*RIDLEY, J.*).—*R. v. HOOPER & HARDY* (1913), 9 Cr. App. Rep. 5, C. C. A.

**5255. Consent of directors of public prosecutions—Condition precedent.]**—Observations on the procedure to be followed on a charge of being a habitual criminal, before trial, during trial, & after conviction, & on the form of the indictment.

As to proceedings before trial. There are two conditions precedent: the consent of the Director of Public Prosecutions has to be given, & seven days' notice has to be given to the proper officer of the ct. by which the offender is to be tried, & to the offender himself, that it is intended to insert such charge, & the notice to the offender must specify the previous convictions & the other grounds upon which it is intended to found the charge. These two conditions are of the utmost importance, & unless proper notice has been given no valid trial can take place. The notice itself should give, with particularity, not only the convictions, but the other grounds upon which it is intended to found the charge. The latter must refer specifically to the facts. Care should be taken during the trial that evidence is not given against the offender unless due notice of the facts to be proved has been already given to him.

With regard to proceedings during trial. The indictment should be framed to show clearly that the person is charged with being a habitual criminal; & after verdict, but before sentence at

provisions of that Act: (2) as to the second & subsequent charge, prisoner was not a "first offender."—*It. v. FOWLER* (1903), 23 N. Z. L. R. 356.—*N.Z.*

**—.]**—Where a prisoner charged with an indictable offence has given false evidence, & has been convicted of the offence charged:—*Held: he* ought not to be admitted to probation.

Prisoner was convicted of two charges of forgery in one indictment. He had been previously convicted summarily of stealing two blank stamped cheques, & it was these cheques which he filled up & forged:—*Held: although* the offence of theft was in a sense connected with the forgery, it was a separate offence, & the prisoner was not therefore a "first offender" within First Offenders' Probation Amendment Act, 1903, s. 2.—*R. v. HIRST* (1907), 27 N. Z. L. R. 533.—*N.Z.*

Sect. 4.—Habitual criminals: Sub-sect. 1, A. & B.]

the trial on the primary offence, the charge of being a habitual criminal should be clearly put to the prisoner for him to plead to.

As to proceedings after conviction, it should be observed that there is no obligation on the ct. to pass a sentence of preventive detention. Unless the ct. has passed a sentence of penal servitude for the primary offence, it has no jurisdiction to pass a sentence of preventive detention; & even if the ct. does pass such a sentence of penal servitude there is no obligation to pass a sentence of preventive detention in respect of the man having been found a habitual criminal.

Another point raised in the case of W. (one of defts.) was that his answer to the deputy clerk of assize did not amount to a plea of guilty on a charge of being a habitual criminal. In a sense that is true, for his answer "Yes" was to the question whether he had been previously convicted as a habitual criminal in 1915; but we have no doubt at all that applt. thought that he was being charged with being a habitual criminal, knew that he had been convicted & sentenced for such an offence, & intended to plead guilty to such a charge. He had received a proper notice setting out his previous conviction as such, & he had been sentenced to preventive detention, & he was at the time of committing the offences for which he was then on trial a convict on licence of preventive detention, which fact was proved at the trial. He was defended by counsel, & neither he nor his counsel raised any protest when the learned judge proceeded to treat him as a habitual criminal in virtue of his answer to the deputy clerk of assize. Under these circumstances we hold that this is a case where the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1), can & should be applied on the ground that no substantial miscarriage of justice has actually occurred (LORD TREVELYAN, C.J.).—*R. v. HARRIS*, [1922] 2 K. B. 543; *sub nom. R. v. HARRIS*, *R. v. EDWARDS*, *R. v. JONES*, *R. v. WILKINS*, *R. v. WILCOCK*, 91 L. J. K. B. 587; 128 L. T. 639; 86 J. P. 105; 38 T. L. R. 343; 66 Sol. Jo. 317, 335; 27 Cox, C. C. 178; 16 Cr. App. Rep. 91, 94, 95, 96.

**5256.** ——— **Necessity for proof.**—*R. v. LAURANCE* (1909), 73 J. P. Jo. 564.

**5257.** ——— *R. v. FOSTER* (1909), 3 Cr. App. Rep. 173, C. C. A.

**5258.** ——— **Mode of proof.**—An indictment under Prevention of Crime Act, 1908 (c. 59), s. 10, charged prisoner with felony & also with being a habitual criminal. Prisoner pleaded guilty to the felony & not guilty to the charge of being a habitual criminal:—*Held*: upon the inquiry whether the prisoner was a habitual criminal there was no objection to swearing the jury as for the trial of a felony, although it would have been sufficient to swear them as for the trial of a misdemeanour.

Without laying down any general rule as to how the consent of the Director of Public Prosecutions to a charge of being a habitual criminal being inserted in an indictment ought to be proved, it will be sufficient if some person who has been in correspondence with the Public Prosecutor is called to say that he received the document containing the consent in the ordinary course of correspondence & believes it to be signed by the Director of Public Prosecutions, but it is not necessary to call a witness who has seen him write.

To prove that seven days' notice of the intention to insert in the indictment a charge of being a

habitual criminal has been given to the proper officer of the ct. it is not necessary that the officer himself, e.g. the clerk of the peace, should be called, but there must be some proof of the receipt by him of the notice, e.g. by calling his clerk.

The seven days' notice to be given to the officer of the ct. & to the offender that it is intended to insert a charge of being a habitual criminal in the indictment is seven clear days' notice.

It is not necessary that the notice to the offender of intention to insert a charge of being a habitual criminal in the indictment should contain a statement of the evidence which it is intended to call for the purpose of showing that he is leading persistently a dishonest or criminal life, but the grounds upon which it is intended to prove that he is leading persistently a dishonest or criminal life must be stated in a general way, e.g. that the prisoner is doing no work & has no honest means of livelihood.

Whether evidence of prisoner's persistently dishonest or criminal life previous to his last conviction is admissible in evidence in order to prove that he is at present leading a persistently dishonest or criminal life depends on the facts of the case. The evidence may be admissible as a step in proving that he is at present leading a persistently dishonest or criminal life. Evidence of such dishonest or criminal life before the last conviction is not necessarily inadmissible, but it must be brought down to the date of the pending charge.

If the facts make it doubtful whether prisoner was over sixteen when the first of the three convictions mentioned in sect. 10, sub-sect. 2 (a) took place, some evidence of that fact must be given. But a statement of prisoner to that effect would be sufficient.

Where a person is convicted of, or pleads guilty to, having committed a crime charged in the indictment, the ct. ought not to pass a sentence for that crime before the jury inquire into a further charge, contained in the indictment, of being a habitual criminal.—*R. v. TURNER*, [1910] 1 K. B. 346; 79 L. J. K. B. 176; 102 L. T. 367; 74 J. P. 81; 26 T. L. R. 112; 22 Cox, C. C. 310; 3 Cr. App. Rep. 103, C. C. A.; *sub nom. R. v. TURNER*, *R. v. WALLER*, 54 Sol. Jo. 164, C. C. A.

*Annotations*:—*Reid*, *R. v. Johnson* (1909), 3 Cr. App. Rep. 168; *R. v. Condon* (1910), 4 Cr. App. Rep. 109; *R. v. Fawcett* (1910), 74 J. P. 444; *R. v. Marshall* (1910), 74 J. P. 381; *R. v. Moran* (1910), 5 Cr. App. Rep. 219; *R. v. Walker* (1910), 27 T. L. R. 51; *R. v. Waller*, [1910] 1 K. B. 364; *R. v. Summers* (1914), 10 Cr. App. Rep. 11; *R. v. Harris*, [1922] 2 K. B. 543; *R. v. Coney* (1923), 92 L. J. K. B. 915. *Mentid*, *Browne v. Black*, [1911] 1 K. B. 975.

**5259.** ——— *Where a charge under the Prevention of Crime Act, 1908 (c. 59), of being a habitual criminal is inserted in the indictment against an accused person the prosecution need not prove as part of their case that the consent of the Director of Public Prosecutions has been given to the insertion of such charge, unless the fact is challenged by the accused, in which case the fact may be proved as determined in *Rex v. Turner* ([1910] 1 K. B. 346).* The clerk of assize or the clerk of the peace, or, if any question arises, the Judge, should satisfy himself that such consent has been given before the indictment goes before the grand jury.—*R. v. WALLER*, [1910] 1 K. B. 364; 79 L. J. K. B. 184; 102 L. T. 400; 74 J. P. 81; 26 T. L. R. 142; 22 Cox, C. C. 319; 3 Cr. App. Rep. 213; *sub nom. R. v. TURNER*, *R. v. WALLER*, 54 Sol. Jo. 164, C. C. A.

*Annotations*:—*Fold*, *R. v. Westwood* (1913), 8 Cr. App. Rep. 273. *Reid*, *R. v. Bates* (1911), 80 L. J. K. B. 507; *R. v. Everitt* (1911), 6 Cr. App. Rep. 267; *R. v. Metz*

(1915), 84 L. J. K. B. 1462. *Mentd. R. v. Rowland* (1909), 3 Cr. App. Rep. 277; *R. v. Baggott* (1910), 74 J. P. 213; *R. v. Condon* (1910), 4 Cr. App. Rep. 109; *R. v. Fawcett* (1910), 74 J. P. 444; *R. v. Marshall* (1910), 74 J. P. 381.

#### *B. Notices to Offender and Court.*

**5260. In general—Necessity for proof of notices.]**

—*R. v. FOSTER*, No. 5257, *ante*.

**5261. — Length of notice—Seven clear days.]**

—*R. v. TURNER*, No. 5258, *ante*.

**5262. — Postponement of trial for notice to be given.]**—*R. v. LAWRENCE* (1914), 78 J. P. Jo. 196.

**5263. — Effect of postponement of trial.]**—Where a trial has been postponed to a later assize, a proper notice given to an alleged habitual criminal holds good.—*R. v. CONDUIT* (1914), 11 Cr. App. Rep. 38, C. C. A.

**5264. — Objections to notice—Must be taken at trial.]**—Objections that proper notices, under Prevention of Crime Act, 1908 (c. 59), s. 10 (4) (b), have not been given, must be taken at the trial.—*R. v. SMITH*, *R. v. WESTON*, [1910] 1 K. B. 17; 79 L. J. K. B. 1; 101 L. T. S16; 74 J. P. 13; 26 T. L. R. 23; 54 Sol. Jo. 137; 22 Cox, C. C. 219; 3 Cr. App. Rep. 40, 53, C. C. A.

*Annotations:—Mentd. R. v. Franklin* (1909), 3 Cr. App. Rep. 48; *R. v. Smith* (1909), 3 Cr. App. Rep. 40; *R. v. Jackson* (1910), 4 Cr. App. Rep. 93; *R. v. Sweeney* (1910), 74 J. P. Jo. 77.

**5265. — Effect of technical objection.]**—

The ct. will not give effect to a mere technical objection to the statutory notice if there has been no miscarriage of justice.—*R. v. JONES* (1910), 5 Cr. App. Rep. 29, C. C. A.

**5266. — — —.]**—The statutory notice to an offender under Prevention of Crime Act, 1908 (c. 59), s. 10 (4) (b), is subject to the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1).

Preventive detention differs from penal servitude & approaches industrial serfdom. For a man to be found to be a habitual criminal it must be found that he has been convicted three times previously. In the notice which was served on applt. no mention was made of a crime committed at Leeds, but evidence was given of it, the evidence being a letter written by applt. asking that the matter should be taken into consideration. No substantial miscarriage of justice has occurred, through the omission of this matter from the statutory notice. The proviso applies just as much to the formal notice as it does to graver things (DARLING, J.).—*R. v. HERON* (1913), 9 Cr. App. Rep. 29, C. C. A.

*Annotation:—Refd. R. v. Harris, etc.* (1922), 91 L. J. K. B. 587.

**5267. Notice to officer of court—Proof of receipt of notice.]**—*R. v. TURNER*, No. 5258, *ante*.

**5268. — — —.]**—*R. v. FOSTER*, No. 5257, *ante*.

**5269. — — —.]**—A conviction for being an habitual criminal under Prevention of Crime Act, 1908 (c. 59), s. 10, was quashed on the grounds that (1) there was no proof that seven days' notice had been given to the proper officer of the ct. that it was intended to insert in the indictment against applt. a charge of being an habitual criminal; (2) that the judge in summing up the case to the jury had mentioned other convictions than the three convictions proved against him & those just recorded against him; & (3) that the judge in summing up the case to the jury had told them that the burden of proving that he had attempted

to gain an honest livelihood since his last conviction lay upon applt.—*R. v. STEWART* (1910), 74 J. P. 246; 4 Cr. App. Rep. 175, C. C. A.

*Annotations:—As to* (2) *N.F. R. v. Chatway & Howard* (1910), 5 Cr. App. Rep. 151. *Consd. R. v. Cullford* (1911), 75 J. P. 232.

**5270. — Presumption that notice given.]**—

(1) There is a presumption that the notice to the proper officer of the ct. of an intention to charge a prisoner as an habitual criminal under Prevention of Crime Act, 1908 (c. 59), s. 10 (4) (b), has been duly given. The onus is on prisoner of showing that it has not.

(2) Evidence was given of grounds not included in the notice given to prisoner, but the ct., on appeal from the conviction, acted under the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1), & holding that no substantial miscarriage of justice had occurred, they refused to allow the appeal & confirmed the conviction.—*R. v. WESTWOOD* (1913), 77 J. P. 379; 29 T. L. R. 492; 8 Cr. App. Rep. 273, C. C. A.

*Annotation:—As to* (2) *Folld. It. v. Heron* (1913), 9 Cr. App. Rep. 29.

**5271. — Necessity for.]**—*R. v. HARRIS*, No. 5255, *ante*.

**5272. Notice to offender—Necessity for.]**—*R. v. HARRIS*, No. 5255, *ante*.

**5273. — Necessity for proof of.]**—*R. v. FOSTER*, No. 5257, *ante*.

**5274. — — — Mode of proof.]**—*R. v. TURNER*, No. 5258, *ante*.

**5275. — Presumption of service of notice.]**—On the trial of an allegation of being a habitual criminal the ct. will presume, in the absence of evidence to the contrary, that the notice to the offender under Prevention of Crime Act, 1908 (c. 59), s. 10 (4), has been duly served.—*R. v. TAYLOR* (1921), 16 Cr. App. Rep. 4, C. C. A.

**5276. — Necessary contents.]**—*R. v. TURNER*, No. 5258, *ante*.

**5277. — — —.]**—*R. v. SUMMERS* (1914), 10 Cr. App. Rep. 11, C. C. A.

*Annotation:—Refd. R. v. Harris*, [1922] 2 K. B. 543.

**5278. — — —.]**—*R. v. HARRIS*, No. 5255, *ante*.

**5279. — — — Effect of statement of wrong grounds.]**—A notice given to a prisoner pursuant to Prevention of Crime Act, 1908 (c. 59), s. 10 (4) (b), that it was intended to insert in an indictment against him a charge that he was a habitual criminal & was leading persistently a dishonest & criminal life contained the following ground: "That when you were asked to give some account of yourself, in order that you might have an opportunity of showing that you had since the date of your last release from prison been following some honest employment, you declined to give any information which could be verified on the subject":—*Held*: although in point of form the ground was not one upon which prisoner could be convicted of being a habitual criminal, it did not invalidate the notice, inasmuch as it was in fact a notice of the evidence that would be used against prisoner for the purpose of satisfying the jury that he had not been leading an honest life since the date of his last release from prison, & the fact that the notice stated that the evidence would be given did not make it bad, although there was no legal obligation under the statute to state what evidence would be produced.—*R. v. WEBBER*, [1913] 1 K. B. 33; 82 L. J. K. B. 108; 108 L. T.

#### **PART XIII. SECT. 4, SUB-SECT. 1.—B.**

**5272 1. Notice to offender—Necessity for.]**—On a charge of forgery, falsity & theft, accused was sentenced to be

imprisoned for three years with hard labour, & was at the same time declared an habitual criminal, in terms of Act 9 of 1911:—*Held*: Act No. 9 of 1911 made no provision for the giving

notice to an accused person of an intention on the part of the prosecution to have him declared an habitual criminal.—*GANDY v. R.* (1914), 35 N. L. R. 333.—**S. AF.**

*Sect. 4.—Habitual criminals: Sub-sect. 1, B.; sub-sects. 2 & 3, A., B. & C.]*

349; 76 J. P. 471; 23 Cox, C. C. 323; 8 Cr. App. Rep. 59, C. C. A.

*See, further, Sub-sect. 3, A., post.*

#### SUB-SECT. 2.—PROCEDURE AT TRIAL.

**5280. Indictment—Must contain charge of being a “habitual criminal.”**—*R. v. HARRIS*, No. 5255, *ante*.

**5281. ——— Effect of omission of words “habitual criminal.”**—An indictment containing a count under Prevention of Crime Act, 1908 (c. 59), s. 10 (2), alleged that prisoner, since attaining the age of sixteen years, had at least three times previously to the crime charged in the indictment been convicted of a crime within the meaning of the Act, & that he was leading persistently a dishonest & criminal life, but it did not allege that prisoner was a habitual criminal:—*Held*: the count was sufficient, though from the point of view of pleading it would be better to insert an averment that prisoner was a habitual criminal.

By Prevention of Crime Act, 1908 (c. 59), s. 11, a person sentenced to preventive detention may appeal against the sentence without leave of the Ct. of Criminal Appeal:—*Held*: the ct. would adopt the practice of allowing prisoners, appealing against a sentence of preventive detention, to appeal against the sentence of preventive detention, to which the sentence of preventive detention could not be passed.—*R. v. SMITH*, *R. v. WESTON*, [1910] 1 K. B. 17; 79 L. J. K. B. 1; 101 L. T. 816; 74 J. P. 13; 26 T. L. R. 23; 54 Sol. Jo. 137; 22 Cox, C. C. 219; 3 Cr. App. Rep. 40, 53, C. C. A.

*Annotations:—Refd. R. v. Sweeney* (1910), 74 J. P. Jo. 77. *Mentd. R. v. Franklin* (1909), 3 Cr. App. Rep. 48; *R. v. Smith* (1909), 3 Cr. App. Rep. 40; *R. v. Jackson* (1910), 4 Cr. App. Rep. 93.

**5282. ——— Effect of charge of being a habitual criminal.**—There is no power to try the allegation that an accused person is a habitual criminal before any jury other than the jury which convicted him of the substantive offence charged in the indictment.

The whole question depends upon whether the charge against applt. was a charge of an offence or crime or whether it merely asserted a status or condition in him which would enable the ct., if it were established, to deal with him in a certain manner. We are of opinion that there is nothing in the Act [Prevention of Crime Act 1908 (c. 59)] which would justify us in saying that the charge of being a habitual criminal is a charge of a crime or offence (LORD READING, C.J.).—*R. v. HUNTER*, [1921] 1 K. B. 555; 90 L. J. K. B. 145; 125 L. T. 29; 85 J. P. 147; 37 T. L. R. 82; 26 Cox, C. C. 727; 15 Cr. App. Rep. 69, C. C. A.

**5283. ——— Must be tried immediately after primary charge.**—An indictment for being a habitual criminal under Prevention of Crime Act, 1908 (c. 59), must be tried immediately after the primary charge.

#### PART XIII. SECT. 4, SUB-SECT. 2.

*n. Indictment—Must be tried immediately after primary charge—No interlocutor or adjournment necessary.*—Prisoner, indicted on a charge of theft & of being an habitual criminal, was found by jury guilty of theft. The jury was then resworn to inquire into the second charge & found prisoner to be an habitual criminal. On motion

for sentence on the charge of theft, counsel for prisoner objected as the diet had not been formally adjourned by written interlocutor after the verdict on the first charge & before the second charge was proceeded with:—*Held*: the inquiry being one continuous inquiry no interlocutor or adjournment was necessary.—*H.M. ADVOCATE v. GILLAN*, [1910] S. C. (J.)

If a man occupies a day or two of his time in doing work, that does not prevent him from being a habitual criminal (DARLING, J.).—*R. v. JENNINGS* (1910), 74 J. P. 245; 26 T. L. R. 339; 4 Cr. App. Rep. 120, C. C. A.

*Annotation:—Refd. R. v. Hunter*, [1921] 1 K. B. 555.

**5284. ——— Must be tried before jury trying primary charge.**—*R. v. HUNTER*, No. 5282, *ante*.

**5285. ——— Judge has not power to refuse to try.**—A judge has no power to refuse to try the allegation of being a habitual criminal.—*R. v. HARDING, JEFFREY & JONES* (1920), 15 Cr. App. Rep. 33, C. C. A.

**5286. ——— Should be tried before sentence on primary charge.**—*R. v. TURNER*, No. 5258, *ante*.

**5287. ——— ———**—Where a person is indicted for a crime & also for being an habitual criminal, & pleads guilty to, or is convicted of, the crime, sentence should not be passed upon him in respect thereof until the charge of being an habitual criminal has been tried.—*R. v. WALKER* (1910), 27 T. L. R. 51; 5 Cr. App. Rep. 231; 74 J. P. Jo. 533, C. C. A.

*Annotation:—Refd. R. v. Harris*, [1922] 2 K. B. 543.

**5288. Trial of two together as habitual criminals—Whether trials should be separate.**—A person charged in an indictment with being an habitual criminal, when tried on that issue, should be tried separately & not with any other person.—*R. v. BLAKE* (1910), 74 J. P. 336; 4 Cr. App. Rep. 275, C. C. A.

*Annotation:—Expld. R. v. Taylor & Coney* (1910), 5 Cr. App. Rep. 168.

**5289. ——— ———**—It is not an absolute rule of CONEY (1910), 5 Cr. App. Rep. 168, C. C. A.

**5290. Swearing the jury—Whether for felony or misdemeanour.**—*R. v. TURNER*, No. 5258, *ante*.

#### SUB-SECT. 3.—EVIDENCE AT TRIAL.

##### A. What Evidence may be given.

**5291. Must be confined to matters contained in notice.**—In this case, on the trial of a prisoner for being an habitual criminal, evidence was given of certain offences committed by prisoner since his last release from prison before his re-arrest for the fourth crime. The notice given to him of an intention to insert in the indictment a charge against him of being an habitual criminal pursuant to Prevention of Crime Act, 1908 (c. 59), s. 10 (4) (b), did not state the commission of these offences as one of the “other grounds upon which it is intended to found the charge.” No objection was taken to the evidence when it was given. Applt., by his notice of appeal, did not make the admission of this evidence a ground of appeal. The ct. refused to quash the conviction on the ground of this evidence having been given, & acting under the power given to them by the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1), they held that no substantial miscarriage of justice had actually occurred.—*R. v. MARSHALL* (1910), 74 J. P. 381; 5 Cr. App. Rep. 25, C. C. A.

*Annotation:—Refd. R. v. Heron* (1913), 9 Cr. App. Rep. 29.

##### 49.—SCOT.

#### PART XIII. SECT. 4, SUB-SECT. 3.—A.

**5291 i. Must be confined to matters contained in notice.**—Evidence revealing that prisoner had served terms of imprisonment besides those due to the convictions charged in the notice was rejected.—*R. v. PROCTOR*, *R. v. DOAK* (1909), 44 I. L. T. 107.—*IR.*



**Sect. 4.—Habitual criminals: Sub-sect. 3, C. & D. (a).]**

convictions may be put in as evidence of character & repute, on the question whether the accused is or is not leading persistently a dishonest or criminal life, under sect. 10 (5).—*R. v. FRANKLIN* (1909), 74 J. P. 24; 54 Sol. Jo. 217; 3 Cr. App. Rep. 48, C. C. A.

**Annotations:—***Refd.* *R. v. Chatway & Howard* (1910), 5 Cr. App. Rep. 151; *R. v. Westwood* (1913), 29 T. L. R. 492. **Mentd.** *R. v. Crowley* (1913), 9 Cr. App. Rep. 198.

**5308.** ———.]—*R. v. STEWART*, No. 5269, *ante*.

**5309. What is a previous conviction—Conviction in Ireland.**—A conviction for a crime in Ireland is a previous conviction within the meaning of Prevention of Crime Act, 1908 (c. 59), s. 10 (2).—*R. v. BROWN* (1913), 77 J. P. Jo. 400, C. C. A.

**D. Proof of Dishonest or Criminal Life.**

**(a) In General.**

**5310. Onus of proof—Lies on prosecution.**—*R. v. STEWART*, No. 5269, *ante*.

**5311.** ———.]—Where an offender is charged with being an habitual criminal it is for the Crown to establish that the accused still was at the time of arrest, leading a dishonest or criminal life.—*R. v. YOUNG* (1913), 109 L. T. 753; 78 J. P. 80; 30 T. L. R. 69; 58 Sol. Jo. 100; 23 Cox, C. C. 624; 9 Cr. App. Rep. 185, C. C. A.

**Annotations:—***Refd.* *R. v. Crowley*, *R. v. Sullivan* (1913), 110 L. T. 127; *R. v. Harris*, etc., [1922] 2 K. B. 543.

**5312.** ———.]—On the trial of the allegation of being a habitual criminal the jury should clearly be directed that the onus of proof is on the Crown.

It is entirely discretionary for the judge who presides at the trial, having regard to the Act which he is called upon to enforce & applying it to the particular circumstances of the case then before him, to determine the period of preventive detention (ISAACS, C.J.).—*R. v. CROWLEY* (1913), 83 L. J. K. B. 298; *sub nom.* *R. v. CROWLEY*, *R. v. SULLIVAN*, 110 L. T. 127; 78 J. P. 142; 30 T. L. R. 94; 24 Cox, C. C. 13; 9 Cr. App. Rep. 198, 201, C. C. A.

**Annotation:—***Refd.* *R. v. Harris*, [1922] 2 K. B. 543.

**5313. What is sufficient proof—Three previous convictions alone.**—The requirement of Prevention of Crime Act, 1908 (c. 59), s. 10 (4), that the notice to the offender of an intention to insert such a charge in the indictment "shall specify

five offences in respect of four separate acts, & upon a plea of "guilty" to a further indictment containing four counts charging four offences in respect of two separate acts. Both the conviction & the plea of "guilty" were taken upon the same day:—*Held*: the declaration should be quashed, prisoner having been "previously convicted" on two occasions only & not "on at least four occasions" within Crimes Act, 1908, s. 29.—*It. v. TIER* (1912), 32 N. Z. L. R. 428.—**N.Z.**

**o. What is a previous conviction—Admission of series of charges.**—Prisoner who pleaded guilty to a series of charges of breaking & entering & stealing, had only two prior convictions against him for the same class of offence, there were also several police ct. convictions against him & one on a charge of forgery on indictment:—*Held*: the judge was entitled to take into consideration the series of offences to which the prisoner had pleaded guilty.—*R. v. HAMILTON* (1913), 13 S. R. N. S. W. 651; 30 N. S. W. W. N. 190.—**AUS.**

**p.** ———.]—The ct. has power, under The Indictable Offences Summary Jurisdiction Amendment Act, 1900, s. 14 (3), to declare prisoner an

habitual criminal where he has not been convicted on indictment, but has pleaded guilty in the Magistrate's Ct. & been committed to the Supreme Ct. for sentence.—*It. v. BAGNALL* (1907), 26 N. Z. L. R. 756.—**N.Z.**

**q. — Offences committed before Habitual Criminals & Offenders Act, 1906.**—Where prisoner was convicted after the passing of above Act of an offence committed before its passing, & the requisite number of previous convictions were recorded against him:—*Held*: the ct. had power to declare him an habitual criminal.—*Re SPARROW* (1908), 28 N. Z. L. R. 143.—**N.Z.**

**r. — Crimes Act, 1908, s. 29—Need not be convictions on indictment.**—The previous convictions requisite under above Act, to enable the ct. to declare prisoner an habitual criminal need not necessarily be convictions on indictment, but may be convictions before a magistrate, so long as they are convictions for the offences mentioned in Classes I. or II. of the sect.—*R. v. LEWIS* (1910), 29 N. Z. L. R. 1208.—**N.Z.**

**s. — — — Convictions on different days.**—Each conviction of a prisoner

the previous convictions & the other grounds upon which it is intended to found the charge" means that the notice shall specify "the other grounds" if any. It does not mean that the previous convictions may not by themselves be sufficient grounds upon which to found the charge.

—*R. v. WALLER*, [1910] 1 K. B. 364; 79 L. J. K. B. 184; 102 L. T. 400; 74 J. P. 81; 26 T. L. R. 142; 22 Cox, C. C. 319; 3 Cr. App. Rep. 213; *sub nom.* *R. v. TURNER*, *R. v. WALLER*, 54 Sol. Jo. 164, C. C. A.

**Annotations:—***Refd.* *R. v. Baggott* (1910), 74 J. P. 213; *R. v. Marshall* (1910), 74 J. P. 381; *R. v. Everitt* (1911), 6 Cr. App. Rep. 267. **Mentd.** *R. v. Rowland* (1909), 3 Cr. App. Rep. 277; *R. v. Condon* (1910), 4 Cr. App. Rep. 109; *R. v. Bates* (1911), 80 L. J. K. B. 507; *R. v. Westwood* (1913), 8 Cr. App. Rep. 273; *R. v. Metz* (1915), 84 L. J. K. B. 1462.

**5314.** ———.]—On the charge of being "a habitual criminal" within Prevention of Crime Act, 1908 (c. 59), s. 10 (2) (a), the three previous convictions which the jury must find may be sufficient evidence for the jury when the offences committed show deliberate & systematic preparation, & are repeated at an early opportunity after release from prison.

Five years' preventive detention does not necessarily mean that applt. would be in confinement the whole of that time. The authorities had ample power to release him at an earlier date if satisfied that it was safe to do so (PICKFORD, J.).—*R. v. EVERITT* (1911), 27 T. L. R. 570; 6 Cr. App. Rep. 267, C. C. A.

**5315. — Convictions other than three statutory convictions.**—*R. v. BRUMMITT & MATTHEWS* (1910), 4 Cr. App. Rep. 192, C. C. A.

**5316. — — — Whether strict proof necessary.**—*R. v. STEWART*, No. 5269, *ante*.

**5317. — — — Production of list of previous convictions.**—*R. v. FRANKLIN*, No. 5307, *ante*.

**5318.** ———.]—Other previous convictions than the three statutory convictions need not be proved with the same strictness & particularity as the latter.—*R. v. CHATWAY & HOWARD* (1910), 5 Cr. App. Rep. 151, C. C. A.

**5319.** ———.]—*R. v. SUMMERS*, No. 5277, *ante*.

**5320. — — — Should not be referred to unless proved.**—In this case a conviction for being a habitual criminal under Prevention of Crime Act, 1908 (c. 59), s. 10, was quashed on the ground that

is a separate occasion within above Act, whether the several convictions are recorded on the same day or on different days.—*R. v. STEELE* (1910), 29 N. Z. L. R. 1039.—**N.Z.**

**t. — — — Sequence of convictions necessary.**—The conditions precedent which must exist to authorise a ct. in declaring a prisoner an habitual criminal under above Act, 1908, are a sequence of convictions only, & nothing is said as to a sequence of offences.—*It. v. EHRMAN* (1911), 21 N. Z. L. R. 136.—**N.Z.**

**u. — Act 9 of 1911.**—On a charge of forgery, falsity & theft, accused was sentenced to be imprisoned for a term of three years with hard labour, & was at the same time declared an habitual criminal, in terms of Act 9 of 1911. An appeal was taken on the ground that the crime of falsity, which was one of two previous convictions against accused, was not one of the crimes mentioned in the schedule to the Act of 1911:—*Held*: although the offences mentioned in the schedule did not expressly include the crime of falsity, it came within the generic term of "fraud," which was included in the schedule.—*GANDY v. R.* (1914), 35 N. L. R. 333.—**S. AF.**



the judge in summing up the case to the jury had mentioned to the jury other convictions than those proved against him, & the ct. were unable to say that if they had not been mentioned the jury would have arrived at the same conclusion.—*R. v. CULLIFORD* (1911), 75 J. P. 232; 6 Cr. App. Rep. 142, C. C. A.

**5321. — Conviction abroad.]—***R. v. HEARD*, No. 5322, *post*.

**5322. — Offences similar to primary offence.]—**Evidence of a conviction abroad for a crime punished by all civilised nations, such as theft, is admissible on the question of whether a prisoner, who is charged under the Prevention of Crime Act, 1908 (c. 59), with being a habitual criminal, has been leading persistently a dishonest or criminal life. Where on such a charge it appears that there has been a considerable interval between prisoner's last release from prison & the commission of the crime on which he is charged with being a habitual criminal, e.g. six or nine months, it is desirable, & probably necessary, not only that the attention of the jury should be drawn to the length of this interval, but that evidence should be given that prisoner relapsed into crime because he was leading persistently a dishonest or criminal life. This evidence may take many forms—association with criminals; the possession of funds not consistent with mere charity & not explained by evidence of employment; the character of the crime itself, whether similar to those for which the accused has been habitually convicted in the past or not, & evidence as to the details of the crime on which he is charged as being a habitual criminal showing skill & premeditation.—*R. v. HEARD* (1911), 106 L. T. 304; 76 J. P. 232; 28 T. L. R. 154; 22 Cox, C. C. 725; 7 Cr. App. Rep. 80, C. C. A.

*Annotations:—***Appld.** *R. v. Ford* (1921), 15 Cr. App. Rep. 176. **Refd.** *R. v. Wilson* (1916), 12 Cr. App. Rep. 95; *R. v. Harris, etc.*, [1922] 2 K. B. 543.

**5323. — — — — —.]—***R. v. WILLIAMS* (1912), 8 Cr. App. Rep. 49, C. C. A.

**5324. — Other offences.]—***R. v. BRUMMITT & MATTHEWS*, No. 5315, *ante*.

**5325. — Must be proved.]—***R. v. SMITH* (1922), 153 L. T. Jo. 282, C. C. A.

**5326. — — — — —.]—***R. v. JONES*, No. 5398, *post*.

**5327. — — — — — Warrants issued.]—***R. v. MACDONALD* (1916), 12 Cr. App. Rep. 127, C. C. A.  
*Annotation:—***Mentd.** *R. v. Harris, etc.* (1922), 91 L. J. K. B. 587.

**5328. — Criminal associations.]—***R. v. HEARD*, No. 5322, *ante*.

**5329. — Refusal to work.]—**B. was convicted for being an habitual criminal under Prevention of Crime Act, 1908 (c. 59), s. 10. It appeared that

on his release from prison after serving his sentence on the third crime, he was kept in an asylum which he left about two months before his arrest for the fourth crime, on which he was charged with being a habitual criminal. Evidence was tendered that he was leading persistently a dishonest life by evidence of repute that he was a cunning & dangerous thief; & that in the course of the two months he had refused the work of stone-breaking offered to him at a workhouse. It appeared, however, that during this period B. was living on the charity of relations, & he stated that he had applied for work which had been promised him. This statement was not corroborated before verdict, & the recorder who tried him commented on that fact in his summing up. But as soon as the verdict was given a police officer went into the box & corroborated B.'s statement as to his efforts to get work during the two months before his last arrest. The Ct. of Criminal Appeal quashed the conviction, holding that the refusal to break stones might have been evidence of B.'s leading persistently a dishonest life, had it not been for the fact that he was known to be living on the charity of relations.—*R. v. BAGGOTT* (1910), 71 J. P. 213; 26 T. L. R. 266; 4 Cr. App. Rep. 67, C. C. A.

*Annotations:—***Refd.** *R. v. Heard* (1911), 106 L. T. 304; *R. v. Keane & Watson* (1912), 8 Cr. App. Rep. 12.

**5330. — Whether refusal to give account of self.]—***R. v. WEBBER*, No. 5279, *ante*.

**5331. — — — — —.]—**A jury properly directed are entitled to find that a deft. who refuses to give any information about himself since a discharge from prison five months before the commission of the primary offence is leading persistently a dishonest or criminal life within the Prevention of Crime Act, 1908 (c. 59), s. 10 (5).—*R. v. WILSON* (1916), 12 Cr. App. Rep. 95.

**5332. — Whether neglect to report to police.]—**In order to prove that a convict on licence is leading persistently a dishonest or criminal life within the meaning of Prevention of Crime Act, 1908 (c. 59), s. 10 (2) (a), proof that he has not reported himself to the police is not by itself sufficient evidence to bring the case within the terms of the section.—*R. v. MITCHELL* (1912), 108 L. T. 224; 76 J. P. 423; 28 T. L. R. 484; 23 Cox, C. C. 284; 7 Cr. App. Rep. 283, C. C. A.

*Annotations:—***Expld.** *R. v. Wilson* (1912), 28 T. L. R. 561. **Refd.** *R. v. Harris, etc.*, [1922] 2 K. B. 543; *R. v. Myers* (1922), 16 Cr. App. Rep. 116.

**5333. — Whether fact of being fugitive from justice.]—**On the trial of applt. as an habitual criminal it was shown that he was released from prison on Oct. 28, 1912, & having committed an offence on Mar. 22, 1913, escaped arrest, & was engaged in honest employment to the time of

#### PART XIII. SECT. 4, SUB-SECT. 3.— D. (a).

**5328 i. What is sufficient proof—Criminal associations.]—**Deft. was summarily convicted under 32 & 33 Vict. c. 28, s. 1 (D.), as "a person who, having no peaceable profession or calling to maintain himself by, but who does, for the most part, support himself by crime, & then was a vagrant," etc. The evidence showed that deft. consorted with thieves & reputed thieves; but the witnesses did not positively say that he supported himself by crime:—*Held*: it was not to be inferred that deft. supported himself by crime; to sustain the conviction there should have been statements that witnesses believed he got his living by thieving, or by aiding & acting with thieves, or by such other acts & means as showed he was pursuing crime.—*R. v. ORGAN* (1886),

11 P. R. 497.—OAN.

**5328 ii. — — — — —.]—**Although it is a necessary ingredient of the offence created Police Offences Act, 1908, s. 49 (c), of habitually consorting with thieves that the accused person should have knowledge of the character of the persons with whom he is charged with consorting, where the evidence shows that the consorting was not casual but habitual, such knowledge on the part of the accused will be presumed.—*STEVENS v. ANDREWS* (1909), 28 N. Z. L. R. 773.—N.Z.

**b. — — — — — Need not be with same persons.]—**Habitually consorting with thieves, under Police Offences Act, 1884, s. 26, as amended by Act of 1901, s. 4, need not be associating with the same person or persons. If a person consorted with one thief on one day, with another on another, & so on, that would be consorting with

thieves.—*O'CONNOR v. HAMMOND* (1902), 21 N. Z. L. R. 573.—N.Z.

**c. — — — — — Extracts of previous conviction.]—**Where a person is charged with being an habitual criminal under the Prevention of Crime Act, 1908, sect. 66 of the Criminal Procedure (Scotland) Act, 1887, applies, & previous convictions are sufficiently proved by the production of extracts thereof of which notice in the indictment has been given & to which no notice of objection has been given by accused.—*H.M. ADVOCATE v. GILLAN*, [1910] S. C. (J.) 49.—SCOT.

**d. — — — — — Evidence insufficient to warrant conviction of habitual criminality in respect that it did not establish that the accused was "leading persistently a dishonest or criminal life."—***STIRLING v. H.M. ADVOCATE*, [1911] S. C. (J.) 84.—SCOT.

*Sect. 4.—Habitual criminals: Sub-sect. 3, D. (a) & (b) & E.; sub-sect. 4.]*

his arrest on Aug. 10, 1913. There was evidence that he led a dishonest life between Oct. 28 & March 22, but no evidence to that effect as to the period between March 22 & Aug. 10. The deputy-chairman directed the jury that they might find he was living a dishonest or criminal life during the period March 22, to Aug. 10, because during that period he was a fugitive from justice. Applt. was convicted:—*Held*: this was a misdirection, & the conviction must be quashed. The period of prisoner's life to be considered on the question whether he is leading a dishonest or criminal life extends to the time of his last arrest.—*R. v. BROWN* (1913), 109 L. T. 749; 78 J. P. 79; 30 T. L. R. 40; 58 Sol. Jo. 69; 23 Cox, C. C. 615; 9 Cr. App. Rep. 161, C. C. A.

*(b) Conduct during Intervals between Offences.*

**5334. Period of time to be considered—Time of committing primary offence.]**—There ought not to be a conviction for being a habitual criminal unless at the time of the offence primarily found deft. was living dishonestly or criminally.—*R. v. JONES* (1920), 15 Cr. App. Rep. 20.

**5335. — Immediately before arrest on pending charge.]**—*R. v. TURNER*, No. 5258, *ante*.

**5336. — — —.]**—*R. v. BRUMMITT & MATTHEWS*, No. 5315, *ante*.

**5337. — — —.]**—*R. v. BROWN*, No. 5333, *ante*.

**5338. — Interval between release from prison & re-arrest.]**—A prisoner was convicted as a habitual criminal. There was a nine months' interval between his release from prison after his conviction for the third crime & his re-arrest. The Crown gave no evidence of his conduct during that period, but prisoner gave evidence of work he had then done. The chairman, in summing up the case, did not direct the attention of the jury to this interval & to prisoner's conduct then on the question whether he was leading persistently a dishonest or criminal life, but merely pointed out to the jury the previous convictions. The ct. quashed the conviction on the ground that the chairman had not sufficiently directed the jury on the question of persistency by directing their attention to prisoner's conduct during the nine month's interval.—*R. v. KELLY* (1909), 74 J. P. 167; 26 T. L. R. 196; 3 Cr. App. Rep. 248, C. C. A.

*v. Rowland* (1909), 3 Cr. App. Rep. 11, 76 J. P. 232

**5339. — — —.]**—*R. v. WILSON*, No. 5331, *ante*.

**5340. — Prior to last conviction.]**—*R. v. TURNER*, No. 5258, *ante*.

**5341. — Subsequent to commission of primary offence.]**—On the trial of a charge of being a habitual criminal, evidence of deft.'s mode of life after the date of his commission of the crime on which he has been primarily convicted is admissible, but the statutory notice to him of such evidence should be as specific as possible.—*R. v. WOOD* (1916), 12 Cr. App. Rep. 29, C. C. A.

**5342. Length of interval since release—Long interval.]**—*R. v. HEARD*, No. 5322, *ante*.

**5343. — Short interval.]**—Mere shortness of interval between last release from prison & the next subsequent arrest is not necessarily a bar to

conviction as a habitual criminal.—*R. v. CONDON* (1910), 4 Cr. App. Rep. 109, C. C. A.

*Annotations:—Refd. R. v. Heard* (1911), 76 J. P. 232; *R. v. Harris*, [1922] 2 K. B. 543.

**5344. — — —.]**—*R. v. FOSTER*, No. 5257, *ante*.

**5345. — — —.]**—*R. v. BRUMMITT & MATTHEWS*, No. 5315, *ante*.

**5346. Whether evidence of honest work—A sufficient defence.]**—On an allegation of being a habitual criminal mere evidence that accused has been at work since his last release from prison is not a sufficient defence.—*R. v. HAYDEN* (1911), 6 Cr. App. Rep. 213, C. C. A.

**5347. — — —.]**—On the charge of being a habitual criminal, it is not a conclusive defence that deft. has done honest work since his last release.—*R. v. KEANE & WATSON* (1912), 8 Cr. App. Rep. 12, C. C. A.

**5348. — — —.]**—The fact that applt. has been doing work during the greater part of a short interval of liberty is not necessarily conclusive against his being a habitual criminal.—*R. v. SMITH* (1913), 8 Cr. App. Rep. 150, C. C. A.

**5349. — — —.]**—*R. v. JENNINGS*, No. 5283, *ante*.

**5350. — — —.]**—On a charge of being a habitual criminal, it is not necessarily a defence that he has been at work since his last release.—*R. v. MARTIN* (1910), 5 Cr. App. Rep. 31, C. C. A. *Annotation:—Refd. R. v. Heard* (1911), 76 J. P. 232.

**5351. — — —.]**—*R. v. HADLEY* (1910), 4 Cr. App. Rep. 36, C. C. A.

**5352. — — —.]**—*R. v. WILLIAMS*, No. 5323, *ante*.

**5353. — Question for jury.]**—It is a misdirection not to call the jury's attention to a considerable period of presumably honest life.—*R. v. WELLS* (1910), 5 Cr. App. Rep. 33, C. C. A. *Annotation:—Refd. R. v. Heard* (1911), 7 Cr. App. Rep. 80.

**5354. — — —.]**—On the trial of an allegation of being a habitual criminal, it is a question for the jury whether the evidence of prisoner's having worked honestly, & tried to get work since his last release from prison is sufficient.—*R. v. MARTIN* (1912), 7 Cr. App. Rep. 227, C. C. A.

**5355. — — —.]**—There may be an appeal against conviction as a habitual criminal though preventive detention has not been inflicted.

Whether applt. has led an honest life during an interval of liberty is a question of fact.—*R. v. BENNETT (JAMES)* (otherwise *BENNETT (GEORGE)*) (1913), 9 Cr. App. Rep. 225.

**5356. — May rebut evidence of criminal associations.]**—Where a person is charged with being a habitual criminal & the only evidence that he is leading persistently a dishonest or criminal life is that since his last conviction he has associated with a man who had previously been convicted with him of a crime, there is no evidence to support a conviction of being a habitual criminal.—*R. v. HAMMERSLEY* (1919), 122 L. T. 383; 84 J. P. 23; 36 T. L. R. 96; 26 Cox, C. C. 552; 14 Cr. App. Rep. 118, C. C. A. *Annotation:—Refd. R. v. Harris*, [1922] 2 K. B. 543.

*E. Previous Conviction as Habitual Criminal.*

**5357. Sufficiency of—For subsequent conviction—Prevention of Crime Act, 1908 (c. 59), s. 10 (2), (b).]**—Where a person who has been found to be a habitual criminal & has been sentenced to pre-

**PART XIII. SECT. 4, SUB-SECT. 3.—E.**

**5357 i. Sufficiency of—For subsequent conviction—Prevention of Crime, 1908, c. 59, s. 10 (2).]**—Where an accused is charged under above Act, with being

an habitual criminal, & the jury find on evidence that he has on a previous occasion been found to be an habitual criminal & has been sentenced to preventive detention, they must convict him, & they cannot take into

consideration whether, since that sentence, he has been leading a dishonest or criminal life.—*MCDONALD* v. H.M. ADVOCATE, [1917] S. C. (J.) 17.

**SCOT.**

ventive detention subsequently commits another crime, he may, by virtue of the above Act, be again convicted as a habitual criminal, on proof being given of the previous conviction as a habitual criminal, without proving also that since the date of that conviction he has been leading persistently a dishonest or criminal life.—*R. v. DAVIS*, [1917] 2 K. B. 855; 87 L. J. K. B. 119; 117 L. T. 704; 82 J. P. Jo. 4; 34 T. L. R. 25; 62 Sol. Jo. 55; 26 Cox, C. C. 98; 13 Cr. App. Rep. 10, C. C. A.

*Annotation* :—*Folld. R. v. Stanley*, [1920] 2 K. B. 235.

**5358.** ———.—]—Where a person who has been found to be a habitual criminal & has been sentenced to preventive detention subsequently commits another crime, the jury must, under Prevention of Crime Act, 1908 (c. 59), s. 10 (2) (b), upon proof of the previous conviction of the accused person as a habitual criminal, & without proof that he has since the date of the previous conviction been leading persistently a dishonest or criminal life, find him to be a habitual criminal. But where a person has been found by a jury to be a habitual criminal the ct. is not bound to pass a sentence of preventive detention.—*R. v. STANLEY*, [1920] 2 K. B. 235; 89 L. J. K. B. 452; 123 L. T. 271; 84 J. P. 119; 36 T. L. R. 328; 64 Sol. Jo. 341; 26 Cox, C. C. 611; 14 Cr. App. Rep. 141, C. C. A.

*Annotations* :—*Folld. R. v. Vincent* (1920), 15 Cr. App. Rep. 19. *Refd. R. v. Harris*, [1922] 2 K. B. 543; *R. v. Clarke* (1923), 17 Cr. App. Rep. 90.

**5359.** ———.—]—*R. v. HARRIS*, No. 5255, *ante*.

**5359a.** ———.—]—The question here is whether the judgment in *R. v. Stanley*, No. 5358, *ante*, is to be followed. If it is to be followed, the true proposition, no doubt, is, that as soon as it is decided to include in the statutory notice the statement contained in sect. 10 (2) (b), it is made certain beforehand that the jury, subject only to the question of identity, must find against the accused. . . . The general question, Is this offender a habitual criminal? is, & must always be, in the absence of admission, a question of fact for the jury to determine. . . . The controversy here is whether, on the true construction of the statute, there is not for the jury a question other than the question of mere identity. . . . We are of opinion that the Legislature has left to the jury the question whether prisoner is a habitual criminal, taking care, however, to provide that he must not be so found unless, at the least, one or other of two conditions precedent shall have been fulfilled (*per CUR.*).—*R. v. NORMAN* (1924), *Times*, May 27.

**5360. Whether admissible—If previous conviction quashed on appeal.**—*R. v. CROWLEY*, No. 5312, *ante*.

#### SUB-SECT 4.—SENTENCE.

**5361. General rule—Matters to be considered.**—In considering the sentence upon a habitual criminal, regard must be had to the nature of the crime for which he last served a term of imprisonment.—*R. v. YATES* (1910), 5 Cr. App. Rep. 222, C. C. A.

**5362.** — **Sentence on primary offence—To be postponed to trial as habitual criminal.**—*R. v. TURNER*, No. 5258, *ante*.

**5363.** ———.— *WALKER*, No. *ante*.

**5364.** ———.—]—*R. v. CONEY*, No. 5304, *ante*.

**5365. Whether court has power to increase sentence—To penal servitude—To enable sentence of preventive detention to be passed.**—The ct. of trial has no power to impose a sentence of three years' penal servitude merely to give itself jurisdiction to order preventive detention.—*R. v. JONES* (1910), 75 J. P. 125; 27 T. L. R. 108; 6 Cr. App. Rep. 1, C. C. A.

**5366.** ———.—]—*Qu.*: whether the ct. has power to pass a sentence of penal servitude on the primary conviction, so as to qualify itself to inflict preventive detention.—*R. v. SWEENEY*, (1910), 4 Cr. App. Rep. 70; 74 J. P. Jo. 77, C. C. A.

*Annotation* :—*Refd. R. v. Jones* (1910), 27 T. L. R. 108.

**5367.** ———.—]—*R. v. CARPENTER & LEWIS* (1910), 4 Cr. App. Rep. 229, C. C. A.

**5368.** ———.—]—Applt. was convicted at quarter sessions of larceny from the person & of being a habitual criminal & he was sentenced to three years' penal servitude to be followed by five years' preventive detention:—*Held*: quarter sessions in order to give themselves power to sentence applt. to preventive detention had sentenced him to three years' penal servitude & this sentence ought not to have been passed for this offence of larceny from the person notwithstanding the bad record of applt.—*R. v. BELL* (1914), 30 T. L. R. 645; 10 Cr. App. Rep. 262; 78 J. P. Jo. 340, C. C. A.

**5369.** ———.—]—The ct. does not, as a rule, approve of a sentence to a term of penal servitude, merely to ground a sentence of preventive detention.—*R. v. MYERS* (1922), 16 Cr. App. Rep. 116, C. C. A.

**5370.** ———.— **To enable Secretary of State to commute sentence to preventive detention—Prevention of Crime Act, 1908 (c. 59), s. 12.**—Where it appeared that a judge had sentenced applt., who had not been convicted of being habitual criminals, to terms of six years' penal servitude with a view to the Home Secretary commuting part of the sentences to preventive detention under the above Act:—*Held*: the sentences should not have been imposed with a view to action being taken by the Home Secretary but solely on the merits of each case, & they reduced the sentences to terms of eighteen months' imprisonment with hard labour.—*R. v. FLICKER*, *R. v. CHUTER* (1910), 74 J. P. 381; 26 T. L. R. 540; 5 Cr. App. Rep. 79, C. C. A.

**5371. Whether sentence of penal servitude need be imposed.**—On conviction of or plea of guilty to being a habitual criminal there need not necessarily be a sentence to penal servitude.—*R. v. VINCENT* (1920), 15 Cr. App. Rep. 19, C. C. A.

*Annotation* :—*Refd. R. v. Clarke* (1923), 17 Cr. App. Rep. 90.

**5372.** ———.—]—It is undoubtedly the law that where a person has been convicted of being a habitual criminal & has been sentenced to preventive detention, proof of those facts is sufficient to ground another conviction as a habitual criminal, but it by no means follows that because convicted he must necessarily be sentenced to penal servitude & preventive detention (LORD HEWART, C.J.).—*R. v. CLARKE* (1923), 17 Cr. App. Rep. 90, C. C. A.

**5373. Relation of primary sentence to term of preventive detention.**—In passing the primary sentence, regard should be had to the term of preventive detention & where the ct. was of the opinion that the sentence was excessive in view of the term of preventive detention it reduced the sentence.—*R. v. SMITH* (1909), 3 Cr. App. Rep. 90, C. C. A.

*Annotation* :—*Refd. R. v. Jackson* (1910), 4 Cr. App. Rep. 93.

*Sect. 4.—Habitual criminals: Sub-sects. 4 & 5. Sects. 5, 6 & 7.]*

**5374. Sentence of preventive detention—Nature of punishment.]—***R. v. HILL (1911), 6 Cr. App. Rep. 110, C. C. A.*

*—R. v. HERON, No. 5266, ante.*

*In discretion of judge.]—*

*CROWLEY, No. 5312, ante.*

**5377. — Usual period.]—**Applt. was convicted of larceny & of being a habitual criminal, & was sentenced to three years' penal servitude & ten years' preventive detention.

I do not say that other persons have not been sentenced to ten years' preventive detention, but as a rule we impose five years, & there is nothing in this case which makes it much worse than others (*RIDLEY, J.*).—*R. v. HAMILTON (1913), 9 Cr. App. Rep. 89, C. C. A.*

*Annotation:—Consd. R. v. Crowley (1913), 83 L. J. K. B. 298.*

*—R. v. STANLEY, No. 5358, ante.*

**5379. — ]—**On conviction as a habitual criminal, the ct., as a rule, approves of a sentence of preventive detention.—*R. v. MCNERNEY (1921), 16 Cr. App. Rep. 21, C. C. A.*

**5380. — Power of Home Secretary—To release.]—***R. v. HOWARD (1910), 4 Cr. App. Rep. 62, C. C. A.*

*—R. v. EVERITT, No. 5314, ante.*

*of sentence.]—R. v. HILL, No. 5374, ante.*

**Effect of consecutive sentences of 3½ years' penal servitude.]—***R. v. WARNER, No. 5162, ante.*

#### SUB-SECT 5.—APPEAL.

*See Prevention of Crime Act, 1908 (c. 59), s. 11.*

**5384. Whether appeal as of right—Against conviction.]—**A habitual criminal, so found under Prevention of Crime Act, 1908 (c. 59), cannot, as of right, appeal against conviction.—*R. v. MARTIN (1912), 7 Cr. App. Rep. 196, C. C. A.*

**5385. — Though no sentence of preventive detention imposed.]—***R. v. BENNETT, No. 5355, ante.*

**5386. — Against sentence of preventive detention.]—***R. v. SMITH, R. v. WESTON, No. 5281, ante.*

**5387. — & sentence of penal servitude.]—***R. v. SMITH, R. v. WESTON, No. 5281, ante.*

**5388. Whether "substantial miscarriage of justice"—Operation of proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1).]**—*R. v. ROWLAND, [1910] 1 K. B. 458; 79 L. J. K. B. 327; 102 L. T. 112; 74 J. P. 144; 26 T. L. R. 202; 3 Cr. App. Rep. 277, C. C. A.*

*Annotation:—Mentd. R. v. Hardy (1910), 74 J. P. 396.*

#### PART XIII. SECT. 4, SUB-SECT. 4.

**e. Sentence of preventive detention.]—**On a charge of forgery, falsity & theft, accused was sentenced to be imprisoned for a term of three years with hard labour, & was at the same time declared an habitual criminal, in terms of Act 9 of 1911. On appeal on the ground that the sentence was incompetent in that it embodied two separate & distinct punishments for the same offence:—*Held: there was nothing illegal in the form in which the sentence had been imposed.—GANDY v. R. (1914), 35 N. L. R. 333.—S. AF.*

#### PART XIII. SECT. 4, SUB-SECT. 5.

**1. Power to withdraw admission of**

*guilt.]—*Two persons charged respectively with crime & with being habitual criminals pleaded guilty to both charges, under the provisions of Criminal Procedure (Scotland) Act, 1887, s. 31, & were remitted to the High Ct. for sentence. One of accused having adhered to his plea of guilty, & the other having been refused leave to withdraw the same by the judge, both were sentenced to penal servitude, to be followed by preventive detention. Both appealed, & sought to withdraw their respective admissions of being habitual criminals on the ground that they had pleaded under a misconception as to the nature & consequences of that charge. The proceedings in both cases had been regular, & each

**5389. — — — Objection to statutory notice.]—***R. v. MARSHALL, No. 5291, ante.*

**5390. — — — ]—***R. v. JONES, No. 5265, ante.*

**5391. — — — ]—***R. v. WESTWOOD, No. 5270, ante.*

**5392. — — — ]—***R. v. HERON, No. 5266, ante.*

*— — — ]—R. v. STOCKDALE, No.*

*5300, ante.*

**5394. — — — Issue of warrant since last discharge—Inability of accused to procure counsel at trial.]—***R. v. MACDONALD, No. 5327, ante.*

**5395. — — — Objection to summing up.]—***R. v. POWELL (1921), 16 Cr. App. Rep. 23, C. C. A.*

**5396. — — — ]—***R. v. HARRIS, No. 5255, ante.*

**5397. — — — Irregularities & wrongful admission of evidence.]—***R. v. FOWLER, No. 5296, ante.*

**5398. — — — ]—**Where, in seeking to establish that a person was a habitual criminal, the prosecution relied on commission of a crime as part of the material upon which that charge was founded, they must prove the commission of that crime in the usual way, & not offer evidence of it to a jury already informed of prisoner's previous convictions.

The test as to "no substantial miscarriage of justice" is whether the jury must inevitably have come to the conclusion they did, apart from the evidence irregularly introduced.—*R. v. JONES (1922), 127 L. T. 160; 86 J. P. 123; 66 Sol. Jo. 489; 27 Cox, C. C. 221; 16 Cr. App. Rep. 124, C. C. A.*

**5399. — — — ]—***R. v. SMITH, No. 5325, ante.*

#### SECT. 5.—HABITUAL DRUNKARDS.

**5400. Definition—Habitual Drunkards Act, 1879**

**(c. 19), s. 3—Inebriates Act, 1898 (c. 60), s. 2.]—**The expression habitual drunkard in the above sects. applies to a person who habitually drinks to excess, & who

incapable of managing himself or his affairs, even though when sober he is capable of managing himself & his affairs.—*EATON v. BEST, [1909] 1 K. B. 632; 78 L. J. K. B. 425; 100 L. T. 494; 73 J. P. 113, 25 T. L. R. 244; 22 Cox, C. C. 66; D. C.*

**5401. — — — ]—***TAYLER v. TAYLER (1912), 56 Sol. Jo. 572.*

**5402. Detention in inebriate reformatory—Power of magistrates to order without consent—Inebriates Act, 1898 (c. 60), s. 1.]—**The register of the minutes or memorandum of convictions of a ct. of summary jurisdiction which has to be kept under Summary Jurisdiction Act, 1879 (c. 49), s. 22, by the clerk of the ct. is admissible in evidence to prove a previous conviction of deft. for a similar offence in the same ct.

had had the assistance of a competent law agent. The ct. refused to allow accused to withdraw their admissions, & dismissed both appeals.—*PAUL v. H.M. ADVOCATE, KNOX v. H.M. ADVOCATE (1914), Sc. L. R. 210.—SCOT.*

#### PART XIII. SECT. 5.

**g. Plea of guilty to original offence—No admission of habitual drunkenness—Trial by jury.]—**Inebriates Act, 1898, s. 1, applies where the offender pleads guilty, & if he does not admit that he is an habitual drunkard a jury may be sworn to inquire as to this. In such case the evidence necessary to satisfy the ct. that the offence charged was committed under the

The consent of deft. to be tried summarily under Inebriates Act, 1898 (c. 60), s. 2, is necessary before a magistrate can make an order under Licensing Act, 1902 (c. 28), s. 6 (1).—*POLICE COMR. v. DONOVAN*, [1903] 1 K. B. 895; 72 L. J. K. B. 545; 88 L. T. 555; 52 W. R. 14; 19 T. L. R. 392; 20 Cox, C. C. 435; *sub nom.* METROPOLIS POLICE COMRS. *v.* DONOVAN, 67 J. P. 147; 47 Sol. Jo. 437, D. O.

*Annotation:—Reid. Wing v. Epsom U.D.C.* (1904), 68 J. P. 259.

**5403. — Whether imprisonment can also be imposed.**—*R. v. PRINCE*, No. 4986, *ante*.

**5404. — Inebriates Act, 1898 (c. 60), s. 2 (1).**—Where a person is convicted on an indictment preferred against him under the above Act a sentence of imprisonment with hard labour cannot be inflicted upon him in addition to the detention in a certified inebriate reformatory authorised by the section.—*R. v. BRIGGS*, [1909] 1 K. B. 381; 78 L. J. K. B. 166; 100 L. T. 240; 73 J. P. 31; 25 T. L. R. 105; 53 Sol. Jo. 164; 21 Cox, C. C. 762; 1 Cr. App. Rep. 206, C. O. A.

**5405. Proof of previous convictions.**—*POLICE COMR. v. DONOVAN*, No. 5402, *ante*.

#### SECT. 6.—YOUTHFUL OFFENDERS.

**5406. Young person under sixteen—Age computed at date of conviction—Criminal Law Amendment Act, 1885 (c. 69), s. 4.**—*R. v. CAWTHRON*, No. 5225, *ante*.

**5407. — When sentence of imprisonment can be imposed—Certificate under Children Act, 1908 (c. 67), s. 102 (3).**—A boy under sixteen years of age, to whom the description of "young person" in sect. 131 of the above Act applied, was convicted of malicious damage & sentenced to four months' imprisonment with hard labour. No

certificate was given under sect. 102 (3) of that Act:—*Held*: the sentence was one which in law could not be given.—*R. v. BRADFORD* (1911), 105 L. T. 752; 76 J. P. 46; 28 T. L. R. 26; 22 Cox, C. C. 627; 7 Cr. App. Rep. 42, C. C. A.

**5408. —**—The certificate under sect. 102, of the above Act, which enables a ct. to sentence a person of the age of fourteen to imprisonment ought not to be granted merely because no "place of detention" within sects. 106, 108, of that Act has been provided.—*R. v. FOSTER* (1916), 12 Cr. App. Rep. 164, C. C. A.

**5409. Child under fourteen—Conviction for larceny—Whipping may be added to detention—Larceny Act, 1861 (c. 96), s. 4.**—*R. v. LYDFORD*, No. 5229, *ante*.

**5410. — Power to send to industrial school—Children Act, 1908 (c. 67), s. 58 (3).**—Under the above Act, justices have jurisdiction to order a child to be sent to a certified industrial school, as well, where he has been guilty of an offence the maximum punishment of which would in the case of an adult be less than penal servitude, as where he has been guilty of an offence which in the case of an adult would be punishable with penal servitude.—*TYDEMAN v. THROWER*, [1914] 2 K. B. 494; 83 L. J. K. B. 814; 110 L. T. 1018; 78 J. P. 182; 30 T. L. R. 374; 24 Cox, C. C. 163; 12 L. G. R. 739, D. C.

**5411. Detention in reformatory—Order for period in excess of that authorised—Reformatory Schools Act, 1893 (c. 48), s. 1.**—*R. v. BOUNDY, ETC.*, JJ. (1904), 68 J. P. Jo. 340, D. C.

—*See, now*, Children Act, 1908 (c. 67), s. 65.

#### SECT. 7.—DEPORTATION OF ALIENS.

*See ALIENS*, Vol. II., pp. 193–197, Nos. 540–553.

influence of drink may consist of the depositions taken before the magistrates when accused was returned for trial.—*R. v. MEEHAN*, [1905] 2 I. R. 577.—*IR.*

#### PART XIII. SECT. 6.

**h. Young person under sixteen—Age computed at date of conviction—Children Act, 1908, ss. 103, 131.**—Accused, who was convicted of murder, had not attained sixteen when the crime was committed, but at the date of the trial was more than sixteen:—*Held*: accused was not a "young person" within above Act, & he might competently be sentenced to death.—*R. v. FITZ*, [1919] 2 I. R. 35; 53 I. L. T. 7.—*IR.*

—*Accused, convicted of culpable homicide, attained the age of sixteen between the date of the offence & conviction:—Held*: (1) he could legally be sentenced to penal servitude; (2) it was competent for the ct., in lieu of such sentence, to pronounce an order for detention in a Borstal Institution.—*H.M. ADVOCATE v. CRAWFORD*, [1918] S. C. (J.) 1; 55 Sc. L. R. 10.—*SCOT.*

**i. Young person under seventeen—Sentence of imprisonment—State Children Act, 1911, s. 24.**—There is no power under above Act to sentence a child to imprisonment for any offence except a capital offence to which the death penalty attaches.—*R. v. BEESTON*, [1915] S. R. Q. 101.—*AUS.*

**m. Child under fourteen—Bond to maintain at industrial school—Dures.**—A bond to secure the payment of the cost of maintaining at an industrial school a boy under fourteen years of

age, convicted of larceny, & who otherwise came within the requirements of Industrial Schools Act, s. 7, given in consequence of the judge's statement that in default the boy would be sent to the reformatory, is void, this being in law *dures*.—*ST. THOMAS (CITY OF) v. YEARSLEY* (1895), 22 A. R. 340.—*CAN.*

**n. — Age need not be mentioned in conviction—Duty of Judge.**—Deft., under the age of sixteen, was convicted for unlawfully entering a vessel lying at a wharf & stealing a sum of money, the property of the master of the vessel, & was ordered under Act of 1890, c. 37, s. 34, to be imprisoned in the Halifax Industrial School for three years:—*Held*: (1) it was not necessary, in the conviction, to refer to the age of the party or the opinion of the justice on that subject; (2) the power of determining the age, or apparent age, of the party before him being given exclusively to the justice, it was to be assumed that the power had been followed; (3) as the questions of the age of the party, & whether he was, or was not, a Protestant, could not, or need not, be inquired into on the trial of the offence, they would properly form a subject of inquiry on the part of the justice after the conviction & before sentence, & it would not, therefore, be necessary to refer to them in the conviction.—*R. v. BRINE* (1900), 33 N. S. R. 43.—*CAN.*

**o. Detention in reformatory—Person over seventeen.**—Deft., a youth of over seventeen years of age, was charged with stealing a small sum of money from the contribution box of a church. Deft. pleaded guilty, & was committed for two years to the pro-

vincial reformatory. He was taken to the reformatory & sent on to the central prison & kept there in custody under the warrant of commitment to the reformatory. On a motion for his discharge on the return of a *habeas corpus*:—*Held*: there had been a miscarriage of legal directions in sending a lad of seventeen to the reformatory & in sending him on a sentence of two years to the central prison.—*R. v. HAYWARD* (1903), 23 C. L. T. 48; 5 O. L. R. 65; 1 O. W. R. 799.—*CAN.*

**p. — Power to send to industrial school—Children Act, 1908, s. 74 (6).**—Under above Act an order for the detention of a child of twelve in a certified industrial school cannot be pronounced by a sheriff until after the local education authority has been given an opportunity of being heard.—*A. B. v. HOWMAN*, [1917] S. C. (J.) 23.—*SCOT.*

**q. Juvenile delinquent—Juvenile Delinquents Act, s. 29.**—Under above Act, it must be shown that the child has become a delinquent not that he is likely to become one.—*R. v. LIMOGES & STACKHOUSE*, [1920] 1 W. W. R. 293; 32 Can. Crim. Cas. 200.—*CAN.*

**r. — Reformatory Schools Act, 1866, s. 14.**—A boy of fifteen pleaded guilty to a breach of the public peace & was sentenced to be imprisoned for ten days & was thereafter under above Act ordered to be sent to a reformatory school for five years:—*Held*: such minor offences did not come within the scope of the section, which was intended to apply to minor grades of serious crimes.—*M'QUIRE v. FAIRBAIRN* (1881), 9 R. (Cl. of Sess.) 4; 19 Sc. L. R. 72.—*SCOT.*

### SECT. 8.—RECOGNISANCES TO KEEP THE PEACE—ARTICLES OF THE PEACE.

**5412. Method of taking—Whether by officer out of court.**—Recognisance cannot be taken by officer out of ct. without special custom.—*CANE'S CASE* (1673), *Freem. K. B.* 355; 89 *E. R.* 264; *sub nom. CAULE v. LLEMARK*, 3 *Keb.* 223, 249.

**5413. — & drawing up.**—The usual practice in taking the recognisance of a person convicted at quarter sessions is that the person so convicted, before he is allowed to leave the ct., enters orally into the recognisance before the officer of the ct., who makes a minute of it; & the recognisance is not formally drawn up till afterwards.—*Ex p. JEFFREYS* (1888), 52 *J. P.* 280, *D. C.*

**5414. Who may be bound.**—*ANON.* (1700), 12 *Mod. Rep.* 413; *Holt, K. B.* 664; 88 *E. R.* 1417.

**5415. Power of court to order in addition to sentence of imprisonment.**—Where an indictment for perjury had been removed into the *Q. B.* by *certiorari*, & deft. convicted, & sentenced by the ct. to be imprisoned for eighteen calendar months & to give security to keep the peace & be of good behaviour for two years, to commence from the expiration of the eighteen months, & to be further imprisoned until such security were given:—*Held*: the ct. might, as part of the sentence, require such sureties.—*DUNN v. R.* (1848), 12 *Q. B.* 1031; 18 *L. J. M. C.* 41; 12 *L. T. O. S.* 535; 13 *J. P.* 197; 13 *Jur.* 233; 3 *Cox, C. C.* 205; 116 *E. R.* 1157, *Ex. Ch.*; *affg. S. C. sub nom. R. v. DUNN* (1847), 12 *Q. B.* 1026.

*Annotation*:—*Consd. R. v. Trueman*, [1913] 3 *K. B.* 164.

**5416. —**—Where a person is convicted of maliciously publishing a defamatory libel under Libel Act, 1843 (c. 96), s. 5, the ct. may as part of sentence, order the deft. to be imprisoned for the maximum term allowed by that section, order him upon the expiration of that term to enter into recognisances & find sureties to keep the peace for a reasonable time named in the order & in default of his so doing to be further imprisoned until the expiration of the period during which he is so required to keep the peace.—*R. v. TRUEMAN*, [1913] 3 *K. B.* 164; 82 *L. J. K. B.* 916; 109 *L. T.* 413; 77 *J. P.* 428; 29 *T. L. R.* 599; 23 *Cox, C. C.* 550, *C. C. A.*

*Annotation*:—*Mentd. R. v. Syme* (1914), 112 *L. T.* 136.

**5417. Jurisdiction of quarter sessions—Judgment respited.**—Indictments for assault having been preferred at one sessions, deft. appeared & pleaded guilty, whereupon he was required to enter into recognisances to appear & receive judgment at the next sessions, if called upon, & to keep the peace, judgment being respited in the meantime.

### PART XIII. SECT. 8.

**s. General rule.**—Any ct. which has power to direct a person to find sureties to keep the peace & be of good behaviour, has at common law power to commit such person to prison for a reasonable time determinable on his finding such sureties.

On an application for sureties to keep the peace evidence cannot be called to contradict evidence of applicant. Binding over a person against whom articles of the peace are exhibited is not in the nature of punishment but is to prevent the apprehended danger of a breach of the peace being committed.—*Ex p. HASKEN* (1889), *Crimes (Ireland) Act Cases*, 319.—*IR.*

**5414 i. Who may be bound.**—The recognisance required *Justices Act*, 1886, s. 227, to be entered into by applt. was entered into by applt.'s manager, who purported to be acting on behalf of applt., & also as a surety for applt.:—*Held*: in the absence

of evidence to the contrary, it might reasonably be inferred that the manager was authorised to enter into the recognisance, & the recognisance entered into by him was a sufficient compliance with the requirements of sect. 227.—*NEW ZEALAND & AUSTRALIAN LAND CO., LTD. v. SALISBURY*, [1920] *S. R. Q.* 63.—*AUS.*

**5415 i. Power of court to order in addition to sentence of imprisonment.**—B. was committed to gaol for six months for threatening an assault & at the same time ordered to find sureties of the peace for that period. It did not appear that he had refused or failed to find them:—*Held*: the order should have been that B. should be imprisoned for the term unless he should in the meantime find the sureties.—*Ex p. BECKETT* (1871), 11 *N. S. W. S. C. R.* 1.—*AUS.*

**t. Jurisdiction of justices—Surety for good behaviour.**—Unless some serious breach of the peace be

At the next sessions the judgment was further respited, but at a subsequent session deft. appeared, & then the ct. sentenced him to be imprisoned six months, to pay a fine, & at the expiration of his imprisonment to enter into recognisances to keep the peace:—*Held*: ct. of quarter sessions is a continuing ct. from session to session, & therefore had jurisdiction to pronounce such sentence.—*KEEN v. R.* (1847), 10 *Q. B.* 928; 2 *New Mag. Cas.* 271; 3 *New Sess. Cas.* 25; 16 *L. J. M. C.* 180; 9 *L. T. O. S.* 313; 12 *J. P.* 4; 11 *Jur.* 1060; 2 *Cox, C. C.* 341; 116 *E. R.* 352.

*Annotations*:—*Refld. Campbell v. R.* (1847), 10 *L. T. O. S.* 396. *Mentd. R. v. Belton* (1848), 12 *J. P.* 232; *R. v. Staffordshire JJ.* (1857), 3 *Jur. N. S.* 1148; *R. v. Westmorland JJ.* (1868), *L. R.* 3 *Q. B.* 457; *R. v. McLain, R. v. Barr* (1922), 91 *L. J. K. B.* 562.

**5418. — Effect of Probation of Offenders Act, 1907 (c. 17).**—Applt. having been convicted of larceny at quarter sessions was discharged conditionally under sect. 1, sub-sect. 2, of the above Act, on his entering into a recognisance, subject to certain conditions authorised in the circumstances by the Act, to appear for sentence when called upon at any time during a specified period. Applt. committed a breach of one of the conditions of the recognisance, & was in consequence called upon to appear before the quarter sessions for sentence. It was contended for applt. that sect. 6, sub-sect. 5, of the Act only applied to cases where a deft. had been bound over by a ct. of summary jurisdiction under sect. 1, sub-sect. 1, of the Act to appear for conviction & sentence, & that quarter sessions had, therefore, no power to sentence applt. Quarter sessions having stated a case for the opinion of the ct.:—*Held*: quarter sessions had power to sentence applt., for, assuming, as appeared probable, that there was no power to do so under sect. 6, sub-sect. 5, cts. of quarter sessions have always had, as part of their inherent jurisdiction, power to order a convicted person to be bound over to come up for judgment when called upon, & that power is unaffected by the above Act.—*R. v. SPRATLING*, [1911] 1 *K. B.* 77; 80 *L. J. K. B.* 176; 103 *L. T.* 704; 75 *J. P.* 39; 27 *T. L. R.* 31; 55 *Sol. Jo.* 31; 22 *Cox, C. C.* 348; 5 *Cr. App. Rep.* 206, *C. C. A.*

**5419. Jurisdiction of justices.**—On the hearing by justices of a summons against a deft. for threatening to assault complainant, deft. alleged that complainant had used threatening language towards him, but he made no formal charge against complainant. The justices, after hearing the evidence of complainant & deft., found as a fact that there was a real danger of a breach of the

threatened or likely to arise sureties for good behaviour, as distinguished from sureties to keep the peace, should be seldom or never required by justices.—*O'KANE v. SELLHEIM* (1882), 1 *Q. L. J.* 85.—*AUS.*

**a. — Order must show jurisdiction.**—An order of justices requiring a person to find sureties to keep the peace & be of good behaviour must show on its face facts necessary to give the justices jurisdiction to make such order.—*R. (BOYLAN) v. LONDONDERRY COUNTY JJ.*, [1912] 2 *I. R.* 374.—*IR.*

**5419 i. —**—When justices convict summarily of an assault under 24 & 25 *Vict. c.* 100, s. 42, they may further order deft. to find sureties for good behaviour.—*R. (DONOGHUE) v. COUNTY CORK JJ.*, [1912] 2 *I. R.* 64.—*IR.*

**5419 ii. —**—The fact that threatens, or an assault, which would authorise justices in requiring sureties for the



peace on the part of both parties, & they ordered both of them to be bound over to be of good behaviour. The order made against complainant, as drawn up, contained no averment that deft. went in bodily fear of complainant:—*Held*: the justices had, in the circumstances, power to order complainant to be bound over, & the absence from the order of an averment that deft. went in bodily fear of complainant did not render it bad on its face.—*R. v. WILKINS*, [1907] 2 K. B. 380; *sub nom. R. v. WILKINS, Ex p. JOHN*, 96 L. T. 721; 71 J. P. 327; 21 Cox, C. C. 443, D. C.

*Annotation*:—*Refd. Lansbury v. Riley*, [1914] 3 K. B. 229.

**5420.** —[—]—Where a ct. of summary jurisdiction is satisfied that a person who is brought before it has been guilty of inciting others to commit breaches of the peace & intends to persevere in such incitement the ct. may order him to enter into recognisances & to find sureties for his good behaviour or to be imprisoned in default of so doing.—*LANSBURY v. RILEY*, [1914] 3 K. B. 229; 83 L. J. K. B. 1226; 109 L. T. 546; 77 J. P. 440; 29 T. L. R. 733; 23 Cox, C. C. 582, D. C.

*See, also, MAGISTRATES.*

**5421. Duration of recognisances—Should be for specified time.**—*ANON.* (1698), 12 Mod. Rep. 251; 88 E. R. 1300.

**5422.** —[—]—Where a person convicted of misdemeanour is ordered to enter into a recognisance to be of good behaviour, the practice has always been to make the order for a specified limited time, & this should be followed.—*R. v. EDGAR* (1913), 109 L. T. 416; 77 J. P. 356; 29 T. L. R. 512; 57 Sol. Jo. 519; 23 Cox, C. C. 558; 9 Cr. App. Rep. 13, C. C. A.

**5423. Whether special conditions can be attached—Condition made as to abstinence from liquor—Probation of Offenders Act, 1907, c. 17, s. 1 (2).**—When a prisoner has been convicted on indictment of an offence punishable with imprisonment but which was in no way connected with indulgence in drink, & the ct. in lieu of imposing a sentence of imprisonment makes an order under the above Act, discharging the offender conditionally on his entering into a recognisance to be of good behaviour & to appear for sentence when called on at any time during a period not exceeding three years, the ct. has no power to order an additional condition as to abstinence from intoxicating liquor to be inserted in the recognisance.—*R. v. DAVIES*, [1909] 1 K. B. 892; 78 L. J. K. B. 363; 100 L. T. 305; 73 J. P. 151; 25 T. L. R. 279; 21 Cox, C. C. 776; 2 Cr. App. Rep. 31, C. C. A.

**5424. Refusal to enter into recognisances—Before justices—Pursuant to order of quarter sessions—Whether justices have power to commit to prison.**—Defts. by an order of quarter sessions were required forthwith before one or more justices of the county to enter into their own recognisances & to find two sureties to keep the peace for six calendar months. Upon refusal before two justices to enter into recognisance or find sureties the justices committed them to the county gaol for the residue of the term of six calendar months, unless in the meantime they should enter into such recognisances & find such sureties:—*Held*: in

so doing the justices exceeded their authority, the order of sessions not having provided the alternative of imprisonment upon disobedience of the order.—*Re ASHTON* (1845), 7 Q. B. 169; 1 New Mag. Cas. 269; 1 New Sess. Cas. 581; 115 E. R. 452; *sub nom. R. v. HUNTINGDONSHIRE JJ.*, 14 L. J. M. C. 99; 5 L. T. O. S. 72.

**5425. Grounds for discharging recognisances—Expiry of time of recognisance.**—A recognisance to appear on a certain day, & in the mean time to keep the peace, was discharged on the ground that the day had passed, & that no indictment had been lodged.—*R. v. BENN* (1735), *Lee temp. Hard.* 98; 95 E. R. 61.

**5426.** — **Consent of prosecutor.**—A recognisance was discharged upon producing prosecutor's consent, verified by affidavit.—*R. v. ENGLAND* (1735), *Lee temp. Hard.* 158; 95 E. R. 101.

**5427.** — **Destitution of family on committal for breach.**—A deft. having been committed to prison on a forfeited recognisance whereby his wife & family are become burthensome to the parish is not a sufficient ground for the discharge of deft. from such recognisance.—*R. v. STANCHER* (1816), 3 Price, 261; 146 E. R. 255.

**5428.** — **After estreat & levy by sheriff as to part—Levy of Fines Act, 1822, c. 46, s. 6.**—The above Act empowers the ct. of quarter sessions to discharge a forfeited recognisance in cases where the sheriff has levied part of the amount, & the party has been committed to prison for the remainder.—*HARPER v. HAYTON* (1829), 5 Man. & Ry. K. B. 305; 3 Man. & Ry. M. C. 13; 8 L. J. O. S. M. C. 129.

**Discharge of recognisance—Removal by certiorari.**—*See CROWN PRACTICE*, Vol. XVI., p. 434, Nos. 2958–2960.

**5429. Appearance on recognisance—Necessary when day fixed.**—*ANON.* (1702), 7 Mod. Rep. 17; 87 E. R. 1068.

**5430.** — **Must be in person.**—*ANON.* (1709), 11 Mod. Rep. 253; 88 E. R. 1022.

**5431. What amounts to breach of recognisance—Escape from lawful arrest.**—It is a forfeiture of a recognisance for good behaviour to escape from a constable, though no felony was committed & though the arrest was tortious.—*ANON.* (1584), *Godb.* 22; 78 E. R. 14.

**5432.** — **Not slanderous words—Or trespass.**—*R. v. KING* (1588), *Cro. Eliz.* 86; 78 E. R. 345; *sub nom. ANON.*, *Moore*, K. B. 249.

*Annotations*:—*Refd. Haylock v. Sparke* (1853), 1 E. & B. 471. *Mentd. R. v. Wrightson* (1708), *Holt*, K. B. 354.

**5433.** —[—]—*STAMPE v. HIDE & CLINTON* (1620), 2 Roll. Rep. 247; *Palm.* 126; 81 R. E. 767.

*Annotation*:—*Refd. Haylock v. Sparke* (1853), 1 E. & B. 471.

**5434.** — **Not merely provocative words.**—A recognisance for good behaviour is not forfeited by rash, quarrelsome or unmannerly words, unless they directly tend to a breach of the peace, to terrify others or to promote sedition.—*R. v. HEYWARD* (1638), *Cro. Car.* 498; 79 E. R. 1030.

*Annotation*:—*Mentd. R. v. Ely JJ.* (1855), 20 J. P. 116.

**5435.** — **Assault.**—A recognisance for keeping the peace is forfeited by an assault upon any

peace & good behaviour, arose by reason of a *bona fide* dispute as to title, does not oust the jurisdiction of the justices to require such sureties.—*R. (MULHOLLAND) v. MONAGHAN JJ.*, [1914] 2 I. R. 156.—*IR.*

**5419 iii.** —[—]—The whole object of requiring sureties of the peace is to prevent some mischief that may reasonably be anticipated, & when any

person threatens to destroy a building about to be erected the magistrate may bind him over to keep the peace.

—*GORMAN v. GORMAN* (1891), 10 N. Z. L. R. 223.—*N.Z.*

**5435 i. What amounts to breach of recognisance—Assault.**—On *sci. fa.* upon a recognisance to keep the peace the ct. of quarter sessions was proved,

affirming a conviction of deft. on a charge of assaulting M. by using insulting & abusive language to him in his own office, & on the public street, & by using his fist in a threatening & menacing manner to the face & head of M.:—*Held*: sufficient proof of a breach of the peace, & deft. was for t  
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*Sect. 8.—Recognisances to keep the peace—Articles of the peace. Sects. 9 & 10: Sub-sects. 1 & 2.]*

person.—*R. v. STANLEY* (1755), Say. 139; 96 E. R. 830.

**5436. — Procuring another to break the peace.**—*ANON.* (1509–1547), Bro. N. C. 148; 73 E. R. 911.

**5437. Estreat of recognisances—Notice of motion must be given.**—*ANON.* (1701), 12 Mod. Rep. 494; 88 E. R. 1470.

**5438. — Recognisance must be broken.**—Estreats ought not to be made on proof by witnesses of misbehaviour committed out of ct., but it ought to appear by some act of ct. that the condition of the recognisance is broken.—*R. v. COSSINS* (1745), Park. 54; 145 E. R. 712.

*Annotation:—Reid. R. v. Ely J.J.* (1855), 5 E. & B. 489.

**5439. — Proof of breach necessary.**—On an indictment for libel, deft. pleaded guilty, & entered into his own recognisance to appear & receive judgment when called upon to do so, & not to be called upon at all, if he discontinued to publish libels on prosecutor. The ct. refused to pass judgment, unless prosecutor produced an affidavit, stating that deft. had since the trial published libels respecting him.—*R. v. RICHARDSON* (1840), 8 Dowl. 511; 4 Jur. 104.

**5440. — Procedure by certiorari.**—*R. v. MUL LUCHMAN* (1909), 44 L. Jo. 60.

*See, further, CROWN PRACTICE, Vol. XVI., pp. 433, 434, Nos. 2950–2957.*

**5441. — Respite of estreat.**—The ct. has jurisdiction to respite & stay process on estreated recognisances, & they will do so on application, in order to give the cognisors an opportunity of trying a question of law respecting the subject-matter of the condition, although the forfeiture import the breach of a duty imposed by competent authority under an Act of Parliament.—*Re FRIDLINGTON* (1821), 9 Price, 658; 147 E. R. 214.

**5442. — Discharge of estreated recognisances.**—*R. v. CARTMAN* (1823), 11 Price, 637; 147 E. R. 589.

**5443. — Estreated recognisance may be compounded—Upon subsequent appearance.**—*R. v. TOMB* (1715), 10 Mod. Rep. 278; 88 E. R. 727.

**5444. Recognisances of sureties—When estreated—Non-appearance of prisoner.**—The ct. will not estreat the recognisance of bail until the non-appearance of the principal be entered.—*R. v. STRUDWICK* (1723), 8 Mod. Rep. 104; 88 E. R. 142.

*R. v. HARMER* (1854), 11 U. C. R. 555.—**CAN.**

**b. Refusal to enter into recognisances—Before justices.**—*A.* before defts. two justices, swore that he was afraid pltf. would destroy his property; & prayed that he might be bound over to keep the peace. Defts. thereupon, on pltf.'s refusal to find sureties, committed him to gaol.—*Held:* 16 Vict. c. 180, applied, & only a special action on the case could be maintained.—*FULLERTON v. SWITZER* (1856), 13 U. C. R. 575.—**CAN.**

**c. Recognisances of sureties—Commitment in default—Form.**—A commitment in default of sureties to keep the peace should show the date on which the words were alleged to have been spoken, & contain a statement to the effect that complainant is apprehensive of the bodily injury.—*Re ROSS* (1864), 3 P. R. 301.—**CAN.**

**d. Appearance on recognisance.**—Judgment will be entered on a recognisance against both principal & sureties, where the principal has not appeared in accordance with the condition of such recognisance, & where a

rule *nisi* for such judgment has been served on the sureties, & the principal has left the province, & they have failed to show cause.—*R. v. CUDIHAY* (1865), 1 Old. 701.—**CAN.**

**e. Estreat of recognisance.**—In order to estreat a recognisance taken under Dominion Act, 1869, c. 30, a certificate is required from the proper officer under sect. 45 that it is forfeited; upon that a rule *nisi* is taken out on affidavit of the facts, & if no cause is shown, judgment follows, but without costs.—*R. v. HICKMAN* (1878), 12 N. S. R. (3 R. & C.) 255.—**CAN.**

**f. —**—*R. v. BROWN* (1879), 13 N. S. R. (1 R. & G.) 51.—**CAN.**

**g. Amount of recognisance must be fixed.**—Under Art. 959 of the Criminal Code, when a justice of the peace requires any one to give security to keep the peace he must fix the amount of the bond to be given, & order him to be imprisoned for a term to be mentioned, not exceeding twelve months, in case he should refuse or neglect to give such security. The justice of the peace must afterwards establish & record deft.'s refusal or

**5445. —**—*R. v. WILLIAMS* (1870), 18 W. R. 806; 34 J. P. Jo. 307.

**5446. — Withdrawal of estreat—Upon evidence of steps taken by sureties.**—Upon an appln. by sureties for the ct. to withdraw the estreat of their recognisances, which has been previously ordered counsel for the prosecution has no *locus standi*. The ct., upon being satisfied that the sureties had taken all reasonable steps to secure the attendance of deft., withdrew an estreat previously ordered, but which had not yet issued.—*R. v. SANGIOVANNI* (1904), 68 J. P. 55.

**5447. — When discharged—Not upon non-appearance of prisoner.**—*R. v. CAUDWELL* (1852), 16 J. P. Jo. 200.

**5448. — Unless appearance of prisoner impossible.**—*R. v. DOYEN* (1899), 34 L. Jo. 645.

## SECT. 9.—POLICE SUPERVISION.

**5449. Previous conviction essential—Prevention of Crimes Act, 1871 (c. 112).**—*R. v. BENDON* (1911), 6 Cr. App. Rep. 178, C. C. A.

**5450. — Must be of recent date.**—Police supervision not superadded to a sentence when there has been a long interval without a conviction.—*R. v. POUNTNEY* (1920), 15 Cr. App. Rep. 28, C. C. A.

## SECT. 10.—EFFECT OF CONVICTION.

### SUB-SECT. 1.—IN GENERAL.

*NOTE.—Cases as to Outlawry are omitted as being obsolete in practice.*

**5451. Conviction unreversed—Bar to action against witness for giving false evidence.**—A person, who has been convicted of a crime, & against whom the conviction stands unreversed, cannot maintain an action against a witness for negligently giving false evidence which caused him to be wrongfully so convicted.

As long as a conviction stands, no one against whom it is producible shall be permitted to aver against it (*COLLINS, M.R.*).—*BYNOE v. BANK OF ENGLAND*, [1902] 1 K. B. 467; 71 L. J. K. B. 208; 86 L. T. 140; 50 W. R. 359; 18 T. L. R. 276, C. A.

*Annotations:—Apld. Turley v. Daw* (1906), 94 L. T. 216; *Norman v. Mathews* (1916), 85 L. J. K. B. 857.

neglect to furnish the security, & he can only issue his warrant of commitment after such refusal or neglect. A commitment, therefore, which requires deft. to furnish security to keep the peace, but does not fix the amount, is illegal.—*Re DOE*, [1893] Q. R. 2 Q. B. 600.—**CAN.**

**h. Original jurisdiction of Queen's Bench Division.**—Judges of the Q. B. Div. as conservators of the peace have original jurisdiction independently of the statute of Edw. III. to require sureties for good behaviour from persons whose acts or language are shown to be likely to endanger the public peace.—*Ex p. SEYMOUR v. DAVITT, Ex p. BEARNS v. HEALY, Ex p. SEYMOUR v. QUINN* (1883), 15 Cox, C. C. 242.—**IR.**

### PART XIII. SECT. 10, SUB-SECT. 1.

**k. Conviction unreversed—No bar to civil proceedings.**—Where an actor had been brought under Crimes (No 2367) Act, 1915, s. 575, & pltf. was afterwards convicted of felony—*Held:*, such conviction was no bar to the carrying on of the action by the

**5452. Committal order unreversed.]**—So long as a committal order stands, an action will not lie at the suit of a judgment debtor against the high bailiff of the County Ct. for not having served him, the debtor, with the judgment summons upon which the order is made.—*TURLEY v. DAW* (1906), 94 L. T. 216; 22 T. L. R. 231.

**5453. Magistrate's order unreversed.]**—*NORMAN v. MATHEWS* (1916), 85 L. J. K. B. 857; 114 L. T. 1043; 32 T. L. R. 303; 80 J. P. Jo. 100, D. C. *Annotation* :—*Refd.* *Norman v. Mathews* (1916), 32 T. L. R. 369.

**5454. Effect of endurance of punishment—Libel on person convicted of felony.]**—In an action by the editor of a newspaper for libel in calling him a "felon editor," defts. justified, alleging that pltf. had been convicted of felony & sentenced to twelve months' hard labour. Pltf. replied that after his conviction he underwent his sentence of twelve months' imprisonment & hard labour, & so became as cleared from the crime & its consequences as if he had received the Queen's pardon under the great seal. On demurrer:—*Held*: a good reply.—*LEYMAN v. LATIMER* (1878), 3 Ex. D. 352; 47 L. J. Q. B. 470; 37 L. T. 819; 26 W. R. 305; 14 Cox, C. C. 51, C. A.

*Annotations* :—*Refd.* *Hay v. Tower Division JJ.* (1890), 59 L. J. M. C. 79; *Monson v. Tussauds*, *Monson v. Tussaud*, [1894] 1 Q. B. 671; *Yates v. Kyffin*, *Taylor & Wark*, [1899] W. N. 141; *In the Estate of Crippen*, [1911] P. 108.

**Effect of free pardon.]**—*See* No. 5457, *post*.

**5455. Forfeiture of office—Elementary Education Act, 1870 (c. 75).]**—A member of a school board in England convicted of conspiracy under Criminal Law & Procedure (Ireland) Act, 1887 (c. 20), & imprisoned:—*Held*: to have been "punished with imprisonment for crime" within the meaning of Sched. II, Part. I, r. 14, to Education Act, 1870 (c. 75), & so to have vacated his seat on the board.—*CONYBEARE v. LONDON SCHOOL BOARD*, [1891] 1 Q. B. 118; 60 L. J. Q. B. 44; 63 L. T. 651; 55 J. P. 151; 39 W. R. 288; 7 T. L. R. 4; 17 Cox, C. C. 191, D. C.

**5456. Disqualification for holding licence—Wine & Beer-house Act Amendment Act, 1870 (c. 29), s. 14.]**—The above Act applied to a person convicted of felony either before or after the Act passed; & licences held by a person convicted before the Act became void on the passing of the Act.—*R. v. VINE* (1875), L. R. 10, Q. B. 195; 44 L. J. M. C. 60; 31 L. T. 842; 23 W. R. 649; 13 Cox, C. C. 43, D. C.

*Annotations* :—*Consd.* *Re Pulborough School Board Election*, *Bourke v. Nutt*, [1894] 1 Q. B. 725. *Refd.* *Hay v. Tower Division of London JJ.* (1890), 24 Q. B. D. 561; *R. v. Griffiths* (1891), 60 L. J. M. C. 93; *Re Chaffers*, *Ex p. A.-G.* (1897), 76 L. T. 351; *Tower JJ. v. Chambers*, [1904] 2 K. B. 903; *R. v. Austin*, [1913] 1 K. B. 551.

**5457. ——— Removed by free pardon.]**—Upon an application for a licence to sell spirits by retail, it appeared that apptd. had been convicted of felony but had received a free pardon under the Royal Sign-manual:—*Held*: the disqualification imposed on him by the above Act was removed by the pardon, & the licence might be granted to him.—*HAY v. LONDON TOWER DIVISION JJ.* (1890), 24 Q. B. D. 561; 59 L. J. M. C. 79; 62 L. T. 290; 54 J. P. 500; 38 W. R. 414; 6 T. L. R. 169, D. C.

convict.—*WATSON v. WATSON*, [1919] V. L. R. 384.—*AUS.*

**1. Effect of endurance of punishment—Forfeiture—High treason.]**—The property of a person attainted for high treason, is not forfeited until the attainer is complete.—*EASTWOOD v. MCKENZIE* (1837), 5 O. S. 708.—*CAN.*

**m. ——— A person undergoing confinement in a penitentiary as a**

punishment for an indictable offence is not deprived of his property nor his freedom of contract.—*YOUNG v. CARTER* (1912), 22 O. W. R. 643; 3 O. W. N. 1486; 5 D. L. R. 655.—*CAN.*

#### PART XIII. SECT. 10, SUB-SECT. 2.

**n. Appointment of administrator of convict's property—Powers of admini-**

**5458. Compensation under Workmen's Compensation Acts—Not affected by conviction.]**—A workman who had met with an accident in the course of his employment, & was in receipt of £1 a week compensation from his employers, was convicted of stealing & sentenced to eighteen months' imprisonment with hard labour. The employers stopped payment. The workman claimed compensation. He was still suffering from partial incapacity for work as the result of his accident:—*Held*: as the incapacity caused by the accident still continued, the workman, notwithstanding his imprisonment, was entitled to compensation under section 1 of the Workmen's Compensation Act, 1906 (c. 58), s. 1.—*M McNALLY v. FURNESS, WITHEY & Co., LTD.*, [1913] 3 K. B. 605; 82 L. J. K. B. 1310; 109 L. T. 270; 29 T. L. R. 678; 6 B. W. C. C. 604, C. A.

*Annotations* :—*Refd.* *Ling v. De Dion Bouton*, [1920] 1 K. B. 88; *Stowell v. Ellerman Lines* (1923), 16 B. W. C. C. 46.

#### SUB-SECT. 2.—ADMINISTRATION OF CONVICT'S PROPERTY.

**5459. Appointment of administrator of convict's property—Power of administrator—Forfeiture Act, 1870 (c. 23).]**—Sect. 12 of the above Act, which gives the administrator of a convict's property "absolute power to sell" any part of that property "as to him shall seem fit," imports that the administrator must exercise discretion & care in case of a sale; & if he does so, then, under sect. 17, any contract falling within sect. 12 is binding & cannot be in any way impeached by the convict on his discharge. But if an administrator under the Act is proved to have exercised no discretion or care in the matter of a sale, & a loss thereby ensues to the convict's estate, the ct. will hold the administrator personally responsible for the loss.—*CARR v. ANDERSON*, [1903] 2 Ch. 279; 72 L. J. Ch. 534; 88 L. T. 503; 19 T. L. R. 393; 20 Cox, C. C. 416; *sub nom.* *CARR v. HENRY*, 51 W. R. 465; 47 Sol. Jo. 435, C. A.

**5460. ——— ———.]**—The administrator appointed under the above Act had no power to bar the estate tail of a convict & convey the fee to a purchaser.—*Re GASKELL & WALTERS' CONTRACT*, [1906] 2 Ch. 1; 75 L. J. Ch. 503; 94 L. T. 658; 22 T. L. R. 464, C. A.

*Annotation* :—*Refd.* *Re E. D. S.*, [1914] 1 Ch. 618.

**5461. ——— ———.]**—A solr. was retained to defend a man charged with embezzlement & to act for him in a civil action in which he was deft. Both retainers were in writing. By the retainer in the criminal proceedings, which was dated June 14, 1912, the client agreed that the solr. should receive the proceeds of the sale of certain furniture to cover the charges of the defence. The solr. received these proceeds. By the retainer in the civil action the solr. was to act for the client in the conduct of the action for an inclusive fee of 100 guineas. On Oct. 28, 1912, the client pleaded guilty to the criminal charge & was sentenced to penal servitude. Subsequently judgment was recovered against

strator—*Act No. 627.*—Where the curator under above Act assigns the felon's property after the completion of his sentence, the *onus* is upon the curator to show that such assignment was warranted by the Act.

To a suit impeaching an assignment by the curator under above Act of the estate of a felon, the assignee is not a necessary party; & if the ct.

**Sect. 10.—Effect of conviction: Sub-sect. 2. Sect. 11: Sub-sects. 1, 2 & 3.]**

him in the civil action. On Feb. 10, 1914, applt. who had been appointed on Oct. 1, 1913, administrator of the client's property under Forfeiture Act, 1870 (c. 23), s. 9, applied by summons under Attorneys & Solrs. Act, 1870 (c. 28), s. 8, to set aside the agreements as to costs, as being unfair & unreasonable, & for the delivery of a bill of costs & for taxation. The solr. in answer to the appln. contended that the amount agreed by the civil retainer had been paid more than twelve months before the appln., inasmuch as he had collected with, as he alleged, the authority of the client, the sum of £100, from the debtor of the client, & that, therefore, by reason of sect. 10 of the Act, the appln. was out of time. On Oct. 1, 1912, the client had assigned all his real & personal estate to the liquidator of a co. which had formerly employed him. On Apr. 1, 1914, the liquidator assigned the estate to applt.:—**Held**: the retainer in the criminal proceedings was not an agreement "respecting the amount & manner of payment" of the solr.'s charges within Attorneys & Solrs. Act, 1870 (c. 28), s. 4, & by reason of the assignment of Apr. 1, 1914, applt. had at the date of the master's order a good title to the client's estate & was entitled to maintain the appln. notwithstanding that he might not have had a good title at the date when the summons was issued.—**Re JACKSON**, [1915] 1 K. B. 371; 84 L. J. K. B. 548; 112 L. T. 395; 31 T. L. R. 109; 59 Sol. Jo. 272, D. C.

**SECT. 11.—OFFENCES AFTER PREVIOUS CONVICTION.**

**SUB-SECT. 1.—WHAT IS A CONVICTION.**

**5462. Actual judgment—Not merely verdict.]**—In an action of debt upon Disorderly Houses Act, 1751 (c. 36), s. 5, by one of the two inhabitants, to recover three several penalties of £20:—**Held**: by the words "shall be convicted," was meant a conviction by judgment of the etc., & not by verdict.—**BURGESS v. BOETEFEUR** (1844), 7 Man. & G. 481; 8 Scott, N. R. 194; 13 L. J. M. C. 122; 3 L. T. O. S. 161; 8 Jur. 621; 8 J. P. Jo. 358; 135 E. R. 193.

**Annotations:—Consd.** *R. v. Rabjohns*, [1913] 3 K. B. 171. **Refd.** *Jephson v. Barker & Redman*, Swan v. Same (1886), 3 T. L. R. 40; *R. v. Ireland*, [1910] 1 K. B. 654. **Mentd.** *R. v. Stonnell* (1845), 1 Cox, C. C. 142.

**5463. Order for entry into recognisances—By court of summary jurisdiction.]**—A conviction before a police magistrate can only be proved by

thinks that the assignment was unwarranted, it may direct the curator to recovery as far as he is able to the felon, or failing that to make him compensation.

Property held as a trustee by a person who is convicted of a felony does not pass to the curator.—**MITCHELL v. McDUGALL** (1885), 11 V. L. R. 487.—**AUS.**

**o. — Forfeiture Act, 1870.]**—Above Act is not in force in Canada.—**YOUNG v. CARTER** (1912), 22 O. W. R. 643; 3 O. W. N. 1486; 26 O. L. R. 576; 5 D. L. R. 655.—**CAN.**

**PART XIII. SECT. 11, SUB-SECT. 1.**

**p. What is a conviction.]**—In a trial on a criminal charge prosecutor cannot, in the first instance, give evidence of a previous conviction of the accused where such previous conviction is not made by statute an ingredient of the offence, for which accused is being

the production of the record of the conviction, or an examined copy of it. Therefore where a police magistrate, after hearing a case of common assault, ordered accused to enter into recognisances & pay the recognisance fee, but did not order him to be imprisoned or to pay any fine, & an action having been subsequently brought for the same assault, the magistrates' clerk stated in evidence the above facts, but record of the proceedings was put in:—**Held**: (1) the above was not a conviction within the meaning of Offences against the Person Act, 1861 (c. 100), s. 45; (2) the conviction, if any, was not proved.—**HARTLEY v. HINDMARSH** (1866), L. R. 1. C. P. 553; Har. & Ruth. 607; 35 L. J. M. C. 255; 14 L. T. 795; 12 Jur. N. S. 502; 14 W. R. 862.

**Annotations:—Refd.** *R. v. Miles* (1890), 24 Q. B. D. 423; *Police Comr. for Metropolis v. Donovan* (1903), 52 W. R. 14.

**5464. — After verdict or plea of guilty.]**—In Coinage Offences Act, 1861 (c. 99), ss. 9, 12, "conviction" means only the finding by the jury of a verdict of guilty or a plea of guilty. Therefore a person so found guilty, & released on recognisance to come up for judgment when called on, when convicted again is a person who has been "previously convicted."—**R. v. BLABY**, [1894] 2 Q. B. 170; 63 L. J. M. C. 133; 70 L. T. 879; 58 J. P. 576; 42 W. R. 511; 10 T. L. R. 431; 38 Sol. Jo. 420; 18 Cox, C. C. 5; 10 R. 277, C. C. R.

**Annotation:—Refd.** *R. v. Rabjohns* (1913), 109 L. T. 414.

**5465. Binding over.]**—Where the keeper of a disorderly house had, upon prosecution, merely been bound over to come up for judgment when called upon:—**Held**: there had been such a "conviction" as entitled the inhabitants giving information to the reward payable under Disorderly Houses Act, 1751 (c. 36), s. 5.—**JEPHSON v. BARKER & REDMAN**, *SWAN v. BARKER & REDMAN* (1886), 3 T. L. R. 40.

**Annotation:—Refd.** *R. v. Rabjohns*, [1913] 3 K. B. 171.

**5466. —.]**—The holder of a licence, granted under the Penal Servitude Acts, who pleads guilty to an indictable offence, & is bound over to come up for judgment when called on, has been "convicted" within the meaning of Penal Servitude Act, 1864 (c. 47), s. 4, & his licence is forfeited, & under sect. 9 of that Act he may be detained in custody & compelled to serve a term of penal servitude equal to the unexpired portion of his previous sentence.—**R. v. RABJOHNS**, [1913] 3 K. B. 171; 82 L. J. K. B. 994; 109 L. T. 414; 77 J. P. 435; 29 T. L. R. 614; 57 Sol. Jo. 665; 23 Cox, C. C. 553; 9 Cr. App. Rep. 33, C. C. A.

**Annotation:—Refd.** *Harris v. Cooke* (1918), 88 L. J. K. B. 253.

tried. This rule applies though the previous conviction is not of crime within the meaning of The Criminal Code, but only of an offence under a provincial statute, & though the real purpose of the evidence is not to injure the character of the accused but merely to show his previous connection & knowledge as to goods which are the subject-matter of the charge against him. Such evidence suggests to the jury, directly or indirectly, that the accused is a "bad man," & convicted law-breaker & therefore all the more likely to be guilty of the charge laid against him. It is intrinsically evidence of bad character & therefore inadmissible, unless the accused has endeavoured to establish his good character by his own evidence, or that of his witnesses, or by cross-examination of witnesses for the Crown, or unless the accused gives evidence on his behalf & thus renders himself liable to cross-examination by counsel

for the Crown upon all matters which affect his credit, including previous offences & previous convictions. The only exception to the general rule that the prosecutor cannot, in the first instance, give evidence to impeach the character of the accused in order to establish a probability of his guilt, is the practice which allows proof to be adduced of acts committed by the accused, & which may even have led to a previous conviction similar in character to the one which forms the subject-matter of the charge; but such evidence is only admissible to explain an act which otherwise would be of an equivocal character, & to rebut by anticipation an obvious defence of ignorance, accident, mistake or other innocent state of mind; & in order to make such evidence admissible it must appear clearly & definitely that the defence of accident, mistake or absence of intention to commit a offence will be relied upon by the

**Special verdict of guilty but insane.**—*See* Part VII., Sect. 7, sub-sect. 16, E., *ante*.

**Autrefois acquit & autrefois convict.**—*See* Part VIII., *ante*.

#### SUB-SECT. 2.—CHARGING PREVIOUS CONVICTION.

**5467. Any number of convictions may be charged.**—C. was charged with larceny in an indictment which contained two other counts, each charging a previous conviction against C. :—*Held* : any number of previous convictions may be alleged in the same indictment, &, if necessary, proved against prisoner.—*R. v. CLARK* (1853), 3 Car. & Kir. 367; *Dears. C. C.* 198; 22 L. J. M. C. 135; 21 L. T. O. S. 171; 17 J. P. 391; 17 Jur. 582; 1 W. R. 439; 6 Cox, C. C. 210; 1 C. L. R. 477, C. C. R.

*Annotation* :—*Mentd. R. v. Fox* (1866), 15 W. R. 106.

**5468. Indictment for misdemeanour—Previous conviction for felony charged.**—In an indictment for obtaining money by false pretences it is competent to charge a previous conviction for felony, & upon a conviction on both charges, the least sentence of penal servitude that can be awarded is for seven years.—*R. v. DEANE* (1877), 2 Q. B. D. 305; 46 L. J. M. C. 155; 36 L. T. 31; 41 J. P. 212; 13 Cox, C. C. 386, C. C. R.

**5469. —Previous conviction for misdemeanour charged.**—Prisoner was convicted on an indictment for obtaining goods by false pretences, & also pleaded guilty to a previous conviction for false pretences charged in the indictment. He was sentenced to seven years' penal servitude :—*Held* : the sentence was wrong, & should be reduced to five years' penal servitude.—*R. v. HORN* (1883), 48 L. T. 272; 43 J. P. 344; 15 Cox, C. C. 205, C. C. R.

**5470. Form of indictment.**—An indictment charging a felony may allege a previous conviction against prisoner, either before or after the substantive charge.—*McEVIN'S CASE* (1858), Bell, C. C. 20; *sub nom. R. v. HILTON & McEVIN* (1858), Bell, C. C. 20; 28 L. J. M. C. 28; 32 L. T. O. S. 151; 22 J. P. 770; 5 Jur. N. S. 47; 7 W. R. 59; 8 Cox, C. C. 87, C. C. R.

*Annotation* :—*Mentd. R. v. Coggins* (1873), 29 L. T. 469.

—*See, now*, Indictments Act, 1915 (c. 90), rule 11.

**5471. Where not charged in indictment.**—By Penal Servitude Act, 1864 (c. 47), s. 2, where any person shall on indictment be convicted of any crime or offence punishable with penal servitude,

after having been previously convicted of felony, the least sentence of penal servitude that can be awarded in such case shall be a period of seven years. Prisoner was convicted of a crime punishable with penal servitude, & it was proved that he had been previously convicted of felony; but the previous conviction was not stated in the indictment :—*Held* : the above Act did not apply.—*R. v. WILLIS* (1872), L. R. 1 C. C. R. 363; 41 L. J. M. C. 102; 26 L. T. 485; 36 J. P. 389; 20 W. R. 632; 12 Cox, C. C. 192, C. C. R.

#### SUB-SECT. 3.—PROCEDURE AT TRIAL.

**5472. Method of arraignment & giving in charge to jury—Former practice.**—Prevention of Offences Act, 1851 (c. 19), s. 9, prohibits a previous conviction being given in evidence, or stated to the jury, until after a verdict of guilty of the subsequent offence :—*Held* : the old practice should still be pursued, of calling upon prisoner to plead to the whole charge against him, including the previous convictions, but when given in charge to the jury, that portion of the indictment alleging a former conviction should be omitted.—*ANON.* (1851), 17 L. T. O. S. 223; 5 Cox, C. C. 268.

**5473. —**—*R. v. KEY* (1851), 3 Car. & Kir. 371; 2 Den. 347; T. & M. 623; 21 L. J. M. C. 35; 15 Jur. 1065; *sub nom. R. v. KEY, R. v. SHUTTLEWORTH*, 18 L. T. O. S. 173; 5 Cox, C. C. 369; *sub nom. R. v. KAY, R. v. SHUTTLEWORTH*, 15 J. P. 801, C. C. R.

**5474. —**—*When an indictment for felony charges a previous conviction, prisoner is to be arraigned on the whole indictment, but to the jury is to be read in the first instance only that part of the indictment which charges the new offence; after they have found their verdict, that part of the indictment is to be submitted to them, without their being again sworn, which charges the previous conviction.* Prevention of Offences Act, 1851 (c. 19), s. 9, has made no substantial alteration in the practice.—*R. v. SHUTTLEWORTH* (1851), 3 Car. & Kir. 375; 2 Den. 351; T. & M. 626; 21 L. J. M. C. 36; 15 Jur. 1066; *sub nom. R. v. KEY, R. v. SHUTTLEWORTH*, 18 L. T. O. S. 173; 5 Cox, C. C. 369; *sub nom. R. v. KAY, R. v. SHUTTLEWORTH*, 15 J. P. 801, C. C. R.

**5475. —**—*Upon the trial of an indictment for the felony of having committed a misdemeanour within Coinage Offences Act, 1861 (c. 90), ss. 9, 10, 11, relating to the unlawful possession & uttering*

accused.—*R. v. TYMAN & CARSON*, [1923] 2 W. R. 59; [1923] 4 D. L. R. 39 Can. Crim. Cas. 409.—*CAN.*

#### PART XIII. SECT. 11, SUB-SECT. 2.

**5470 i. Form of indictment.**—It is not a misjoinder of counts to add allegations of a previous conviction for misdemeanour, as counts, to a count for larceny; & where there has been a demurrer to such allegations, as insufficient in law, & judgment in favour of prisoner, but he is convicted on the felony count, the ct. of error will not reopen the matter on the suggestion that there is misjoinder of counts.—*R. v. MASON* (1872), 22 C. P. 246, *CAN.*

**5470 ii. —**—*Where a prisoner is indicted for larceny, & is also charged with a previous conviction, the charge of the previous conviction should since stat. 24 & 25 Vict. c. 96, s. 116, follow, & not precede, the charge of the present offence.*—*R. v. O'BRIEN* 1 R. 1 C. L. 166.—*IR.*

**iii. —**—*In an indictment for receiving money under false pretences,*

a previous conviction for larceny cannot be charged.—*R. v. GARLAND* (1869), 1 R. 3 C. L. 383.—*IR.*

**5470 iv. —**—*In a complaint the words charging the accused with a contravention of Night Poaching Act, 1828, on a certain date were followed by the words " & such offence is a second offence, you having been previously convicted in the list annexed " :—Held : previous conviction was libelled as an aggravation & not as a substantive charge, & consequently it could not be competently proved in causa but ought to have been proved after accused had been found guilty of the offence for which he was prosecuted.*—*McDERMOTT v. STEWART (STEWART & TRUSTEES)*, [1918] S. C. (J.) 25.—*SCOT.*

**q. — Extent of former punishment need not be known.**—A charge alleging a previous conviction need not show the extent of the former punishment.—*ANON.* (1868), 4 Mad. 11.—*IND.*

**r. Where not charged in information.**—The information against deft. did not change his offence as a second

offence. The magistrate, on the conclusion of the evidence, found deft. guilty, called for the police report, & finding six previous convictions recorded, imposed a fine greater than the minimum penalty for a second offence. Deft. did not admit the convictions. Two convictions were proved strictly, one on Sept. 27, 1920, prior to the passing of the Lottery & Gaming Act, 1920, & one subsequent thereto; the magistrate thereupon intimated that he would only take into consideration these convictions, but imposed the same penalty :—*Held* : deft. had been definitely charged with the previous conviction, & that in the circumstances the magistrate had power to reconsider his remarks.—*AMES v. NICHOLSON*, [1921] S. A. S. R. 224.—*AUS.*

#### PART XIII. SECT. 11, SUB-SECT. 3.

**5475 i. Method of arraignment & giving in charge to jury.**—Prisoner had been convicted on an indictment charging a previous conviction & subsequent felony under 21 & 25

**Sect. 11.—Offences after previous conviction: Sub-sects. 3 & 4.]**

of counterfeit coin after a previous conviction for a misdemeanour within those sections, prisoner must first be arraigned upon the subsequent offence & evidence respecting the subsequent offence must first be submitted to the jury, & the previous conviction must not be inquired into until after the verdict on the charge of the subsequent offence.—*R. v. MARTIN* (1869), *L. R. 1 C. C. R.* 214; *39 L. J. M. C.* 31; *21 L. T.* 469; *34 J. P.* 196; *18 W. R.* 72; *11 Cox, C. C.* 343, *C. C. R.*

**5476.** —[—Where a person is indicted for night poaching after two previous convictions, the previous convictions should not be proved until the jury find a verdict on the other facts of the case.—*R. v. WOODFIELD* (1887), *16 Cox, C. C.* 314.

**5477.** —[—Prisoner was charged in the first count of an indictment with the misdemeanour of attempting to commit a larceny; in the second count, which dealt with the same facts as in the first count in an alternative manner, with an offence under Prevention of Crime Act, 1871 (c. 112), s. 7, after two previous convictions; & in the third count, with a previous conviction for felony. At the trial he was called upon to plead to the whole indictment in the first instance, & after pleading not guilty, was convicted:—*Held*: upon a writ of error, the provisions of Larceny Act, 1861 (c. 96), s. 116, were quite general, & not confined to offences under the latter Act, & sect. 9 of the former Act did not affect their generality, & as the arraignment did not comply with the requirements of sect. 116 of the latter Act, it was therefore bad, & the conviction must be quashed.—*FAULKNER v. R.* [1905] *2 K. B.* 76; *74 L. J. K. B.* 562; *92 L. T.* 769; *69 J. P.* 241; *53 W. R.* 665; *21 T. L. R.* 417; *49 Sol. Jo.* 460; *20 Cox, C. C.* 838, *D. C.*

**5478.** —[—Where deft. is indicted under Criminal Law Amendment Act, 1885 (c. 69), s. 13, for keeping a brothel after a previous conviction for a similar offence, proof of such previous conviction should not be given until the jury have found deft. guilty of the subsequent offence.—*R. v. HUBERTY* (1905), *70 J. P.* 6.

**5479. Indictment under Prevention of Crimes Act, 1871 (c. 112), s. 7.]**—Where a person is indicted for an offence under the above Act, the previous convictions may not be proved before the jury until the other facts constituting the subsequent offence have been found by them.—*R. v. BROWN* (1901), *65 J. P.* 136.

*Annotations*:—**Overd.** *R. v. Penfold*, [1902] *1 K. B.* 517.  
**Refd.** *R. v. Osborne* (1908), *1 Cr. App. Rep.* 134.

**5480.** —[—On the trial of an indictment charging the prisoner with an offence under the above Act, the previous convictions are a necessary ingredient of the offence, & may be given in evidence before the jury in the first instance.—*R. v. PENFOLD*, [1902] *1 K. B.* 547; *71 L. J. K. B.* 306; *86 L. T.* 204; *66 J. P.* 248; *50 W. R.* 671; *18 T. L. R.* 286; *46 Sol. Jo.* 268; *20 Cox, C. C.* 161, *C. C. R.*

*Annotations*:—**Fold.** *R. v. Osborne* (1908), *1 Cr. App. Rep.* 134.  
**Refd.** *Faulkner v. R.*, [1905] *2 K. B.* 76. **Mentd.** *R. v. Hunter*, [1921] *1 K. B.* 555.

*Vict. c. 96, s. 116, & sentenced by mistake to five years' penal servitude, seven years being the minimum under the statute. Upon error, by the Crown, or the purpose of reversing the judgment & passing the proper sentence, it appeared from the record that the provisions of the statute as to arraigning prisoner, etc., had been neglected:—Held: these provisions were material.—R. v. Fox* (1866), *10*

*Cox, C. C.* 502.—**IR.**

**PART XIII. SECT. 11, SUB-SECT. 4.**

**a. By record or certificate.]**—A conviction returned under the statute to quarter sessions, & filed by the clerk of the peace, becomes a record of the ct., & may be proved by a certified copy.—*GRAHAM v. MCARTHUR* (1866), *25 U. C. R.* 478.—**CAN.**

**5481.** —[—*R. v. OSBORNE* (1908), *1 Cr. App. Rep.* 134, *C. C. A.*

**5482.** — **When joined with offences under other statutes.]**—*FAULKNER v. R.*, No. 5477, *ante.*

**SUB-SECT. 4.—PROOF OF CONVICTION.**

**5483. By record or certificate—Minute-book o sessions—Not sufficient.]**—*R. v. BELLAMY* (1824) *Ry. & M.* 171.

**5484.** —[—Where an indictment for a conspiracy alleged that, "at the Ct. of Quarter Sessions holden, etc. an indictment against A. was preferred to, & found by the grand jury:—" *Held*: this allegation must be proved by a caption regularly drawn up of record, & the minute-book kept by the deputy-clerk of the peace could not be received as evidence of the finding of the bill although no record had been in fact drawn up.—*R. v. SMITH* (1828), *8 B. & C.* 341; *6 L. J. O. S. M. C.* 99; *108 E. R.* 1069.

*Annotations*:—**Fold.** *Porter v. Cooper* (1834), *6 C. & P.* 354.  
**Refd.** *Campbell v. R.* (1847), *11 Q. B.* 814.

**5485.** —[—On an indictment under Vagrancy Act, 1824 (c. 83), the minute book of the sessions where the conviction took place, to prove a previous conviction under the Act is not sufficient evidence, but a certified copy of the record of such conviction must be produced.—*GILES v. SINEY* (1864), *5 New. Rep.* 78; *11 L. T.* 310; *29 J. P.* 246; *13 W. R.* 92.

**5486.** — **Sufficient.]**—An order of a ct. of summary jurisdiction under Elementary Education Act, 1876 (c. 79), imposing a penalty or the parent of a child for non-compliance with a previous order for the attendance of the child at school, may be proved in subsequent proceedings by the minute books of the ct. containing an entry of the order; & it is unnecessary to produce a copy of the order signed by the clerk of the peace or other officer of the sessions.—*LONDON SCHOOL BOARD v. HARVEY* (1879), *4 Q. B. D.* 451; *4 L. J. M. C.* 130; *43 J. P.* 734; *27 W. R.* 783, *D. C.*  
*Annotation*:—**Fold.** *Police Comr. v. Donovan*, [1903] *K. B.* 895.

**5487.** —[—The register of the minutes or memorandum of convictions of a ct. of summary jurisdiction which has to be kept under Summary Jurisdiction Act, 1879 (c. 49), s. 22, by the clerk of the ct. is admissible in evidence to prove a previous conviction of deft. for a similar offence in the same ct.—*POLICE COMR. v. DONOVAN*, [1903] *1 K. B.* 895; *72 L. J. K. B.* 545; *88 L. T.* 555; *52 W. R.* 14; *19 T. L. R.* 392; *20 Cox, C. C.* 435.

*Annotation*:—**Mentd.** *Wing v. Epsom U. D. C.* (1904), *68 J. P.* 259.

**5488.** — **Indictment & finding of jury—Not sufficient.]**—A plea of *autrefois convict* can only be proved by the record; & the indictment with the finding of the jury, etc., indorsed by the proper officer, is not sufficient, although it appear that no record has been made up.—*R. v. BOWMAN* (1833), *6 C. & P.* 101; *2 Nev. & M. M. C.* 147; *subsequent proceedings* (1834), *6 C. & P.* 337.

*Annotation*:—**Mentd.** *R. v. Hughes* (1835), *1 Har. & W.* 313.

**t.** —[—To prove a conviction which took place at a former assizes, the record thereof, & not the Crown book, is the best evidence.—*R. v. DWYER* (1836), *Jebb, Cr. & Pr. Cas.* 198.—**IR.**

**a.** —[—Where principal & accessory are tried at the same assizes, the production, by the proper officer, of the Crown book containing the

**5489.** — — —.]—An allegation that "on, etc., at, etc., a certain indictment was preferred at the Quarter Session of the Peace then & there holden in & for the county of W., against deft. & one E., which indictment was then & there found a true bill," is not supported by the production of the original indictment with the words "true bill" indorsed on it, it being necessary that a regular record should be drawn up, & proved, either by its production or by an examined copy.—*PORTER v. COOPER* (1834), 6 C. & P. 354; 1 Cr. M. & R. 387; 2 Nev. & M. M. C. 178; 4 Tyr. 456; 3 L. J. Ex. 330.

*Annotations*:—*Mentd.* King v. Taylor (1835), 5 Tyr. 800; Lemere v. Elliott (1861), 6 H. & N. 656.

**5490.** — — — **Sufficient during sitting under same commission.**—During the sitting under the same commission, the original indictment, & minutes of the verdict upon it, are receivable in evidence in support of a plea of *autrefois acquit*, without a record being drawn up.—*R. v. PARRY* (1837), 7 C. & P. 836; *sub nom.* *R. v. LEA*, 2 Mood. C. C. 9, C. C. R.

**5491.** — — — **Calendar of sentences—Not sufficient.**—The proper proof that a prisoner was in custody under a sentence of imprisonment passed at the assizes, is by the proof of the record of his conviction; & neither the production of the calendar of the sentences, signed by the clerk of assize, & by him delivered to the governor of the prison, nor the evidence of a person who heard sentence passed, is sufficient for this purpose.—*R. v. BOURDON* (1847), 2 Car. & Kir. 366; 2 Cox, C. C. 169.

**5492.** — — — **Oral evidence—Not sufficient.**—*R. v. BOURDON*, No. 5491, *ante*.

**5493.** — — —.]—*HARTLEY v. HINDMARSH*, No. 5463, *ante*.

**5494.** — — —.]—Upon the hearing of a complaint under Bastardy Laws Amendment Act, 1872 (c. 65), s. 4, the evidence adduced in corroboration of that of complainant was the evidence of a person who deposed that he had been present at the trial & conviction of the alleged father of complainant's child upon an indictment charging him with having had unlawful carnal knowledge of complainant:—*Held*: the conviction was not sufficiently proved.—*MASH v. DARLEY*, [1914] 3 K. B. 1226; 83 L. J. K. B. 1740; 111 L. T. 744; 79 J. P. 33; 30 T. L. R. 585; 58 Sol. Jo. 652; 24 Cox, C. C. 414, C. A.

*Annotation*:—*Refd.* Thomas v. Jones, [1921] 1 K. B. 22.

**5495.** **Form of certificate—Must set out effect & substance of conviction.**—*R. v. SUTCLIFFE* (1788), Russ. & Ry. 469, n., C. C. R.

*Annotation*:—*Folld.* *R. v. Watson* (1821), Russ. & Ry. 468.

**5496.** — — — **Must set out judgment.**—In an indictment against a prisoner for a subsequent felony, he cannot be convicted on Criminal Law Act, 1826 (c. 28), s. 11, merely by the production of the certificate of the previous conviction, unless it state that a judgment followed the conviction, & that the judgment remained unreversed.—

proper entries is, at the trial of the accessory, sufficient evidence of the conviction of the principal.—*R. v. ROBINSON* (1839), 1 Cr. & D. 329.—*IR.*

**b.** — — —.]—To prove a previous conviction there must be a certificate under the hand of the clerk of the ct. or other officer having the custody of the records of the ct. where the conviction took place.—*R. v. JACKSON* (1917), C. P. D. 264.—*S. AF.*

**c.** *Admission of prisoner.*—On

an information charging prisoner with theft. Prisoner consented to be tried summarily, pleaded guilty, & was remanded for sentence. Before sentence passed the magistrate received information that prisoner was believed to have been convicted in 1902 on a charge of obtaining money by fraud. On being called up for sentence, prisoner was asked by the magistrate whether he had been previously convicted of theft & the answer being in the affirmative he was sentenced to ten years, being seven years for the

*R. v. ACKROYD & JAGGER* (1843), 1 Car. & Kir. 158; 1 L. T. O. S. 414; 1 Cox, C. C. 46.

*Annotations*:—*Consd.* *R. v. Stonnell* (1845), 4 L. T. O. S. 474. *Refd.* *Burgess v. Boctefeur* (1844), 8 Scott, N. R. 194.

**5497.** — — —.]—A certificate of a previous conviction for felony is not admissible, unless it sets forth, not only the fact of prisoner's conviction, but also the judgment of the ct. thereon.—*R. v. STONNELL* (1845), 4 L. T. O. S. 474; 9 J. P. 183; 1 Cox, C. C. 142.

**5498.** — — — **Need not contain formal caption.**—Under Transportation Act, 1824 (c. 84), s. 24, which makes a certificate of the conviction, omitting the formal part of the record, evidence, a certificate stating that "at the General Quarter Sessions of the Peace of our Lady the Queen, holden at M. in & for the county of K. on, etc., H. late of, etc., was in due form of law tried & convicted on a certain indictment against him, for," etc., is sufficient, without any more formal caption.—*R. v. HORNE* (1850), 4 Cox, C. C. 263.

**5499.** — — — **Certification by deputy clerk.**—On the trial of an indictment against a person for being at large without lawful cause before the expiration of his term of transportation, a certificate of his former conviction & sentence was put in; it purported to be that of G., "deputy-clerk of the peace" for the county of L., " & clerk of the cts. of general quarter sessions of the peace holden in & for the said county, & having the custody of the records of the cts. of general quarter sessions of the peace holden in & for the said county." It was proved that H. was clerk of the peace of L., & that he had three deputies, partners, of whom G., who had signed the certificate, was one, & that each of them acted as clerk of the peace, & that for forty years they had kept the sessions' records at their office:—*Held*: sufficient proof of the conviction & sentence under Transportation Act, 1824 (c. 84), s. 24.—*R. v. JONES* (1847), 2 Car. & Kir. 524.

**5500.** — — —.]—The certificate of a previous conviction required by Transportation Act, 1824 (c. 84), s. 24, is sufficient, by virtue of Evidence Act, 1845 (c. 113), s. 1, if it purports to be signed by an officer having the custody of the records, although that officer is therein described as the deputy-clerk of the peace of a borough. The certificate need not aver that the quarter sessions at which prisoner was convicted were held by the Recorder.—*R. v. PARSONS* (1866), L. R. 1 C. C. R. 24; 35 L. J. M. C. 167; 14 L. T. 450; 30 J. P. 359; 12 Jur. N. S. 436; 14 W. R. 662; 10 Cox, C. C. 243, C. C. R.

**5501.** **Proof of certificate.**—*R. v. STONE* (1844), 1 Cox, C. C. 70.

**5502.** — — —.]—On an indictment for felony after a prior conviction, prosecutor must prove that the certificate of prior conviction was obtained from the clerk of the peace.—*R. v. WHALE* (1844), 2 L. T. O. S. 519; 8 J. P. 698; 1 Cox, C. C. 69.

**5503.** — — —.]—A certificate of a previous conviction proves itself.—*R. v. ERPS* (1844), 8 J. P. 417.

theft & three years on account of the previous conviction:—*Held*: the magistrate had exceeded his powers in imposing a sentence for a term greater than that allowed when no former conviction has been proved, the previous conviction in this case not having been charged in the information by analogy to Criminal Code, s. 851, nor proved in accordance with sect. 963.—*R. v. EDWARDS* (1907), 7 W. L. R. 1; 17 Man. L. R. 288.—*CAN.*



*Sect. 11.—Offences after previous conviction: Sub-sect. 5. Sects. 12 & 13. Part XIV. Sect. 1: Sub-sect. 1.]*

**SUB-SECT. 5.—PROOF OF IDENTITY.**

**5504. Method of proof.]**—In order to prove the identity of a prisoner who is named in a certificate of a previous conviction, it is not necessary to call a witness who was present at the trial to which the certificate relates, it is sufficient to prove that prisoner is the person who underwent the sentence mentioned in the certificate.—*R. v. CROFTS* (1840), 9 C. & P. 219.

*Annotation:—Reidd. R. v. Leng* (1858), 1 F. & F. 77.

**5505. —.]**—The proof of the identity of prisoner charged with a previous conviction on an indictment for a felony, ought to be positive & direct, & should be given by some one who was present at the trial & conviction set forth in the certificate. Evidence by the gaoler that prisoner was handed over, with others, to him on his appointment, & that he was then in confinement under the sentence set forth in the certificate, is insufficient.—*R. v. BIRD* (1842), 6 J. P. 525.

**5506. —.]**—To prove the identity of a prisoner under a certificate of a former conviction it is not sufficient to prove that he was in the gaol, went up with other prisoners to the sessions, was brought back & remained in gaol one calendar month afterwards. It must be proved that he was tried & convicted of the offence stated in the certificate.—*R. v. LLOYD* (1843), 1 L. T. O. S. 480; 1 Cox, C. C. 51.

**5507. —.]**—A previous summary conviction which, under Criminal Justice Act, 1855 (c. 126), s. 7, is required to be proved by a certified copy,

also requires proof of prisoner's identity, as under Criminal Law Act, 1826 (c. 28), s. 11, which remains in this respect as it stood before. The identity may be proved by evidence from which a jury may draw the conclusion that he is the same person named in the certificate, although no witness saw him convicted at his trial.—*R. v. LENG* (1858), 1 F. & F. 77; 8 Cox, C. C. 73.

**5508. —.]**—*R. v. DRABBLE* (1909), 53 Sol. Jo. 449.

**5509. —.]**—“Proof of the identity” of the person against whom it is sought to prove the conviction with the person named in the record of the conviction required by Prevention of Crime Act, 1871 (c. 112), s. 18, does not mean conclusive proof, but means such evidence as will entitle a jury to find that the identity is proved.—*MARTIN v. WHITE*, [1910] 1 K. B. 665; 79 L. J. K. B. 553; 102 L. T. 23; 74 J. P. 106; 26 T. L. R. 218; 22 Cox, C. C. 236; 8 L. G. R. 218.

**5510. —.]**—The ct. of trial cannot take cognisance of previous convictions unless they are duly proved by a witness, subject to cross-examination.—*R. v. SEYMOUR* (1923), 87 J. P. 148; 17 Cr. App. Rep. 128, C. C. A.

**SECT. 12.—PARDONS AND REPRIEVES.**

*See CONSTITUTIONAL LAW, Vol. XI., pp. 516 et seq.*

**SECT. 13.—VAGRANCY.**

*See MAGISTRATES.*

## Part XIV.—Appeal to Court of Criminal Appeal.

**SECT. 1.—THE RIGHT OF APPEAL.**

**SUB-SECT. 1.—IN GENERAL.**

**5511. When confined to point of law.]**—If, on an appln. for leave to appeal against conviction or sentence, a point of law emerges, the ct. will grant leave to appeal on that point only.—*R. v. BRIGGS* (1909), 1 Cr. App. Rep. 192, C. C. A.; *subsequent proceedings*, [1909] 1 K. B. 381, C. C. A.

**5512. Conviction on information by Attorney-General—For smuggling.]**—An information by the A.-G. in the K. B. Div. for smuggling is not a “criminal information” within Criminal Appeal

Act, 1907 (c. 23), s. 20 (2), & therefore there is no appeal from conviction in such a case to this ct.—*R. v. HAUSMANN* (1909), 73 J. P. 516; 26 T. L. R. 3; 3 Cr. App. Rep. 3, C. C. A.

**5513. Finding of fitness or unfitness to plead & take trial—Criminal Lunatics Act, 1883 (c. 38), s. 2.]**—Where upon the trial of a prisoner, there is a preliminary inquiry as to whether he is fit to plead, & he is found fit to plead, there is no appeal against that finding. The ct., being of opinion that prisoner was insane at the time he committed the act, quashed the sentence, & made an order for his detention as a criminal lunatic under the above

**PART XIII. SECT. 11, SUB-SECT. 5.**

**5504 i. Method of proof.]**—Before a conviction for a second offence under the Liquor Licence Act, it is necessary to prove the identity of deft. with the person named in the certificate of the former conviction, & neither the similarity of names nor the personal knowledge of the magistrate will be sufficient for that purpose.—*R. v. HERRELL* (1898), 12 Man. L. R. 198.—**CAN.**

**5504 ii. —.]**—On a trial before a magistrate who was the same magistrate by whom deft. had been previously convicted of a like offence, the information alleging such prior conviction, all that appeared with regard to it being the evidence of the licence inspector, who proved that deft. was the person previously convicted:—**Held:** it must be assumed that the magistrate satisfied himself as to the prior conviction, the inspector's evidence only being necessary to prove the identity of the deft.—*R. v. Mc-*

*GARRY* (1900), 20 C. L. T. 170; 31 O. L. 486.—**CAN.**

**5504 iii. —.]**—In proof of the conviction of a prior offence by the person accused, identity of name in the certificate of conviction is some evidence of the identity of the person, & it is then a question of the weight of evidence for the determination of the magistrate.—*R. v. LEACH*, *R. v. FOGARTY*, *R. v. WARLOW* (1908), 17 O. L. R. 643; 12 O. W. R. 1016, 1026.—**CAN.**

**5504 iv. —.]**—Police ought not either directly or indirectly to do anything which may prevent the identification of an accused person from being absolutely independent, & they should be most scrupulous in seeing that it is so.—*R. v. MURRAY & MAHONEY* (No. 2), [1917] 1 W. W. R. 404; 10 Alta. L. R. 275; 27 Can. Crim. Cas. 247; 33 D. L. R. 702.—**CAN.**

**5504 v. —.]**—Records of the Finger Print Department are not in them-

selves proof of previous convictions, even where accused's finger prints correspond with the finger prints on a slip setting forth certain convictions. There must also be evidence identifying accused with the person who appears, from such certificate, to have been convicted.—*R. v. JACKSON* (1917), C. P. D. 264.—**S. AF.**

**PART XIV. SECT. 1, SUB-SECT. 1.**

**d. Matters within discretion of judge at trial—Reservation of points of law.]**—Where a prisoner, whether defended or undefended, himself asks that a point of law be reserved, it lies in the discretion of the judge to reserve such point.—*R. v. HIDDILSTON* (1889), 10 N. S. W. L. R. 280.—**AUS.**

**e. — To grant or refuse postponement of trial—Not “a question of law.”]**—The exercise of judicial discretion by a judge in granting or refusing the postponement of a trial is not “a question of law” upon which a case may be reserved under Criminal



Act.—*R. v. JEFFERSON* (1908), 72 J. P. 467; 24 T. L. R. 877; 1 Cr. App. Rep. 95, C. C. A.

*Annotations*:—*Consd.* *R. v. Alexander* (1913), 109 L. T. 745. *Refd.* *R. v. Gilbert* (1914), 84 L. J. K. B. 1424.

**5514.** —.]—Applt. was indicted for libel. Before the trial a jury was empanelled to inquire whether he was fit to plead. They found that he was insane & unfit to plead. Thereupon the judge ordered him to be detained during His Majesty's pleasure. Applt. was made for leave to appeal against that order:—*Held*: as applt. had not been convicted on indictment within Criminal Appeal Act, 1907 (c. 23), s. 3, no appeal would lie.—*R. v. LARKINS* (1911), 105 L. T. 384; 75 J. P. 320; 27 T. L. R. 438; 55 Sol. Jo. 501; 22 Cox, C. C. 598; 6 Cr. App. Rep. 194, C. C. A.

**5515. Plea of insanity set up after trial.**—If a plea of insanity is set up after the trial, the ct. will not interfere unless applt. would obtain some benefit from the exercise of its powers under Criminal Appeal Act, 1907 (c. 23), s. 5 (4).—*R. v. DENCH* (1909), 2 Cr. App. Rep. 281, C. C. A.

**5516.** —.]—The defence of insanity ought to be raised at the trial, & not for the first time in the Ct. of Criminal Appeal.—*R. v. DE VERE* (1909), 2 Cr. App. Rep. 19, C. C. A.

**5517. Matters within discretion of judge at trial**—**Separate trials of persons jointly indicted.**—When prisoners are jointly indicted & applt. is made for them to be tried separately the matter is one for the discretion of the judge; but such discretion must be exercised judicially. But even if it had been exercised judicially the conviction would be quashed if it appeared to the Ct. of Criminal Appeal that a miscarriage of justice had resulted from prisoners having been tried together.—*R. v. GIBBINS & PROCTOR* (1918), 82 J. P. 287, C. C. A.

**5518.** —.]—If a co-prisoner does not apply to be tried separately, no objection on the ground of a joint trial will be entertained by the Ct. of Criminal Appeal.—*R. v. BAKER* (1909), 2 Cr. App. Rep. 249, C. C. A.

**5519.** — **Separate hearing of appeals.**—It is within the discretion of the judge at the trial whether defts. jointly indicated shall be tried severally, & unless one has been prejudiced by such joint trial this ct. will not interfere, though it may hear appeals of such defts. separately.—*R. v. BYWATERS* (1922), 17 Cr. App. Rep. 66, C. C. A.

**5520.** — **Putting prosecution to election of counts.**—The ct. of trial has a discretion as to putting the prosecution to election when there is a multiplicity of counts from which there is no appeal, & the conviction of applt. was quashed where evidence of a previous conviction was wrongly admitted.—*R. v. CURTIS* (1913), 29 T. L. R. 512; 9 Cr. App. Rep. 9, C. C. A.

*Annotation*:—*Refd.* *R. v. Seham Yousry* (1914), 84 L. J. K. B. 1272.

**5521.** —.]—Prisoner, who was charged with publishing a defamatory libel, pleaded *inter alia* justification. A replication to the plea was filed during the course of the trial. The fact that, in the course of the trial, counsel for the prosecution referred to the contents of certain documents which were not admissible in evidence

afforded no ground for quashing the conviction, as the irregularity could not, in the circumstances of the case have influenced the verdict of the jury.

On behalf of applt. it was said that the prosecution ought to have been put to their election. It is sufficient to say that the question of election is one which the ct. in its discretion may grant or refuse (LORD COLERIDGE, J.).—*R. v. SEHAM YOUSRY* (1914), 84 L. J. K. B. 1272; 112 L. T. 311; 31 T. L. R. 27; 24 Cox, C. C. 523; 11 Cr. App. Rep. 13; 78 J. P. Jo. 521, C. C. A.

*Annotation*:—*Refd.* *R. v. Gibbins & Proctor* (1918), 82 J. P. 287.

**5522.** —.]—(1) The discretion of a judge in putting the prosecution to elect as to the charges to be proceeded with will only be reviewed in a case of manifest injustice.

(2) If counsel deliberately refrains from calling witnesses in the ct. below, the Ct. of Criminal Appeal will be slow to give leave to call them on the appeal, & will only do so in exceptional circumstances.—*R. v. STARKIE*, [1922] 2 K. B. 275; 91 L. J. K. B. 663; 86 J. P. 74; 38 T. L. R. 181; 66 Sol. Jo. 300; 16 Cr. App. Rep. 61, C. C. A.

**5523.** — **Allowing witness to be treated as hostile.**—The ct. will not as a rule permit an appeal on the ground that the trial judge wrongly allowed a witness to be treated as hostile.—*R. v. WILLIAMS* (1913), 77 J. P. 240; 29 T. L. R. 188; 8 Cr. App. Rep. 133, C. C. A.

*Annotation*:—*Mentd.* *R. v. White* (1922), 17 Cr. App. Rep. 60.

**5524.** — **Admission of rebutting evidence.**—(1) Whether or not rebutting evidence on the part of the prosecution ought to be admitted at a criminal trial after the close of the evidence for the defence is a matter in the discretion of the judge at the trial.

(2) A summing up, criticised for misdirection, must be considered as a whole.

(3) The rule that the jury must not separate during a trial for murder does not mean that in no circumstances must they physically part from one another. The rule is subject to the qualification that upon an emergency, or where it is necessary, a juror may leave the rest of his fellows.—*R. v. CRIPPEN*, [1911] 1 K. B. 149; 80 L. J. K. B. 290; 103 L. T. 705; 75 J. P. 141; 27 T. L. R. 69; 22 Cox, C. C. 289; 5 Cr. App. Rep. 255, C. C. A.

*Annotations*:—As to (1) *Apld.* *R. v. Sullivan*, [1923] 1 K. B. 47. *Generally, Refd.* *R. v. Foster* (1911), 6 Cr. App. Rep. 196; *R. v. Wilson, Lewis & Havard* (1911), 6 Cr. App. Rep. 125.

**5525.** — **Comment on failure of defendant to give evidence—Or not calling particular witness.**—

The ct. will not review a judge's comment on deft.'s not giving evidence nor on his not calling a particular person.—*R. v. VOISIN*, [1918] 1 K. B. 531; 87 L. J. K. B. 574; 118 L. T. 654; 82 J. P. 96; 34 T. L. R. 263; 62 Sol. Jo. 423; 26 Cox, C. C. 224; 13 Cr. App. Rep. 89, C. C. A.

*Annotation*:—*Mentd.* *R. v. Cook* (1918), 34 T. L. R. 515.

**5526.** — **Discharge of jury.**—The right to discharge a jury is entirely within the discretion of the judge who tries the case, & the Ct. of Criminal Appeal has no jurisdiction to review the exercise of that discretion. A jury, however,

Code, s. 1014.—*R. v. MULVHILL* (1914), 19 B. C. R. 197.—**CAN.**

**f.** — *Refusal of permission to recall witness in order to impeach her credit.*—The refusal of permission to recall a witness in order to lay a foundation for evidence impeaching her credit by contradicting a previous

statement made by her is a matter wholly in the discretion of the trial judge, & an appellate ct. should hesitate to interfere with the exercise of that discretion.—*R. v. SCHRABA*, [1921] 3 W. W. R. 107; 31 Man. L. R. 275.—**CAN.**

**5526 i.** — *Discharge of jury.*—The

discharge of a jury during the course of a trial is a matter solely within the jurisdiction of the trial judge, & his discretion is not open to review on appeal.—*R. v. BORDENINK*, [1919] 1 W. W. R. 968; 45 D. L. R. 470.—**CAN.**

**g.** — *To grant or refuse a*

**Sect. 1.—The right of appeal: Sub-sects. 1 & 2.]**

should not be discharged merely to enable the prosecution to present a stronger case against prisoner on some other occasion.—*R. v. LEWIS* (1909), 78 L. J. K. B. 722; 100 L. T. 976; 73

J. P. 346; 25 T. L. R. 582; 22 Cox, C. C. 141; 2 Cr. App. Rep. 180, C. C. A.  
Annotation:—*Mentd. R. v. Richardson* (1913), 8 Cr. App. Rep. 159.

**5527. — With a view to increasing term.]—**Leave to appeal against sentence granted with a

*separate trial when two indicted together.]—*When two or more persons are charged together, the granting or refusing of an application for a separate trial is in the discretion of the judge, & where such discretion has been exercised, the Supreme Ct. has no power to interfere.—*R. v. LEO* (1914), T. P. D. 299.—**S. AF.**

**h. Special leave—When granted.]—**In granting special leave to appeal in criminal cases the High Ct. will follow the practice of the Judicial Committee of the Privy Council.—*EATHER v. R.* (1914), 19 C. L. R. 409.—**AUS.**

**k. ———.]—**The Appellate Div. follows the practice of the Privy Council with regard to appeals from convictions by a jury in criminal cases & will not review or interfere with the course of such cases unless it is shown that by a disregard of the form of legal process or by some violation of the principles of natural justice or otherwise substantial & grave injustice has been done.—*R. v. DIDAT* (1913), App. D. 299.—**S. AF.**

**l. ———.]—**On indictment for attempting to trade with the enemy contrary to the provisions of the Trading with the Enemy Act, 1914, on various dates both before & after the passing of that Act, the judge held that the Act was not retrospective as to attempts to trade with the enemy & that, as to the attempts alleged to have taken place after the passing of the Act, there was no evidence to go to the jury, & directed the jury to find a verdict of "not guilty," which they did. The Crown having applied for special leave to appeal from the judgment of acquittal or, alternatively, from the direction of the judge:—*Held*: special leave to appeal should be refused.—*R. v. SNOW* (1915), 20 C. L. R. 315.—**AUS.**

**m. ———.]—**On complaint for publishing information which might be useful to the enemy the magistrate found that the information published was not of such a character that it might be directly or indirectly useful to the enemy, & dismissed the complaint:—*Held*: the only question was what inference should be drawn from the facts, & special leave to appeal refused.—*CORRIE v. LOVEKIN* (1915), 19 C. L. R. 562.—**AUS.**

**n. ———.]—**Special leave to appeal from a judgment of the Ct. of Appeal for Ontario, under 60 & 61 Vict. c. 34, s. 1 (e), will not be granted on the ground merely that there is error in such judgment; nor when it is certain that a similar application to the Ct. of Appeal would be refused.—*A.-G. of ONTARIO v. SCULLY* (1902), 33 S. C. R. 16.—**CAN.**

**o. ———.]—**Leave to appeal to the Ct. of Criminal Appeal should not be lightly granted.—*R. v. LAI PING* (1904), 25 C. L. T. 22; 11 B. C. R. 102.—**CAN.**

**p. ———.]—***Want of jurisdiction to hear.]—*An application for special leave to appeal to Supreme Ct. refused by the Ct. of Appeal on the ground that there would be no jurisdiction to entertain the appeal if leave were granted.—*R. v. MANITOBA GRAIN CO., LTD.*, [1922] 3 W. W. R. 560.—**CAN.**

**q. ———.]—***Special circumstances must be shown.]—*The High Ct. has, under Judiciary Act, 1903-1912, s. 35 (1) (b), an unfettered discretion to grant or refuse special leave in every case, but a *prima facie* case showing special circumstances must be made out.—

*EATHER v. R.* (1915), 20 C. L. R. 147.—**AUS.**

**r. Only after trial or conviction.]—***R. v. LALANNE* (1870), 3 L. N. 16.—**CAN.**

**s. On questions of law.]—**Under C. S. U. C., c. 112, any question of law which may have arisen on a criminal trial may be reserved for the consideration of superior cts. of common law.—*R. v. BISSELL* (1882), 1 O. R. 514.—**CAN.**

**t. ———.]—***Must be some particular question.]—*The power to reserve a question of law arising on a criminal trial means that some particular question of law must be stated.—*R. v. MOKE*, [1917] 3 W. W. R. 575.—**CAN.**

**a. ———.]—***Criminal Code, s. 1024 A.]—*The "conflict" referred to in Criminal Code, s. 1024 A, must be one on a question of law.—*R. v. JANONSKY* (1922), 65 D. L. R. 83; 37 Can. Crim. Cas. 226; 63 S. C. R. 223.—**CAN.**

**b. Second application with new material.]—**Where defts.' applications for orders nisi to quash convictions were refused on the ground of non-compliance with the statute & rule requiring a recognisance & affidavit of justification to be filed:—*Held*: the indulgence of the ct. ought not to be extended in favour of fresh applications made by defts. upon new material supplying the defects.—*R. v. RICHARDSON, R. v. ADDISON* (1889), 13 P. R. 303.—**CAN.**

**c. ———.]—**After the dismissal of a case reserved on the application of the accused, a second application, although upon new grounds, is to be discouraged.—*R. v. BELS SINGH* (1915), 27 Can. Crim. Cas. 40.—**CAN.**

**d. On refusal to reserve case—Writ of error.]—**Whether the police ct. is a ct. of justice within 32 & 33 Vict. c. 21, s. 18, or not, is a question of law which may be reserved by the judge at the trial, under C. S. U. C., c. 112, s. 1, & where it does not appear by the record in error that the judge refused to reserve such question it cannot be considered upon a writ of error.—*R. v. MASON* (1872), 22 C. P. 246.—**CAN.**

**e. ———.]—**On trial for "assault with intent to murder," certain evidence was tendered for the Crown, which prisoner's counsel objected to as inadmissible. The evidence was admitted, & prisoner's counsel then applied to have a case reserved. The judge refused the application:—*Held*: a writ of error does not lie upon such refusal, & Criminal Procedure Act, s. 266, is a restriction, & not an enlargement, of the common law scope of writs of error.—*R. v. GILBOY* (1889), 7 Man. L. R. 54.—**CAN.**

**f. ———.]—**Where the ct. appealed from has affirmed the refusal to reserve a case moved for at a criminal trial on two grounds, & is unanimous as to one of such grounds, but not as to the other, the supreme ct. on appeal can only take into consideration the ground of motion in which there was dissent.—*McINTOSH v. R.* (1894), 23 S. C. R. 180.—**CAN.**

**g. ———.]—***Court of Appeal cannot give judgment on merits—Even with consent of parties.]—*On an application for leave to appeal from the decision of a trial judge, refusing to state a reserved case under Criminal Code, s. 1014, the consent of the parties cannot give the ct. jurisdiction to treat the matter as one arising on a case actually re-

served, & so give judgment on the merits.—*R. v. GRAVES* (No. 2) (1912), 12 E. L. R. 49; 20 Can. Crim. Cas. 384.—**CAN.**

**aa. On weight of evidence.]—**Prisoner was indicted for theft & was acquitted on the ground of insanity:—*Held*: the judge could not reserve a case depending upon the weight of evidence, & the question reserved, whether there was evidence of insanity as required by s. 736 of the code, was within the principle decided.—*R. v. PHINNEY* (No. 2) (1903), 36 N. S. R. 288.—**CAN.**

**bb. Where new trial granted.]—**An appeal to the Supreme Ct. of Canada does not lie in cases where a new trial has been granted by the Ct. of Appeal, under Criminal Code, 1892, ss. 742 to 750 inclusively.—*VIAU v. R.* (1898), 29 S. C. R. 90.—**CAN.**

**cc. Regulated by Criminal Code.]—**Criminal appeals are regulated by the provisions of the Criminal Code.—*RICE v. R.* (1900), 32 S. C. R. 480.—**CAN.**

**dd. Decisions of English Court of Criminal Appeal not binding in Alberta.]—***R. v. GURVIN* (1911), 18 W. L. R. 482; 20 W. L. R. 130; 45 S. C. R. 167.—**CAN.**

**ee. After acquittal—By complainant.]—**Deft. was indicted for theft under Criminal Code, s. 305 (a). The theft was admitted, but it was contended that there was evidence of insanity at the time of the act. The judge charged jury that there was no such evidence, & that the case did not come within s. 736. The jury having found the prisoner not guilty, two questions were reserved for the opinion of the ct.: (1) Whether there was evidence of insanity as required by s. 736; (2) if not, whether there should be a new trial. Upon motion to quash the case reserved on the ground that where there had been an acquittal the Crown could not have a case reserved or an appeal:—*Held*: the motion must be dismissed, & the case proceeded with to ascertain whether there was evidence of insanity sufficient in law for submission to the jury.—*R. v. PHINNEY* (No. 1) (1903), 36 N. S. R. 264.—**CAN.**

**ff. ———.]—**Under s. 749 of the Code a complainant has no right to appeal from an acquittal of accused unless he "thinks himself aggrieved" by such acquittal.—*R. v. SUCKLING*, [1920] 3 W. W. R. 89.—**CAN.**

**gg. Court cannot go outside reserved case.]—**The ct. cannot travel outside the reserved case in search of facts, as the effect of the evidence should be summarised in presenting the case, & the jurisdiction of the ct. being statutory, the case to be accepted as presented.—*R. v. HAYNES* (1914), 14 E. L. R. 457; 23 Can. Crim. Cas. 101.—**CAN.**

**hh. Death of appellant before hearing.]—**M. & N. were convicted of criminal breach of trust, & each was sentenced to one year's rigorous imprisonment & fine of R.1,000. Both prisoners appealed to the High Ct. N. died pending his appeal. One of the relatives of N. applied to the High Ct. to set aside the conviction & order the fine to be refunded:—*Held*: on N.'s death his appeal abated under Code of Criminal Procedure (Act X. of 1882), s. 431.—*Re NABI SHAH* (1894), 1 L. R. 19 Bom. 714.—**IND.**

**kk. On questions of fact.]—**The Appellate Div. is slow to interfere with the findings of judges & magistrates

view to increasing the term.—*R. v. JAMES* (1923), 17 Cr. App. Rep. 155, C. C. A.

**5528. Certificate granted.—Only where judge has doubt on case.**—A certificate of appeal should only be granted when the learned judge has a doubt about some point in the case.—*R. v. LANGLEY* (1923), 17 Cr. App. Rep. 199, C. C. A.

#### SUB-SECT. 2.—AGAINST CONVICTION.

**5529. Special verdict of insanity—Trial of Lunatics Act, 1883 (c. 38), s. 2 (1).**—*R. v. VAN WAAS* (1908), 72 J. P. Jo. 305, C. C. A.

**5530.** — — — — —]—There is an appeal against the special verdict allowed by sect. 2 (1) of the above Act.—*R. v. IRELAND*, [1910] 1 K. B. 654; 79 L. J. K. B. 338; 102 L. T. 608; 74 J. P. 206; 26 T. L. R. 267; 54 Sol. Jo. 543; 22 Cox, C. C. 322; 4 Cr. App. Rep. 74.

*Annotations*.—**Consd.** *Felstead v. R.*, [1914] A. C. 534. **Refd.** *R. v. Machardy*, [1911] 2 K. B. 1144. **Mentd.** *Oaten v. Auty*, [1919] 2 K. B. 278.

**5531.** — — — — —]—There is no appeal against that part of a special verdict under sect. 2 of the above Act, which finds deft. to be insane.—*R. v. MACHARDY*, [1911] 2 K. B. 1144; 80 L. J. K. B. 1215; 105 L. T. 556; 76 J. P. 6; 28 T. L. R. 2; 55 Sol. Jo. 757; 22 Cox, C. C. 614; 6 Cr. App. Rep. 272, C. C. A.

*Annotations*.—**Consd.** *R. v. Hill* (1911), 105 L. T. 751; *Felstead v. R.*, [1914] A. C. 534.

**5532.** — — — — —]—A special verdict given under sect. 2 of the above Act, is one & indivisible, & is a verdict of acquittal. Therefore accused who by the special verdict is found guilty of the act charged, but insane at the time is not a convicted person within Criminal Appeal Act, 1907 (c. 23), s. 3, & cannot appeal from that part of the verdict which finds that he was insane at the time of doing the act.—*FELSTEAD v. R.* [1914] A. C. 534; 83 L. J. K. B. 1132; 111 L. T. 218; 78 J. P. 313; 30 T. L. R. 469; 58 Sol. Jo. 534; 24 Cox, C. C. 243; 10 Cr. App. Rep. 129, H. L.; *affg. S. C. sub nom. R. v. FELSTEAD* (1913), 30 T. L. R. 143, C. C. A.

*Annotations*.—**Apld.** *R. v. Taylor*, [1915] 2 K. B. 709. **Refd.** *Oaten v. Auty*, [1919] 2 K. B. 278; *Public Prosecutions Director v. Beard*, [1920] A. C. 479. **Mentd.** *Re Houghton*, *Houghton v. Houghton*, [1915] 2 Ch. 173.

**5533.** — — — — —]—The Ct. of Criminal Appeal has no jurisdiction either under Criminal Appeal Act, 1907 (c. 23), or in a case stated under Crown Cases Act, 1848 (c. 78), s. 1, to entertain an appeal by a person against whom a special verdict has been found that he was guilty of the act charged against him, but that he was insane at the time, inasmuch as he is not a convicted person within the above-mentioned statutes.—*R. v. TAYLOR*, [1915] 2 K. B. 709; 84 L. J. K. B. 1671; 113 L. T. 513; 79 J. P. 439; 31 T. L. R. 449; 59 Sol. Jo. 530; 25 Cox, C. C. 84; 11 Cr. App. Rep. 198, C. C. A.

**5534. Summary conviction—As incorrigible rogue.**—No appeal lies to the Ct. of Criminal

Appeal under Criminal Appeal Act, 1907 (c. 23), s. 20 (2), from a conviction of a person as a rogue & vagabond at petty sessions, where he is committed with hard labour until the next general or quarter sessions of the peace as an incorrigible rogue under Vagrancy Act, 1824 (c. 83), s. 5, & is there sentenced to imprisonment with hard labour, although an appeal does lie under that sect. with leave, against the sentence imposed by quarter sessions.—*R. v. BROWN* (1908), 72 J. P. 427; 1 Cr. App. Rep. 85, C. C. A.

*Annotation*.—**Consd.** *R. v. Johnson*, [1909] 1 K. B. 439.

**5535.** — — — — —]—Appl. was convicted before the magistrates at petty sessions of being an incorrigible rogue within Vagrancy Act, 1824 (c. 23), s. 5. Although twice before convicted of being an idle & disorderly person, he had never been convicted of being a rogue & vagabond within sect. 4 of the Act. He was sent to quarter sessions to be dealt with, & was there sentenced. Applt. petitioned the Home Secretary against his sentence who referred the case to the Ct. of Criminal Appeal under Criminal Appeal Act, 1907 (c. 23), s. 19 (a):—**Held**: a person sentenced by quarter sessions as an incorrigible rogue can appeal against the sentence, but not against the conviction, & applt. not having been at some former time adjudged to be a rogue & vagabond & duly convicted thereof, quarter sessions had no power to sentence him as an incorrigible rogue.—*R. v. JOHNSON*, [1909] 1 K. B. 439; 78 L. J. K. B. 290; 100 L. T. 464; 73 J. P. 135; 25 T. L. R. 229; 53 Sol. Jo. 288; 22 Cox, C. C. 43; 2 Cr. App. Rep. 13, C. C. A.

*Annotation*.—**Consd.** *R. v. Evans*, [1915] 2 K. B. 762.

**5536.** — — — — —]—*R. v. LEWIS* (1910), 4 Cr. App. Rep. 52, C. C. A.

**5537. After plea of guilty.**—Only under exceptional circumstances will the ct. be induced to grant leave to reopen a case in which prisoner has pleaded guilty.—*R. v. LUCAS* (1908), 1 Cr. App. Rep. 61, C. C. A.

*Annotation*.—**Refd.** *R. v. Verney* (1909), 2 Cr. App. Rep. 107.

**5538.** — — — — —]—For leave to be granted where applt. had pleaded guilty special circumstances would have to be shown, such as those where there was ground for saying there had been a mistake (LORD ALVERSTONE, C.J.).—*R. v. BROCK* (1908), 72 J. P. Jo. 365, C. C. A.

**5539.** — — — — —]—**Of offences not committed.**—*R. v. VERNEY* (1909), 73 J. P. 288; 2 Cr. App. Rep. 107, C. C. A.

*Annotation*.—**Refd.** *R. v. Alexander* (1912), 76 J. P. 215.

**5540.** — — — — —]—**Plea due to mistake—Misstatement of law by judge.**—If deft. pleads guilty, owing to a misstatement of the law by the judge, the ct. will quash the conviction.—*R. v. ALEXANDER* (1912), 107 L. T. 240; 76 J. P. 215; 28 T. L. R. 200; 23 Cox, C. C. 140; 7 Cr. App. Rep. 110, C. C. A.

**5541.** — — — — —]—On an appeal on the ground that applt. pleaded guilty by mistake, the ct. will satisfy itself on the facts whether he really did

upon questions of fact, but in special cases where there are circumstances which convince the ct. that, making all allowance for the considerations of the manner & demeanour of witnesses, the ct. below should have entered a different finding, it will allow the appeal.—*R. v. MPETA* (1912), App. D. 568.—**S. AF.**

#### PART XIV. SECT. 1, SUB-SECT. 2.

**s. On points not raised at the trial.**—After the conviction of a prisoner, sentence was deferred pend-

ing an appeal to the full ct. & certain points were reserved. After the rising of the ct. & during vacation the prisoner's attorney submitted certain other points to the judge in his chambers, & they were included in the special case:—**Held**: such points were not properly submitted within Criminal Law Amendment Act, s. 422, & could not be considered.—*R. v. DEAN &*

132; 12 N. S. W. W. N. 141.—**AUS.**

**t. Conviction must be shown to be erroneous on admitted facts.**—On an

application for leave to appeal to Ct. of Criminal Appeal it is essential that applt. should establish that there is something arising out of the admitted facts which indicates that the verdict of the jury was erroneous.—*JEFFRIES v. R.* (1916), 18 W. A. L. R. 143.—**AUS.**

**a. Not where evidence sufficient to at evidence of accomplice.**—A new trial cannot be granted to a person convicted of incest where there was sufficient evidence to convict prisoner without the woman's evidence.

1.—*The right of appeal: Sub-sects. 2 & 3. Sects. 2 & 3.*

not understand the effect of his plea.—*R. v. RHODES* (1914), 11 Cr. App. Rep. 33, C. C. A.  
*Annotation:—Reid. R. v. Golathan* (1915), 112 L. T. 1048.

5542. ———.]—In the absence of mistake, this ct. will not entertain an appeal after a plea of guilty pleaded on the advice of counsel.—*R. v. FORDE*, [1923] 2 K. B. 400; 92 L. J. K. B. 501; 128 L. T. 798; 87 J. P. 76; 39 T. L. R. 322; 67 Sol. Jo. 539; 27 Cox, C. C. 406; 17 Cr. App. Rep. 99, C. C. A.

SUB-SECT. 3.—AGAINST SENTENCE OR ORDER.

5543. *Sentence fixed by law—Sentence of death—Criminal Appeal Act, 1907 (c. 23), s. 3.*—*R. v. LORD* (1908), 52 Sol. Jo. 740; 1 Cr. App. Rep. 110; 72 J. P. Jo. 400, C. C. A.

5544. ———.]—The Ct. of Criminal Appeal has no jurisdiction to extend the time for appealing, or applying for leave to appeal against a conviction involving sentence of death, or against such sentence, which is fixed by law.

On a conviction for murder the sentence is one which is fixed by law, therefore there is no right of appeal. The commutation of the sentence to penal servitude for life is not a sentence of law. It is the exercise of the prerogative of mercy which rests with the Sovereign. It was on the recommendation of the Home Secretary that the Sovereign commuted the sentence, & from that there can be no appeal (LORD READING, C.J.).—*R. v. TWYNHAM* (1920), 90 L. J. K. B. 586; 124 L. T. 286; 85 J. P. 48; 26 Cox, C. C. 678; 15 Cr. App. Rep. 38, C. C. A.

5545. *Sentence commuted by Home Secretary—Sentence of death—Commuted to penal servitude for life.*—*R. v. LORD*, No. 5543, *ante*.

5546. ———.]—*R. v. TWYNHAM*, No. 5544, *ante*.

5547. ———. *Sentence of imprisonment—Commuted to detention in Borstal Institution.*—There is no appeal from the commutation by the Home Secretary of detention in a Borstal Institution to ordinary imprisonment, under Prevention of Crime Act, 1908 (c. 59), s. 7.—*R. v. KEATING* (1910), 103 L. T. 322; 74 J. P. 452; 26 T. L. R. 686; 22 Cox, C. C. 343; 5 Cr. App. Rep. 181, C. C. A.

5548. *After plea of guilty—Variation of sentence.*—Where prisoner appeals against a sentence passed upon him at the trial in respect of an offence to which he has pleaded guilty, the Ct. of Criminal Appeal has no power, if it is necessary to set that sentence aside, to substitute another in its place under Criminal Appeal Act, 1907 (c. 23), s. 4 (3).—*R. v. DAVIDSON* (1909), 100 L. T. 623; 25 T. L. R. 352; 22 Cox, C. C. 99; 2 Cr. App. Rep. 51; 73 J. P. Jo. 100, C. C. A.  
*Annotation:—N.F. R. v. Ettridge*, [1909] 2 K. B. 24.

5549. ———.]—Where prisoner pleads guilty at his trial the Ct. of Criminal Appeal has power to quash the sentence passed upon him & to substitute such other sentence, warranted in

—*R. v. GALLANT* (1922), 65 D. L. R. 538; 37 Can. Crim. Cas. 234.—CAN.

b. *After plea of guilty—On technical point.*—In a review case the ct. will not, where the accused has pleaded guilty, upset a finding on a technical point.—*R. v.*

a statute prescribes a definite penalty for an offence, the imposition of a penalty other than the one prescribed is irregular, & the conviction will be set aside.—*Ex p. WILSON* (1877), 1 P. & B. 274.—CAN.

PART XIV. SECT. 2.

d. *Notice of appeal or of application for leave to appeal—Criminal Code*, R. S. C., 1906, c. 146, s. 1024.]—The

law, as they think ought to have been inflicted.—*R. v. ETTRIDGE*, [1909] 2 K. B. 24; 78 L. J. K. B. 479; 100 L. T. 624; 73 J. P. 253; 25 T. L. R. 391; 53 Sol. Jo. 401; 22 Cox, C. C. 101; 2 Cr. App. Rep. 62, C. C. A.  
*Annotation:—Folld. R. v. Woodman* (1909), 2 Cr. App. Rep. 67.

5550. *Sentence on breach of recognisances.*—*Qu.*: whether under Criminal Appeal Act, 1907 (c. 23), s. 7, there is an appeal against conviction for breach of a recognisance.—*R. v. CALLAGHAN* (1913), 8 Cr. App. Rep. 185, C. C. A.

5551. *Sentence as incorrigible rogue—By quarter sessions.*—*R. v. BROWN*, No. 5534, *ante*.

5552. ———.]—*R. v. JOHNSON*, No. 5535, *ante*.

5553. *Order for payment of costs—Evidence as to means heard by court.*—*R. v. HOWARD* (1910), 6 Cr. App. Rep. 17, C. C. A.

5554. *Order for restitution of property.*—On an appeal by prisoner against a conviction to the Ct. of Criminal Appeal in a case where an order for the restitution of stolen goods has been made, the person against whom it was made has no right, either under Criminal Appeal Act, 1907 (c. 23), s. 6 (2), to apply to that ct. to annul or vary such order, but can only be heard if the ct. proposes to annul or vary it.—*R. v. ELLIOTT*, [1908] 2 K. B. 452; 77 L. J. K. B. 812; 99 L. T. 200; 72 J. P. 285; 24 T. L. R. 645; 52 Sol. Jo. 535; 21 Cox, C. C. 666; 1 Cr. App. Rep. 15, C. C. A.

As to appeal against expulsion order.]—*See ALIENS*, Vol. II., pp. 193–197.

SECT. 2.—TIME LIMIT FOR APPEAL—  
EXTENSION OF TIME.

5555. *Notice of appeal or of application for leave to appeal—On point of law.*—*R. v. WESTACOTT*, No. 5900, *post*.

5556. ———.]—Where applt. was two or three days out of time in his appeal the ct. granted an extension of time to raise a point of law.—*R. v. JACKSON* (1909), 3 Cr. App. Rep. 166, C. C. A.

5557. ———. *Ignorance of time limit.*—Applt. was indicted for maliciously inflicting grievous bodily harm upon Mary Pearson. He was found guilty, & sentenced to five years' penal servitude. He applied for leave to appeal, giving as a reason for the delay that he did not understand that an appeal had to be lodged within ten days, as he was completely unnerved by the severity of his sentence. An extension of time granted. Inquiries had been made about the woman Pearson. She married a man seventeen years ago, & left him to live with applt. She then left applt. & lived with another man, who bore the name of Pearson. She had been several times convicted for assaults, & was a common prostitute. She was made allowances of money by Pearson, & it was suggested that applt. went to attempt to obtain some of it. At the trial the recorder thought the woman was respectable, & that applt. had been instrumental in breaking up the

power given by above sect. to a judge of the Supreme Ct. of Canada, to extend the time for the service on the A.-G. of notice of an appeal in reserved Crown case may be exercised after the expiration of the time limited by the Code for the service of such notice.—*GILBERT v. R.* (1907), 38 S. C. R. 207; 27 C. L. T. 158.—CAN.

e. ———. *After verdict—Before sentence.*—After verdict, but before sen-

PART XIV. SECT. 1, SUB-SECT. 3.  
c. *Sentence fixed by law.*—When

home:—*Held*: in view of the facts which had since come to the knowledge of the ct., the sentence must be reduced to eighteen months hard labour.—*R. v. DICKINSON* (1909), 2 Cr. App. Rep. 78, C. C. A.

**5558.** — *Appeal not entered on ground of expense.*—Extension of time for appealing was allowed on the ground that at the time of his conviction applt. was under the impression that to appeal against his conviction would entail expense which he was unable to meet.—*R. v. VILLARS* (1909), 3 Cr. App. Rep. 246, C. C. A.

**5559.** — *Term of detention as habitual criminal—Within discretion of Home Secretary.*—*R. v. ASTON* (1910), 4 Cr. App. Rep. 19, C. C. A.

**5560.** — *Effect of long delay—Discretion of court.*—The Ct. of Criminal Appeal will require substantial reasons to be advanced before they will grant an extension of time for giving notice of appeal, or of application for leave to appeal, under Criminal Appeal Act, 1907 (c. 23), s. 7 (1), at all events where the delay is other than slight.—*R. v. RHODES* (1910), 74 J. P. 380; 5 Cr. App. Rep. 35, C. C. A.

*Annotation.*—*R. v. Rigby* (1923), 128 L. T. 800.

**5561.** — *Interests of prisoner in other hands.*—When the ground of an applt. for extension of time for leave to appeal is that applt. believed that his interests were in other hands, the ct. will not entertain the applt. when there has been undue delay.—*R. v. WILLIAMS* (1911), 6 Cr. App. Rep. 158, C. C. A.

**5562.** — *Applt. was convicted of housebreaking, & was sentenced to imprisonment. Applt. had served that sentence & was released from prison six months before the applt. His character had been good. Applt. was a soldier, & the case had now been taken up on his behalf by some of the officers of his regiment, who had appealed to the Home Office. Some suspicion was thrown on another man in the same regiment, who had been convicted of other stealing; with the property stolen by him was found one of the articles stolen in the housebreaking for which the applt. was convicted:—Held: leave to appeal would be granted.*—*R. v. WILLIAMS* (1912), 8 Cr. App. Rep. 71, C. C. A.

**5563.** — *When an applt. is made much out of time, the ct. will only grant it for strong reasons.*—*R. v. WATSON* (1912), 8 Cr. App. Rep. 45, C. C. A.

**5564.** — *Prisoner with bad record.*—*R. v. HARTLEY* (1913), 9 Cr. App. Rep. 218, C. C. A.

**5565.** — *Conviction against co-offender—quashed.*—*R. v. PRIESTLEY* (1914), 10 Cr. App. Rep. 37, C. C. A.

**5566.** — *Discretion of court.*—If the ct. thinks that there was no case to be put to the jury it will quash the conviction.

If the ct. thinks there has been a miscarriage

tence, it is too late to move for a reserved case.—*R. v. PERTELLA, R. v. LEE CHUNG* (1908), 14 B. C. R. 43. CAN.

**1.** — *Effect of long delay—After sentence served.*—There is no general rule that after serving his sentence a prisoner is absolutely disqualified from moving for a new trial on the ground that the verdict was against the weight of evidence. An application for a new trial on this ground must be made promptly; & the fact that, with the assent of the Crown, leave has been granted by the Supreme Ct. to move the Ct. of Appeal for a new trial does not bind the Ct. of Appeal to go into the merits of the case if the application has not been

made within a reasonable time.—*R. v. HUGHES* (1909), 29 N. Z. L. R. 239.—N.Z.

#### PART XIV. SECT. 3.

**5571 i.** *Grounds of appeal—Reference to court when insufficient.*—Notice of appeal from a conviction for stealing in a dwelling-house disclosed that the only ground of appeal was whether identification could be proved by evidence of finger prints. The Registrar, considering that point of law was settled by authority, referred the appeal to the ct. for summary determination, & the ct. dismissed the appeal summarily as frivolous.—*R. v. MORRIS* (No. 2), [1914] S. R. Q. 274.—AUS.

of justice in respect of which there is no appeal, it will order facilities for an appeal to be given.—*R. v. JACKSON & REYNOLDS (alias ROPER)* (1914), 10 Cr. App. Rep. 28, C. C. A.

**5567.** — *—*—The ct. will not entertain an applt. for extension of time for leave to appeal except on strong grounds.—*R. v. RIGBY* (1923), 128 L. T. 800; 87 J. P. 123; 39 T. L. R. 453; 67 Sol. Jo. 681; 27 Cox, C. C. 411; 17 Cr. App. Rep. 111, C. C. A.

**5568.** — *—*—The ct. only grants an extension of time for appealing in exceptional cases.—*R. v. MOORE* (1923), 17 Cr. App. Rep. 155, C. C. A.

**5569.** — *No power when sentence of death passed.*—The Ct. of Criminal Appeal may amend a notice of an applt. for leave to appeal against a conviction on grounds involving questions of fact, duly given under Criminal Appeal Act, 1907 (c. 23), s. 7 (1), into a notice of appeal involving grounds of law only. On an applt. for leave to appeal against a conviction for murder, where it appeared there were grounds of law which could be argued in favour of applt. the ct. made such an amendment, as by sect. 7 of the Act they were prevented from extending the time for giving notice of appeal.—*R. v. MEAD* (1909), 73 J. P. 192; 53 Sol. Jo. 378; 2 Cr. App. Rep. 47, C. C. A.

**5570.** — *—*—*R. v. TWYNHAM*, No. 5544, ante.

#### SECT. 3.—NOTICE OF APPEAL.

**5571.** *Grounds of appeal—Reference to court when insufficient.*—*R. v. OLIVER*, No. 5598, post.

**5572.** — *Should be stated in notice.*—Grounds of appeal should be stated in the notice of appeal & not in written statements addressed to the ct.—*R. v. SIMPKINS* (1922), 17 Cr. App. Rep. 1, C. C. A.

**5573.** — *In general terms—When shorthand notes not yet available for counsel.*—Even when the shorthand note of the trial is not in counsel's hands, notice of appeal must state, at least generally, the grounds & particulars relied upon.—*R. v. ADLER* (1923), 17 Cr. App. Rep. 105, C. C. A.

**5574.** — *Not stated in the notice—Must be stated to court.*—When an appeal to the Ct. of Criminal Appeal is to be supported on a ground not stated in the notice, it should be mentioned in counsel's opening.—*R. v. LEE KUN* (1916), 32 T. L. R. 225; 11 Cr. App. Rep. 293, C. C. A.

**5575.** — *Misdirection—Particulars must be given with notice.*—Particulars of misdirection alleged as a ground of appeal should be given in the notice of appeal.

The ct. should always have particulars of the

**5572 i.** — *Should be stated in notice.*—The representative of the Crown should be served with a notice of motion setting out the grounds of appeal.—*R. v. LAI PING* (1904), 25 C. L. T. 22; 11 B. C. R. 102.—CAN.

**5572 ii.** — *—*—In all cases where leave to appeal is applied for, ample notice of the application must be given to the A.-G., & the notice of motion should set forth the grounds relied on.—*R. v. VANBUSKIRK POIRIER* (1920), 48 N. B. R. 24; 57 D. L. lt. 513.—CAN.

**5575 i.** — *Misdirection—Particulars must be given with notice.*—When, in a criminal appeal it is intended to rely on alleged misdirection, or to object

**Sect. 3.—Notice of appeal. Sect. 4: Sub-sects. 1 & 2, A. & B.]**

misdirection complained of; but the ct. has a discretion in the matter (LORD READING, C.J.).—*R. v. ANON.* (1916), 12 Cr. App. Rep. 7, C. C. A.

**5576.** ———.]—Substantial particulars of misdirection or of other objections to the summing up must always be set out in, or sent to the Registrar of the Ct. of Criminal Appeal with, the notice of appeal. If required, the Registrar will ask for further & better particulars.—*WYMAN v. WYMAN* (1918), 13 Cr. App. Rep. 163, C. C. A.

**5577.** ———.]—In appeals on the ground of misdirection, the extent of the misdirection suggested should be carefully stated.—*R. v. HOOLEY, MACDONALD & WALLIS* (1922), 92 L. J. K. B. 78; *sub nom. R. v. HOOLEY, R. v. MACDONALD, R. v. WALLIS*, 127 L. T. 228; 87 J. P. 4; 38 T. L. R. 724; 27 Cox, C. C. 248; 16 Cr. App. Rep. 171, C. C. A.

*Annotation:—Refd. R. v. Jones* (1922), 16 Cr. App. Rep. 95.

**5578. Withdrawal of notice of abandonment of appeal.]—***R. v. BARKER* (1910), 5 Cr. App. Rep. 283, C. C. A.

**5579.** ———.]—The reinstatement of an abandoned appeal is entirely at the discretion of the ct.—*R. v. PITMAN* (1916), 12 Cr. App. Rep. 14, C. C. A.

*Annotations:—Apld. R. v. Cox* (1920), 15 Cr. App. Cas. 36. *Mentd. R. v. Moore* (1923), 17 Cr. App. Rep. 153.

**5580.** ———.]—The ct. will only exceptionally allow a notice of abandonment of appeal to be withdrawn.—*R. v. COX* (1920), 15 Cr. App. Rep. 36.

**5581.** ———.]—Special circumstances must exist before the Ct. of Criminal Appeal will grant leave to withdraw a notice of the abandonment of an appeal & will allow the appeal to proceed.—*R. v. SLOAN, R. v. WADDINGTON* (1923), 87 J. P. 56; 39 T. L. R. 173; 67 Sol. Jo. 403, C. C. A.

**5582. Form of notice—Application against sentence—Intention to appeal against conviction.]—**If a notice of appln. for leave to appeal, though in form an appln. as to sentence, is in fact intended as an appln. against conviction, the ct. may treat it as such.—*R. v. MILBURN* (1909), 2 Cr. App. Rep. 152, C. C. A.

**5583. Amendment of notice—From fact to point of law.]—***R. v. MEAD*, No. 5569, *ante*.

**SECT. 4.—PROCEDURE AT HEARING.**

**SUB-SECT. 1.—IN GENERAL.**

**5584. Leave must be obtained when necessary.]—**The Ct. of Criminal Appeal will not hear an appeal against conviction for which its leave is necessary, unless such leave has been formally asked.—*R. v. SCHEFFER* (1914), 11 Cr. App. Rep. 1.

**5585. Presence of appellant—Appeal involving questions of fact.]—**Where an appeal to the Ct.

of Criminal Appeal involves questions of fact & prisoner desires to be present, the ct. has no power under Criminal Appeal Act, 1907 (c. 23), s. 11 (1), to hear the appeal in his absence.—*R. v. DUNLEAVEY*, [1909] 1 K. B. 200; 78 L. J. K. B. 359; 100 L. T. 240; 73 J. P. 56; 21 Cox, C. C. 760; 1 Cr. App. Rep. 212, C. C. A.

**5586. Hearing in camera—Conviction for incest.]—**

—Punishment of Incest Act, 1908 (c. 45), s. 5, applies to proceedings in the Ct. of Criminal Appeal.—*R. v. PRIESTLEY* (1922), 127 L. T. 221; 16 Cr. App. Rep. 143, C. C. A.

*See, now, Criminal Law Amendment Act, 1922* (c. 56), s.

**5587. ——— Conviction under Defence of Realm Amendment Act, 1915 (c. 34), s. 1 (3).]—***R. v. M.* (1915), 32 T. L. R. 1; 11 Cr. App. Rep. 207, C. C. A.

**5588.** ———.]—*ANON.* (1915), 11 Cr. App. Rep. 281, C. C. A.

**5589. Adjournment of appeal—Judge at trial a member of the court.]—**The ct. has a discretion in granting an adjournment on the ground of one of its members having been the judge at the trial.—*R. v. SHARMAN (alias SUTHERLAND)* (1913), 9 Cr. App. Rep. 131, C. C. A.

**5590.** ———.]—*R. v. BENNETT, R. v. NEWTON* (1913), 9 Cr. App. Rep. 146; 77 J. P. Jo. 508, C. C. A.

**5591. ——— To enable witness to be called.]—**In a proper case the ct. will adjourn the hearing of an appln., & permit the name of a prospective witness not to be mentioned in public if it is duly supplied to the registrar.—*R. v. GORDON, HICKSON, WILLIS & HARRIS* (1913), 8 Cr. App. Rep. 237, C. C. A.

**5592. ——— For trial of further indictments.]—***R. v. LAYCOCK* (1911), 6 Cr. App. Rep. 209, C. C. A.

**5593. ——— Notice of intended application to be given.]—**An appln. for adjournment of a case likely to last some time should be notified to the ct. some days before its sitting.—*R. v. ROBERTS* (1917), 12 Cr. App. Rep. 252.

**5594. Only one counsel heard—For appellant.]—***R. v. WEAVER* (1908), 1 Cr. App. Rep. 12; 72 J. P. Jo. 256, C. C. A.

**5595.** ———.]—The ct. will only hear one counsel for applt.—*R. v. REYNOLDS* (1910), 6 Cr. App. Rep. 28, C. C. A.

**5596. Duty of counsel—As to personal investigation of facts.]—**Counsel ought not to inform the ct. of any facts he has personally investigated in the course of preparing the appeal.—*R. v. BENJAMIN* (1913), 8 Cr. App. Rep. 146, C. C. A.

**5597. Separate judgments may be delivered.]—***R. v. KERR* (1921), 15 Cr. App. Rep. 165, C. C. A.

**5598. Summary determination of appeals—Neither side represented—Criminal Appeal Act, 1907 (c. 23), s. 15 (2).]—***R. v. OLIVER* (1908), 1 Cr. App. Rep. 45; 72 J. P. Jo. 340, C. C. A.

**5599.** ———.]—*R. v. RYE* (1909), 2 Cr. App. Rep. 155, C. C. A.

**5600. Application to single judge—Reference to**

to the summing up of a judge at the trial, substantial particulars of the misdirection & of any other objection to the summing up must be clearly stated in the notice of the appeal, or sent to the Registrar with the notice of the appeal.—*R. v. TEMPLETON*, [1922] St. R. Qd. 165.—**AUS.**

**g. Amendment of notice—Adding grounds of appeal.]—**Prisoner gave notice of appeal within the specified time. Counsel was assigned to prisoner after that time. On hearing of the appeal, counsel moved to amend the notice of appeal by adding several

additional grounds of appeal, & the ct. granted leave.—*R. v. WALKER* (No. 1) (1915), S. R. Q. 115.—**AUS.**

**PART XIV. SECT. 4, SUB-SECT. 1.**

**h. Presence of appellant.]—**Where a person is detained in a State gaol under a sentence of a State Ct., the High Ct. has no jurisdiction to order him to be allowed to come before the High Ct. in order that he may personally apply for leave to appeal from a judgment of a court of that State.—*HORWITZ v. CONNOR* (1908), 6 C. L. R. 38.—**AUS.**

**k. ———.]—***R. v. RIEL* (No. 1) (1885), 1 Terr. L. R. 20.—**CAN.**

**l. ———.]—***R. v. GLASS* (1877), 21 L. C. J. 245.—**CAN.**

**m. Right to begin.]—**On special cases reserved at Criminal Trials, the party at whose instance the case has been reserved has the right to begin.—*R. v. ROBERTS* (1886), 12 V. L. R. 135.—**AUS.**

**n. Only one counsel heard—On either side.]—**In reserved criminal cases, only one counsel will be heard on either

5. Sentence ordered to run from date of conviction—Bail pending appeal—[Escape.]—Deft. was convicted of assault & sentenced to 30 days' imprisonment. He entered upon his sentence, but on the following day was admitted to bail pending an appeal which was heard six weeks later, when it was held that the appeal did not lie. Deft. was in ct. & left without



*Sect. 4.—Procedure at hearing: Sub-sect. 2, B. Sect. 5: Sub-sect. 1, A. & B.; sub-sect. 2, A.]*

**5620.** ———.]—If leave to appeal against sentence is obtained by misrepresentation, sentence will not run from the date of conviction.—*R. v. FENLEY* (1920), 15 Cr. App. Rep. 118, C. C. A.

**5621.** ———.]—Sentence of imprisonment in second division.]—In the case of first offenders sentenced to imprisonment in the second division the ct. is inclined to allow sentence to run from the date of conviction.—*R. v. DYER, BELLAMY & WAKEFIELD* (1909), 2 Cr. App. Rep. 174, C. C. A.

**5622.** ———.]—The ct. leans to allowing sentences of imprisonment in the second division to run from the date of conviction.

Resps. are not entitled to be heard on applns. for such relief.—*R. v. MASON* (1919), 14 Cr. App. Rep. 126; 84 J. P. Jo. 5, C. C. A.

**5623.** ———.]—Time in prison awaiting trial reckoned.]—*R. v. GULSTON*, No. 5611, *ante*.

**5624.** ———.]—*R. v. RANGLES* (1908), 1 Cr. App. Rep. 194, C. C. A.

**5625.** ———.]—Not on ground of good character.]—Previous good character is not a ground for allowing sentence to run from conviction.—*R. v. O'SULLIVAN* (1908), 1 Cr. App. Rep. 35, C. C. A.

**5626.** ———.]—Not where appeal adjourned to suit counsel.]—Where an appln. for leave to appeal is deferred to suit the convenience of counsel & is afterwards heard & dismissed, the ct. will not order the sentence to date from the conviction.—*R. v. PARK, R. v. HILL* (1915), 32 T. L. R. 157; 11 Cr. App. Rep. 304, C. C. A.

**5627.** ———.]—Although prosecution not represented.]—When the ct. is satisfied that a verdict was reasonable in view of the proved facts, it will not grant leave to appeal because the judge did not direct the jury on the alleged absence of motive on deft.'s part or refer to his previous good character.

The Ct. of Criminal Appeal, on dismissing an appln. for leave for appeal, may, notwithstanding that the prosecution is not represented, order that the sentence imposed on appt. shall run from the date of conviction.—*R. v. BROWNHILL* (1912), 29 T. L. R. 156; 8 Cr. App. Rep. 118; 76 J. P. Jo. 616, C. C. A.

**5628.** ———.]—Prosecution not entitled to be heard on application.]—*R. v. MASON*, No. 5622, *ante*.

**5629.** Sentence ordered to run from date of entry of case in list—Adjournments.]—*R. v. BOYD*

interference, remaining at large for three months, when he was re-arrested & taken to gaol to complete his sentence.—*Held*: (1) re-arrest was justified, for his failure to return to custody when his appeal failed constituted in law an escape, & made him liable to serve the uncompleted portion of the original sentence, as well as to the punishment, if any, to be awarded for the escape itself; (2) having obtained his liberty on bail on his own motion pending the appeal, he could not be heard to say, though the proceedings were not justified, that he had not been out on bail during this period, which, therefore, was not to be reckoned as part of his sentence.—*R. v. RAPP* (1914), 31 O. L. R. 117.—**CAN.**

#### PART XIV. SECT. 5, SUB-SECT. 1.—A.

**5630 i.** *Whether court will review verdict.*—The ct. has no inclination to control or interfere with the verdict of a jury, where there is conflicting or circumstantial evidence, & the case has been legally tried & properly & fairly submitted to them.—*R. v. DOWSEY* (1866), 2 Old. 93.—**CAN.**

**5630 ii.** ———.]—A question of fact or of mixed fact & law, can not be dealt with by the ct.—*R. v. WAKELYN* (1913), 23 W. L. R. 807; 10 D. L. R. 455; 4 W. W. R. 170; 21 Can. Crim. Cas. 111.—**CAN.**

**5630 iii.** ———.]—Under Code of Criminal Procedure, s. 418, an appeal in a case tried by a jury lies on matters of law only, & the ct. has no power to try the accused on matters of fact.—*WAFADAR KHAN v. R.* (1894), 1 L. R. 21 Calc. 955.—**IND.**

**5630 iv.** ———.]—On an application by a convicted person to the Supreme Ct. under The Criminal Code Act, 1893, s. 416, for leave to apply to the Ct. of Appeal for a new trial on the ground that the verdict was against the weight of evidence, the judge should consider whether there is a reasonable prospect of the Ct. of Appeal granting a new trial. If it is clearly not arguable that the verdict is against the weight of evidence, the application ought to be refused.—*R. v. BRODERSON* (1905), 25 N. Z. L. R. 861.—**N.Z.**

**t.** ———.]—Where dissent in court below.]—In a criminal appeal, it is

(1908), 1 Cr. App. Rep. 64; 72 J. P. Jo. 352, C. C. A.

#### SECT. 5.—SCOPE OF INQUIRY.

##### SUB-SECT. 1.—MATTERS DEALT WITH AT TRIAL.

###### A. Matters left to and decided by Jury.

**5630.** *Whether court will review verdict.*—*R. v. TOWLER* (1908), 1 Cr. App. Rep. 34, C. C. A.

**5631.** ———.]—The ct. will not entertain a point submitted to the jury with a proper direction.—*R. v. PAYS* (1908), 1 Cr. App. Rep. 48, C. C. A.

**5632.** ———.]—*R. v. MARTIN*, No. 5993, *post*.

**5633.** ———.]—An alibi will not be re-tried by the Ct. of Criminal Appeal.—*R. v. POPE* (1909), 2 Cr. App. Rep. 22, C. C. A.

**5634.** ———.]—When the defence is mistaken identity, if it is put properly to the jury the ct. will not set the verdict aside. The jury are the judges of fact. Criminal Appeal Act, 1907 (c. 23), was never meant to substitute another form of trial for trial by jury.—*R. v. SIMPSON* (1909), 2 Cr. App. Rep. 128, C. C. A.

**5635.** ———.]—The ct. does not sit to try cases over again (*per CUR.*).—*R. v. JENKINS* (1909), 2 Cr. App. Rep. 247, C. C. A.

**5636.** ———.]—*R. v. EDMUNDS* (1909), 25 T. L. R. 658; 2 Cr. App. Rep. 257, C. C. A.

**5637.** ———.]—Where the facts are all consistent with guilt, & some inconsistent with innocence, the ct. will not interfere with the verdict.—*R. v. WOODBRIDGE* (1909), 2 Cr. App. Rep. 321, C. C. A.

**5638.** ———.]—The ct. will not review a verdict when the defence of accident has been properly put before the jury.—*R. v. ATHERTON* (1909), 3 Cr. App. Rep. 84, C. C. A.

**5639.** ———.]—We do not sit to try cases where something was not proved which could have been proved, & in this case we think there was no ground whatever for saying applt. was not properly convicted (*per CUR.*).—*R. v. SAUNDERS* (1909), 3 Cr. App. Rep. 227, C. C. A.

**5640.** ———.]—When there has been a proper direction to the jury it is not the usual practice of this ct. to interfere with the jury's verdict & to re-try the case. It is only in very exceptional cases that this rule will be departed from.

It must not be supposed that the fact that a judge disapproved of the verdict of the jury would alone be sufficient to upset a conviction.—*R. v. SCHIRAGER* (1911), 6 Cr. App. Rep. 253, C. C. A.

doubtful whether any question except that upon which there was a dissent in the court below could be reviewed on an appeal to the supreme ct.—*EBERTS v. R.* (1912), 47 S. C. R. 2.—**CAN.**

**u.** ———.]—Where the ct. appealed from has affirmed the refusal to reserve a case moved for at a criminal trial on two grounds, & is unanimous as to one of such grounds but not as to the other, the Supreme Ct. can only take into consideration the ground of motion in which there was dissent.—*MCINTOSH v. R.* (1894), 23 S. C. R. 180.—**CAN.**

**a.** ———.]—In an appeal taken to the Supreme Ct. the subject of appeal is restricted to the matters upon which there was a judicial dissent in the provincial ct.—*R. v. PICARIELLO & LASSANDRO*, [1923] 1 W. W. R. 1489; [1923] 2 D. L. R. 706; 39 Can. Crim. Cas. 229.—**CAN.**

**b.** *Case stated must contain all facts.*—A case reserved for Ct. of Appeal must contain all the findings of fact upon which the judge below based his decision.—*R. v. STEERS* (1918), 26 B. C. R. 334.—**CAN.**

5641. —.]—*R. v. HANCOX*, No. 5780, *post*.  
 5642. —.]—*R. v. BROWNHILL*, No. 5627, *ante*.  
 5643. —.]—*R. v. HAND* (1913), 48 L. Jo. 136, C. C. A.

### B. Defence of Insanity.

5644. **Whether appeal allowable.**—*R. v. JEFFERSON*, No. 5513, *ante*.

5645. —.]—The ct. will not entertain an appln. for leave to appeal on the ground of insanity unless a strong *prima facie* case is made out.—*R. v. JESSHOPE* (1910), 5 Cr. App. Rep. 1, C. C. A.  
*Annotations* :—*Refd.* *R. v. Loake* (1911), 7 Cr. App. Rep. 71; *R. v. Lumb* (1912), 7 Cr. App. Rep. 263; *R. v. Boss* (1921), 16 Cr. App. Rep. 71.

5646. —.]—Where a defence of insanity has been suggested but not proved, & has not been accepted by the jury, this ct. will not interfere.—*R. v. ATHERLEY* (1909), 3 Cr. App. Rep. 165, C. C. A.

5647. —.]—The *onus* of proving insanity is upon the defence, it is not for the Ct. of Criminal Appeal, but for the jury to deal with the question of prisoner's sanity or insanity.—*R. v. SMITH* (1910), 6 Cr. App. Rep. 19, C. C. A.  
*Annotation* :—*Refd.* *R. v. Abramovitch* (1912), 7 Cr. App. Rep. 145.

5648. —.]—Where there is conflicting evidence as to prisoner's sanity, the ct. will not interfere on the ground that the judge took a view against insanity, if he directed the jury properly on the principles which should guide them.—*R. v. MARSLAND* (1911), 7 Cr. App. Rep. 77, C. C. A.

5649. —.]—The ct. will not grant an appln. for leave to appeal on the ground that applt. was temporarily insane when he committed the crime, when that suggestion has been properly dealt with at the trial.—*R. v. COLLINS* (1911), 6 Cr. App. Rep. 193, C. C. A.

5650. —.]—When the defence of insanity has been properly left to the jury, the ct. will not as a rule reconsider the verdict.—*R. v. LAW* (1913), 9 Cr. App. Rep. 246, C. C. A.

5651. —.]—When the only defence at the trial was that of insanity the ct. will not allow an appeal on the fact.—*R. v. THORNLEY* (1915), 11 Cr. App. Rep. 270, C. C. A.

5652. —.]—When the defence of insanity has been set up at the trial, it is only in exceptional circumstances that this ct. will hear any further

evidence on that subject.—*R. v. PERRY* (1919), 14 Cr. App. Rep. 48, C. C. A.

5653. **Powers of Home Secretary.**—Where a defence of insanity has not been accepted by the jury at the trial, the Ct. of Criminal Appeal will not interfere except on conclusive proof. The large powers possessed by the Home Secretary remain untouched in any way by the Act constituting this ct.—*R. v. JONES* (1910), 4 Cr. App. Rep. 207, C. C. A.

*Annotation* :—*Refd.* *R. v. True* (1922), 127 L. T. 561.

5654. —.]—Where a defence of insanity has been left with a proper direction to the jury at the trial, the ct. will not act upon fresh evidence tendered to prove insanity unless legal insanity be clearly proved. The suggestion that applt.'s family history points to insanity in his case should be made to the Home Secretary.—*R. v. LOAKE* (1911), 7 Cr. App. Rep. 71, C. C. A.  
*Annotation* :—*Refd.* *R. v. Lumb* (1912), 7 Cr. App. Rep. 263.

5655. —.]—Where, after a trial, fresh evidence as to prisoner's insanity is forthcoming, this ct. will, in its discretion, leave the case to be dealt with by the Home Secretary, if he thinks fit to do so.—*R. v. LUMB* (1912), 7 Cr. App. Rep. 263, C. C. A.

*Annotations* :—*Folld.* *R. v. Boss* (1921), 16 Cr. App. Rep. 71. *Refd.* *R. v. McLaren* (1913), 9 Cr. App. Rep. 107; *R. v. Tillet* (1921), 15 Cr. App. Rep. 159.

5656. —.]—*R. v. Boss* (1921), 16 Cr. App. Rep. 71, C. C. A.

### SUB-SECT. 2.—MATTERS NOT RAISED AT TRIAL.

#### A. Specific Defence not raised.

5657. **Whether appeal allowable.**—The ct. will not entertain a defence of payment over of money not set up at the trial.—*R. v. COOPER* (1909), 3 Cr. App. Rep. 100, C. C. A.

5658. —.]—When the defence of insanity has been successfully set up at the trial, the Ct. of Criminal Appeal will not entertain an appeal on the ground that the true defence was innocence of the offence charged.

It is against the practice of the ct. to allow an appeal to be made on lines different from those followed in the ct. below (*PHILLMORE*, J.).—*R. v. CARROLL* (1910), 4 Cr. App. Rep. 146, C. C. A.

5659. —.]—*R. v. SIMPSON*, No. 5979, *post*.

D. L. R. 121; 35 Can. Crim. Cas. 261; 61 S. C. R. 608.—**CAN.**

### PART XIV. SECT. 5, SUB-SECT. 2.—A.

5657 i. **Whether appeal allowable.**—On a charge of murder accused was convicted of manslaughter. His counsel had refrained at the trial from calling evidence of previous hostility by deceased towards the accused, apprehending that it might supply evidence of motive.—*Held* : a new trial should not be granted in order to enable accused to call this evidence for the purpose of showing that he acted in self-defence.—*MATTSON v. R.* (1919), 27 C. L. R. 176.—**AUS.**

5657 ii. —.]—If there is error in a judge's charge, the lack of objection to it at the time does not disable accused from taking advantage of it later.—*R. v. MURRAY & MAHONEY*, [1917] 2 W. W. R. 805.—**CAN.**

5657 iii. —.]—An accused person who at his trial has not pleaded the right of private defence, but has raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial that he acted in the exercise of the right of private defence.—*R. v. TIMMAL* (1898), 1 L. R. 21 All. 122.—**IND.**

### PART XIV. SECT. 5, SUB-SECT. 1.—B.

5644 i. **Whether appeal allowable.**—Prisoner was convicted of attempting to murder his wife. The defence of insanity was set up, & in support the general conduct & behaviour of the prisoner about the time of the commission of the crime, & the evidence of two medical practitioners, was relied on. The jury found the prisoner guilty, stating, in reply to a question of the judge, that they had considered the evidence on the defence of insanity :—*Held* : the finding of the jury against the defence of insanity not only was not unreasonable, but was reasonable, & therefore the appeal dismissed.—*It. v. MARINONE*, [1915] S. R. Q. 14.—**AUS.**

5644 ii. —.]—On a charge of murder, accused set the defence of insanity but was convicted. The ct. granted a new trial on the ground that further evidence on the question of insanity was available although it could have been procured at the trial. In such cases the ct. will relax the strict rule because the accused may not be capable of properly instructing his advisers.—*It. v. TUCKER* (1915), 15 S. R. N. S. W. 504; 32 N. S. W. W. N. 169.—**AUS.**

5644 iii. —.]—Deft. was convicted of the murder of his wife, & the evidence

clearly established the fact of killing, in circumstances which, in the absence of explanation, would constitute murder. The defence was, that deft. was insane. The judge refused to reserve for the opinion of the ct. sixteen questions which he was asked to reserve :—*Held* : there was no sufficient ground to support any of the questions except question 12, upon which it was directed that a case should be stated. Question 12 was as follows : "Was my charge to the jury that the *onus* was upon prisoner to satisfy them 'beyond a reasonable doubt' as to his insanity, a proper statement of the law"?—*Held* : the question should be answered in the negative, & a new trial should be directed.—*It. v. ANDERSON* (1914), 26 W. L. R. 783.—**CAN.**

5644 iv. —.]—On the defence of insanity on a charge of murder it is a misdirection, justifying a new trial, for the judge to instruct the jury that such defence must be established beyond a reasonable doubt. Insanity, as a defence on such charge, may be found upon a substantial preponderance in the weight of evidence. The degree of proof required is not as great as that required to overcome the presumption of innocence.—*R. v. CLARK*, [1921] 2 W. W. R. 446; 48 N. B. R. 342; 59

*Sect. 5.—Scope of inquiry: Sub-sect. 2, A., B. & C.; sub-sect. 3.]*

**5660.** ———.]—The ct. will not entertain a defence which was not, but which could have been, set up at the trial.—*R. v. DEANE* (1911), 7 Cr. App. Rep. 69, C. C. A.

**5661.** ———.]—A mere omission or misstatement in a summing up is not in itself a misdirection where the case has been fully heard by the jury but there is a miscarriage of justice within Criminal Appeal Act, 1907 (c. 23), s. 4, where the omission of misstatement is such that the jury may probably have been misled by it.

When a judge has said in the hearing of counsel & without any objection from him that a particular defence, say, consent, was not intended to be raised, applt. cannot in ordinary circumstances, rely on that defence on appeal (LORD ALVERSTONE, C.J.).—*R. v. WANN* (1912), 107 L. T. 462; 76 J. P. 269; 28 T. L. R. 240; 23 Cox, C. C. 183; 7 Cr. App. Rep. 135, C. C. A.

*Annotation:—Mentd. R. v. May* (1912), 8 Cr. App. Rep. 63.

**5662.** ———.]—The ct. will not entertain a case for applt. inconsistent with the defence set up at the trial.—*R. v. PHILPOT* (1912), 7 Cr. App. Rep. 140, C. C. A.

**5663.** ———.]—Where, on a trial for murder, the defence was accident, the ct. will not entertain an appeal on the ground that there was sufficient provocation to reduce the crime to manslaughter.—*R. v. FITZGIBBONS* (1912), 7 Cr. App. Rep. 264, C. C. A.

**5664.** ———.]—Appln. for leave to appeal granted where, in exceptional circumstances, an important point for the defence was not taken, but refused on a point which could have been taken at the trial.—*R. v. LEE* (1910), 12 Cr. App. Rep. 67, C. C. A.

**5665.** ———.]—*Alibi.*—Defence of alibi not set up at the trial must not be set up on appeal.—*R. v. BEAUCHAMP* (1909), 2 Cr. App. Rep. 20, C. C. A.

**5666.** ———.]—*Insanity.*—*R. v. ATKINS*, No. 5703, *post.*

**5667.** ———.]—*R. v. DE VERE*, No. 5516, *ante.*

**5668.** ———.]—Where evidence for the defence as to the state of prisoner's mind can be called at the trial, the ct. will not hear that evidence unless, perhaps, insanity is alleged.—

#### PART XIV. SECT. 5, SUB-SECT. 2.—B.

**5674i.** *Whether appeal allowable.*—It is the right & duty of the ct. to take into consideration objections to the record not put forward by counsel, as also answers, not adduced by the Crown, to points, which have been taken for the defence.—*It. v. NASH & FORBES* (1855), 2 Legge, 905.—*AUS.*

**5674ii.** ———.]—While it is well established that in a proper case the ct. will not refuse to grant a new trial in a case of felony because counsel for the defence did not take the objection at the trial, deliberate withholding of objection to something which might be remedied at the trial ought to be discountenanced; & where the objection is one having reference to practice & procedure, failure to take it ought, unless in very exceptional circumstances, to be an answer to the objection when afterwards urged.—*It. v. WALKER & CHINLEY* (1910), 13 W. L. R. 47.—*CAN.*

**5674iii.** ———.]—Objections to the reception of evidence as to confessions not having been raised when the evidence was tendered, it was not open to prisoner to raise them after verdict.—*R. v. HOO SAM* (1912), 20 W. L. R. 571; 1 W. W. R. 1049.—*CAN.*

*R. v. BRADLEY* (1909), 2 Cr. App. Rep. 124, C. C. A.

**5669.** ———.]—*R. v. DENCH*, No. 5515, *ante.*

**5670.** ———.]—Upon an indictment for felonious wounding, applt. was found guilty, but insane. At the trial applt., who was undefended, pleaded that what he did was done in self-defence. The only question which the judge left to the jury was whether applt. was insane:—*Held*: applt.'s defence, however weak, should have been left to the jury; failure to so leave it amounted to a miscarriage of justice; & therefore the conviction must be quashed.—*R. v. HILL* (1911), 105 L. T. 751; 76 J. P. 49; 28 T. L. R. 15; 22 Cox, C. C. 625; 7 Cr. App. Rep. 26, C. C. A.

*Annotation:—Refd. R. v. Immer, R. v. Davis* (1917), 118 L. T. 416.

**5671.** ———.]—The ct. will not, as a rule, entertain a defence of insanity not set up at the trial.—*R. v. McLAREN* (1913), 9 Cr. App. Rep. 107, C. C. A.

*Annotation:—Refd. R. v. Alexander* (1913), 9 Cr. App. Rep. 139.

**5672.** ———.]—*R. v. ALEXANDER* (1913), 109 L. T. 745; 23 Cox, C. C. 604; 9 Cr. App. Rep. 139; 77 J. P. Jo. 483, C. C. A.

*Annotations:—Refd. R. v. Gilbert* (1914), 84 L. J. K. B. 1424; *It. v. Lesbini*, [1914] 3 K. B.

**5673.** ———.]—The ct. declines to receive evidence of insanity when it has not been offered in defence at the trial.—*R. v. TELLETT* (1921), 15 Cr. App. Rep. 159, C. C. A.

#### B. Point of Law not taken.

**5674.** *Whether appeal allowable.*—*R. v. ROSE* (1909), 2 Cr. App. Rep. 265, C. C. A.

**5675.** ———.]—*Effect of proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1).*—*R. v. RAWLINGS*, No. 6149, *post.*

**5676.** ———.]—A conviction may be quashed on a point of law not taken at the trial.—*R. v. BOUGHTON* (1910), 6 Cr. App. Rep. 8, C. C. A.

**5677.** ———.]—*R. v. SHAW* (1911), 104 L. T. 112; 75 J. P. 191; 27 T. L. R. 181; 22 Cox, C. C. 376; 6 Cr. App. Rep. 103, C. C. A.

**5678.** ———.]—The ct. may give effect to a point of law which might have been taken for the defence at the trial.—*R. v. WILKS* (1914), 10 Cr. App. Rep. 16, C. C. A.

**5674 iv.** ———.]—A conviction for adultery on two counts of an indictment, the first charging an offence on Sept. 16, 1913, & the second an offence on Mar. 14, 1914, will not be quashed on a case reserved on objection that the evidence adduced in support of the second count was not admissible in support of the first, if the accused failed to avail himself of the privilege of applying to have each count tried separately.—*It. v. STRONG* (1915), 43 N. B. R. 190.—*CAN.*

**5674 v.** ———.]—On trial of accused evidence was given of a confession by him. The Crown refused to call as a witness a third party who was present when the alleged confession was made. The judge refused to compel the Crown to call all its witnesses with regard to the alleged confession & take all the evidence thereon before admitting it in evidence. The main trial then proceeded & in the course of it accused's counsel himself called the third party as a witness with regard to the alleged confession. The Ct. of Appeal dismissed a motion on behalf of accused under Criminal Code, s. 1015, for leave to appeal from the Judge's refusal to reserve the question of the proper admission of the confession.—*R. v. GAUTHIER*, [1921] 2 W. W. R. 1.—*CAN.*

**5674 vi.** ———.]—If an objection exists, whether to the charge of the Judge or to the reception of evidence, the objection must be taken at the time, & taken in a specific, tangible shape, so that it may not be misunderstood.—*It. v. O'CONNELL* (1844), 7 L. R. 261, 332.—*IR.*

**5674 vii.** ———.]—Where an indictment is informal, but accused is not thereby prejudiced in his defence, & does not raise any objection on that ground at trial, the ct. will not on appeal quash a conviction merely on the ground of such informality.—*It. v. WANG YUNG SHAN* (1905), T. S. 397.—*S. AF.*

**5674 viii.** ———.]—Where an indictment charged accused with the contravention of one of three closely related sects. of a certain statute, which sects. had all to be referred to for a complete definition of the offence intended to be charged, the sect. mentioned only providing the penalty to be imposed for a commission of such offence, & accused, pleading to the merits, at trial took no objection to, & suffered no prejudice in consequence of, the error:—*Held*: the indictment was sufficient to sustain a conviction of such offence.—*DENNILL v. R.* (1905), T. S. 100.—*S. AF.*

5679. —.]—*R. v. METZ*, No. 6152, *post*.

5680. —.]—The Ct. of Criminal Appeal will not entertain an objection to the admissibility of evidence, if the objection was not taken at the trial when the evidence was tendered, although it was taken during the opening speech of counsel for the prosecution.—*R. v. SANDERS*, [1919] 1 K. B. 550; 88 L. J. K. B. 982; 120 L. T. 573; 26 Cox, C. C. 390; 14 Cr. App. Rep. 9, C. C. A.

#### C. Other Cases.

5681. **Defence reserved before magistrates—Not fully investigated at trial.**—(1) If deft. reserves his defence before the magistrate, so that his defence at the trial has not been investigated, the ct. will not review the case on that ground. Otherwise, perhaps, if he has so acted by legal advice.

(2) A conviction will not be quashed because, in a conflict of testimony, the jury might have come to an opposite conclusion.—*R. v. McNAIR* (1909), 25 T. L. R. 228; 2 Cr. App. Rep. 2, C. C. A.

5682. **Charge of serious offence—Verdict of lesser offence—Omission of defence to deal with lesser offence.**—*R. v. DONOVAN & HURLEY* (1909), 2 Cr. App. Rep. 17, C. C. A.

#### SUB-SECT. 3.—EXAMINATION BY AND REPORTS TO THE COURT.

5683. **Examination of handwriting.**—In this case the question was one of identity. At the trial there was a considerable conflict of oral evidence. The Ct. of Criminal Appeal compared the writing of the real culprit with that of applt. written at the trial, on his notice of appeal, & in prison, & expressed the opinion that the two sets of writing were by a different hand. On that ground & on the ground that the differences between the handwriting of applt. at the trial & that of the real culprit were not adequately & clearly dealt with in the summing up, they quashed the conviction.—*R. v. SMITH* (1909), 74 J. P. 54; 3 Cr. App. Rep. 87, C. C. A.

5684. —.]—(1) On an issue as to handwriting, the ct. may inform itself by examining the notice of appeal which is in applt.'s handwriting.

(2) Proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1), applied in the case of a summing up which was inadequate because it did not put the whole of the defence to the jury.—*R. v. TOTTY* (1914), 111 L. T. 167; 24 Cox, C. C. 227; 10 Cr. App. Rep. 78, C. C. A.

*Annotation:—As to (2) Refd. R. v. Immer, R. v. Davis* (1917), 118 L. T. 416.

5685. **Examination of finger prints.**—Where necessary the Ct. of Criminal Appeal will examine finger prints alleged to be those of applt.—*R. v. BACON* (1915), 11 Cr. App. Rep. 90, C. C. A.

5686. **Reference to depositions.**—*R. v. HILLMAN* (1908), 1 Cr. App. Rep. 49, C. C. A.

5687. —.]—(1) Misdirection on part of the

case for the prosecution is not a ground for quashing a conviction unless there has been a substantial miscarriage of justice.

(2) The ct. may look at the depositions taken before the magistrate though they were not put in at the trial.—*R. v. MONK* (1912), 7 Cr. App. Rep. 119, C. C. A.

5688. —.]—*R. v. HANCOX*, No. 5780, *post*.

5689. —.]—Where there is some evidence to go to the jury, the ct. will, if necessary, look at the depositions.—*R. v. METCALFE* (1913), as reported in 9 Cr. App. Rep. 7, C. C. A.

5690. — **Coroner's depositions not put in at trial.**—B. kept an establishment or home for the reception of mental defectives, & the business & financial arrangements of the home were managed on her behalf by applt. In 1915 B. had a paralytic stroke, & shortly afterwards she executed a general power of attorney in favour of applt. which placed him in full financial control of the establishment. B., however, continued to look after the management of the home, & the welfare of its inmates. In Jan. 1919 one of the inmates died. The evidence given at the coroner's inquest showed that death was due to neglect & starvation. B. & applt. were charged with the manslaughter of deceased. Applt. was convicted at the trial, & sentenced to imprisonment. B. was found unfit to plead, & ordered to be detained during His Majesty's pleasure. On the facts disclosed at the trial, & shown by the coroner's depositions, put in by leave of the ct., on appeal:—*Held*: there was no evidence that applt. had undertaken a duty amounting to the charge of the inmates of the home, & on this ground the conviction of applt. was quashed. Under Criminal Appeal Act, 1907 (c. 23), s. 9 (a), the ct. has power to receive as fresh evidence depositions in a coroner's ct. not put in at the trial.—*R. v. HALL* (1919), 122 L. T. 31; 84 J. P. 56; 26 Cox, C. C. 525; 14 Cr. App. Rep. 58, C. C. A.

5691. **Order for inquiries & report—For information of court.**—In a proper case the Ct. of Criminal Appeal will order inquiries to be made for its information.—*R. v. HUGHES* (1914), 11 Cr. App. Rep. 10, C. C. A.

5692. — **By special commissioner—Criminal Appeal Act, 1907 (c. 23), s. 9 (d).**—*R. v. HOLT* (1920), 14 Cr. App. Rep. 152, C. C. A.

5693. — **By police—Copy of report to be supplied to appellant.**—(1) Police reports made by order of the ct. should be supplied to applt.

(2) As a general rule the ct. will not allow a witness who could have been called at the trial to be called on appeal.

(3) When an applt. is made for leave to appeal & to give fresh evidence, & names have been given, we cannot admit the evidence of persons whose names were not given when the applt. was made (PICKFORD, J.).—*R. v. BROWN* (1910), 4 Cr. App. Rep. 104, C. C. A.

5694. **Order for production of documents—Not**

#### PART XIV. SECT. 5, SUB-SECT. 2.—C.

c. **Objection to charge of judge—On grounds of misdirection or non-direction.**—The rule is the same in criminal as in civil cases, at any rate where prisoner is defended by counsel, that any objection to the charge of the presiding judge, either for non-direction or for misdirection, must be taken at the trial, & if not then taken it cannot be afterwards raised, especially where the evidence fully sustains the verdict.—*R. v. FICK* (1866), 16 C. P. 379.—*CAN.*

d. **Question put to accused.**—The ct. cannot, in a suspension of a conviction on a summary complaint, enter into an inquiry as to the exact question

which had been put to the complainant when no objection had been taken at the time.—*ANDERSON v. MCFARLANE* (1899), 1 F. (Ct. of Sess.) 36.—*SCOT.*

e. **Admissions by accused.**—In a suspension of a conviction the complainant stated that he had while in prison been interrogated by police constables, & that their evidence as to his answers had been illegally admitted at the trial. Prosecutor denied that the police had interrogated the complainant, but stated that the complainant had voluntarily made certain admissions to the police, & that evidence of these admissions had been led at the trial. No objection to this evidence

was taken in the inferior ct.:—*Held*: the bill must be refused.—*RUSSELL v. PATON* (1902), 4 F. (Ct. of Sess.) 77; 39 Sc. L. R. 647; 10 S. L. T. 94.—*SCOT.*

#### PART XIV. SECT. 5, SUB-SECT. 3.

f. **Report & notes of judge.**—There is no general rule that the Ct. of Criminal Appeal will in no case look at any thing except the trial judge's report & notes of the trial. Where it is quite plain that a mistake has been made by the judge other evidence will be regarded.—*R. v. STORER*, [1916] V. L. R. 285.—*AUS.*

*Sect. 5.—Scope of inquiry: Sub-sect. 3. Sect. 6: Sub-sects. 1, 2 & 3.]*

**produced at trial.**—If necessary, the ct. will order documents that ought to have been forthcoming at the trial to be produced.—*R. v. EVANS* (1912), 8 Cr. App. Rep. 15, C. C. A.

**5695. Medical report made on examination before act committed.**—*R. v. COELHO*, No. 6218, *post*.

**5696. Report by Clerk of Assize—As to his discussions with jury.**—On the trial of a prisoner at assizes, some time after the jury had retired to consider their verdict, the clerk of assize went to their room & asked if they had agreed or were likely to agree. The jury then put some questions to him, & he answered them & a discussion took place. Later he visited the jury again, & a further discussion took place. Eventually the jury found prisoner guilty:—*Held*: evidence from the jury-men to prove the above facts was inadmissible, but the ct. could act upon a report made by the clerk of assize, & as it was impossible to say that but for the discussions & the advice given by him the jury would have come to an unanimous conclusion, the conviction must be quashed.—*R. v. WILLMONT* (1914), 78 J. P. 352; 30 T. L. R. 499; 10 Cr. App. Rep. 173, C. C. A.

*Annotations:—Consd. Ellis v. Deheer* (1922), 127 L. T. 431. *Refd. Goby v. Wetherill* (1915), 113 L. T. 502.

## SECT. 6.—CALLING FRESH EVIDENCE.

### SUB-SECT. 1.—PROCEDURE.

**5697. Whether application necessary—Discretion of court.**—The ct. though refusing an appln. to call further evidence, may, at its discretion, give leave on the appeal.—*R. v. GROSVENOR* (1914), 10 Cr. App. Rep. 230, C. C. A.

**5698. Names of new witnesses—Must be disclosed to court.**—*R. v. LOVETT & HIPPERSON* (1908), 1 Cr. App. Rep. 94, C. C. A.; *subsequent proceedings*, 1 Cr. App. Rep. 111, C. C. A.

**5699. ——— Effect of non-disclosure.**—*R. v. BROWN*, No. 5693, *ante*.

**5700. Nature of evidence must be stated.**—*R. v. LOVETT & HIPPERSON*, No. 5698, *ante*.

**5701. ———**—The nature of the evidence of the new witnesses must be disclosed to the ct. & to the registrar.—*R. v. GOWLETT (alias WOODFORD)* (1908), 1 Cr. App. Rep. 204.

**5702. ———**—The ct. will not as a rule give leave to call a witness the nature of whose information is not disclosed.—*R. v. GORDON, HICKSON, WILLIS & HARRIS* (1913), 8 Cr. App. Rep. 246, C. C. A.

**5703. ——— Whether on affidavit.**—Solr. & counsel having been assigned to applt., & an appln. being made on his behalf for leave to call further witnesses, who had not been called at the trial, the ct. said that in such a case the evidence of the suggested witnesses should be placed before the ct. on affidavit. The question of the insanity of prisoner was not raised in the ct. below.—*R. v. ATKINS* (1908), 24 T. L. R. 807; 1 Cr. App. Rep. 45, 69; 72 J. P. Jo. 340, 352, C. C. A.

**5704. ———**—*R. v. DUNTON* (1908), 1 Cr. App. Rep. 165; 72 J. P. Jo. 556, C. C. A.

**5705. ———**—*R. v. HANCOX*, No. 5780, *post*.

**5706. Solicitor assigned—To take proofs.**—When it is necessary to take proofs of fresh witnesses the ct. will assign a solr.—*R. v. HEWSON* (1908), 1 Cr. App. Rep. 47, C. C. A.

**5707. Proofs of proposed witnesses should be prepared.**—An applt. for leave to call further

evidence should be prepared with proofs of the evidence of the proposed witnesses.—*R. v. MARCUS* (1923), 17 Cr. App. Rep. 187, C. C. A.

**5708. Witnesses must be in attendance.**—*R. v. COLEMAN*, No. 5975, *post*.

**5709. Witnesses must be out of court till called.**—

Persons proposed to be called as witnesses, on appeal, must be out of ct. until they are called.—*R. v. MILLER* (1909), 2 Cr. App. Rep. 213, C. C. A.

**5710. Whether cross-examination of witness allowed—Misunderstanding at trial.**—*R. v. EAST* (1908), 1 Cr. App. Rep. 205, C. C. A.

**5711. ——— Credit of witness involved.**—The ct. may give leave to cross-examine a witness on matters of credit which could not be the subject of contradiction at the trial. If a direction is wholly insufficient a conviction may be quashed.—*R. v. HAMILTON* (1917), 118 L. T. 180; 26 Cox, C. C. 157; 13 Cr. App. Rep. 32, C. C. A.

### SUB-SECT. 2.—WHEN LEAVE WILL BE GIVEN.

**5712. Omission to call evidence at trial due to misunderstanding.**—*R. v. GRAY* (1908), 1 Cr. App. Rep. 154, C. C. A.

**5713. ———**—*R. v. REEN & LINTOTT* (1909), 2 Cr. App. Rep. 310, C. C. A.

**5714. ———**—Conviction quashed on the ground that there was a strong probability that if the evidence of certain witnesses for prisoner who, when the case was heard, were absent through a misunderstanding had been before the jury prisoner would have been acquitted.—*R. v. NICHOLSON* (1909), 73 J. P. 347; 2 Cr. App. Rep. 195; *sub nom. R. v. HENDRY*, 25 T. L. R. 635, C. C. A.

**5715. ———**—Leave to call evidence granted where there was reason to think that all the evidence which might have been called at the trial was not exhausted.—*R. v. GARNHAM* (1910), 4 Cr. App. Rep. 150, C. C. A.

**5716. ———**—*R. v. SCHMIDT* (1911), 6 Cr. App. Rep. 288, C. C. A.

**5717. ———**—The ct. will allow evidence to be given, which might have been given at the trial, if it is satisfied that the omission was due to a misunderstanding on deft.'s part.—*R. v. WARREN* (1919), 14 Cr. App. Rep. 4, C. C. A.

**5718. Witness called at trial did not answer to his name.**—Conviction quashed on the ground that the defence was not properly put to the jury.

In this case we give leave to appeal & also leave to call C. who was called at the trial, but being too late did not answer to his name (*BRAY, J.*).—*R. v. RICHARDS* (1910), 4 Cr. App. Rep. 161, C. C. A.

**5719. ———**—*R. v. WITTON* (1911), 6 Cr. App. Rep. 149, C. C. A.

**5720. Adjournment of trial refused.**—*R. v. FARINGTON* (1908), 1 Cr. App. Rep. 113, C. C. A.

**5721. On question of identity.**—X. obtained a horse by false pretences from J. on Nov. 17, at a horse fair. G. was arrested for the offence on Aug. 5, 1908. J. identified G. as being X.; but J.'s man, who had as good if not a better opportunity of seeing X. at the fair, was unable to identify G. as the man. There was no controversy as to G. being at the fair on Nov. 17. A hand-writing expert stated that the cheque given by X. to J. at the fair & a cheque written by G. at the police ct. on his own request, were written by the same person. For the defence, one witness said that G. was with him at the fair at the time the offence was committed, & he did not commit it

Another witness said that a man, not G., had given him the horse to take away, & a third witness said that he saw a man, not G., commit the offence. G. was convicted. On appeal, a detective-sergeant was called by leave of the ct., who said that the description of X. given to the police about a fortnight after the offence was committed, was that of another man, B. The description gave the height of X. as 5' 6" or 7". G. was about 5' 3" in height, a very short man. The ct. quashed the conviction, having regard to the evidence given on appeal.—*R. v. BETHIDGE* (1908), 73 J. P. 71; 1 Cr. App. Rep. 236, C. C. A.

**5722.** —.]—Fresh evidence will be heard when the evidence of identification is unsatisfactory.—*R. v. GILLING* (1916), 12 Cr. App. Rep. 131, C. C. A.

**5723. Defence of alibi.**—*R. v. LAWS* (1908), 72 J. P. 271; 24 T. L. R. 630; 1 Cr. App. Rep. 6, C. C. A.

**5724.** —.]—*R. v. MALVISI* (1909), 73 J. P. 392; 2 Cr. App. Rep. 251, C. C. A.

*Annotation:—Refd.* *R. v. Rose* (1919), 14 Cr. App. Rep. 14.

**5725.** —.]—*R. v. KEYS* (1918), 13 Cr. App. Rep. 210, C. C. A.

**5726.** —.]—*R. v. WARREN*, No. 5717, *ante*.

**5727. Mistake in summing up at trial.**—Leave was given to call further evidence in view of an alleged mistake in summing up.—*R. v. CROOK* (1910), 4 Cr. App. Rep. 57, C. C. A.

**5728.** —.]—Applt. was convicted on an indictment which charged him under Larceny Act, 1901 (c. 10), with the fraudulent conversion of a sum of money entrusted to him for safe custody. At the trial the judge suggested to the jury the possibility of a criminal conspiracy between prisoner & a person not called as a witness, & the Ct. of Criminal Appeal allowed him to be called on the appeal. In such case if his evidence is satisfactory the ct. will if it believes the jury might have been influenced thereby quash the conviction.—*R. v. HALL* (1915), 11 Cr. App. Rep. 221, C. C. A.

**5729. Perjured testimony at trial.**—*R. v. DONOVAN & HURLEY*, No. 5682, *ante*.

**5730. Evidence affecting character of witness for prosecution.**—The ct. will not quash a conviction when evidence is forthcoming, after the trial, of previous convictions of a material witness for the prosecution, unless those convictions affect his credibility.—*R. v. HAMPSHIRE* (1908), 1 Cr. App. Rep. 212, C. C. A.

**5731. Additional facts ascertained since trial.**—Witnesses are only allowed to be called when additional facts have come to light since the date of trial (*per CUR.*).—*R. v. PITCHFORTH* (1908), 1 Cr. App. Rep. 249, C. C. A.

**5732.** —.]—*R. v. JONES* (1909), 2 Cr. App. Rep. 88, 102, C. C. A.

#### PART XIV. SECT. 6, SUB-SECT. 2.

**5731 i. Additional facts ascertained since trial.**—On application under Crimes Act (No. 2657), 1915, s. 593 (c), for leave for a new trial on the ground that evidence of prisoner's innocence not previously available was now obtained. Three of the proposed witnesses were follow-prisoners who had refused to give evidence at the trial. One of the proposed witnesses was a convicted person who was not called at the trial because a constable had advised prisoner not to call him; another of them could not be found at the time of the trial. The ct. regarding the circumstances as special, itself heard the witnesses proposed to be called, & thereupon quashed the conviction & ordered a new trial.—*R. v. ENNOR*, [1916] V. L. R. 376.—*AUS.*

J.—VOL. XIV.

**g. Affidavits of persons present at hearing.**—Where a conviction is attacked upon the ground that it was made without evidence & in the absence of a plea of guilty, a question of fact arises which, like all other disputed questions of fact, must be determined by evidence; therefore the ct. is not restricted in its investigation to the record of the conviction but may look at the affidavits of those present at the hearing as to what actually took place thereon.—*R. v. BARLOW*, [1918] 1 W. W. R. 499; 29 Can. Crim. Cas. 381.—*CAN.*

#### PART XIV. SECT. 6, SUB-SECT. 3.

**5740 i. Where witness might have been called at trial.**—On a charge of murder accused was convicted of manslaughter. His counsel had refrained at the trial

**5733.** —.]—Conviction quashed in view of fresh evidence not available at the trial.—*R. v. MURPHY* (1921), 15 Cr. App. Rep. 181, C. C. A.

**5734.** —.]—In a proper case the ct. will hear fresh relevant evidence about the character of prosecutrix which was not forthcoming at the trial.—*R. v. GREENBERG* (1923), 17 Cr. App. Rep. 106, C. C. A.

**5735. Evidence of nationality—Order for expulsion of alien.**—On the question whether an expulsion order should be recommended, the ct. will hear evidence on the point whether applt. is an alien or not.—*R. v. FERGUSON* (1911), 7 Cr. App. Rep. 24, C. C. A.

**5736.** —.]—If there is any uncertainty at the trial whether applt. is an alien the ct. will hear evidence on the point.—*R. v. COLLINS* (1913), 8 Cr. App. Rep. 244, C. C. A.

**5737. On appeal against sentence.**—*R. v. WILLIAMS* (1909), 2 Cr. App. Rep. 150, C. C. A.

**5738. To allow appellant to supplement his own evidence.**—*R. v. WESTLAKE* (1920), 15 Cr. App. Rep. 100, C. C. A.

**5739. Only in exceptional circumstances.**—This ct. has to be convinced of very exceptional circumstances before it will reconsider the verdict of a jury in the light of fresh evidence which has not been laid before the jury & which in some cases might have been put before the jury at the trial (*DARLING, J.*).—*R. v. MASON* (1923), 17 Cr. App. Rep. 160, C. C. A.

#### SUB-SECT. 3.—WHEN LEAVE WILL BE REFUSED.

**5740. Where witness might have been called at trial.**—*R. v. HARTLEIGH* (1908), 1 Cr. App. Rep. 17, C. C. A.

**5741.** —.]—Appln. to call further evidence where applt. could have asked to have the witnesses called at the trial, refused.—*R. v. JONES* (1908), 1 Cr. App. Rep. 27, C. C. A.

**5742.** —.]—Persons who could have been called at the trial cannot be called in this ct. to make out a new case.—*R. v. SOPER* (1908), 1 Cr. App. Rep. 63, C. C. A.

**5743.** —.]—The ct. will not as a rule hear witnesses who ought to, & could have been called at the trial.—*R. v. WINKWORTH* (1908), 1 Cr. App. Rep. 129, C. C. A.

**5744.** —.]—If applt. is represented at the trial & his counsel deliberately refrains from calling witnesses, leave will not be granted to appeal in order that they may be called.—*R. v. WATKINS* (1908), 1 Cr. App. Rep. 183, C. C. A.

**5745.** —.]—The ct. will not readily hear witnesses who were at the trial & were not called.—*R. v. PERRY & HARVEY* (1909), 2 Cr. App. Rep. 89, C. C. A.

from calling evidence of previous hostility by deceased towards accused, counsel apprehending that it might supply evidence of a motive for the murder:—*Held*: a new trial should not be granted in order to enable accused to call this evidence for the purpose of showing that he acted in self-defence.—*MATTSON v. IT.* (1919), 27 C. L. R. 176.—*AUS.*

**5740 ii.** —.]—Before the ct. will entertain applications for leave to call fresh evidence some satisfactory reason must be given why witnesses were not called at the trial; evidence must be material, & if given might have affected the result. Where no proofs of witness's evidence were produced ct. refused application.—*R. v. EYLES* (1917), 17 S. R. N. S. W. 377; 23 C. L. R. 1.—*AUS.*



*Sect. 3.—Calling fresh evidence: Sub-sects. 3, 4*

5746. —.]—*R. v. MORAN* (1909), 3 Cr. App. Rep. 25, C. C. A.

5747. —.]—*R. v. BROWN*, No. 5693, *ante*.

5748. —.]—Witnesses who could have been called at the trial will not be called on appeal.—*R. v. ALLEN* (1910), 4 Cr. App. Rep. 181, C. C. A.

5749. —.]—Where people know of the existence of a witness, but take no trouble to call him, & the fact turns out that on some point his evidence would be more material than originally appeared, that is not a reason for allowing that witness to be called on appeal (*PICKFORD, J.*).—*R. v. HEWITT* (1912), as reported in 7 Cr. App. Rep. 219, C. C. A.

5750. —.]—The general rule that witnesses who might have been called at the trial & were not, will not be called in the ct. above will be enforced with strictness when the defence is an alibi & applt. reserves his defence before the justices, & the more so where prisoner was on bail & knew the names of the witnesses he wished to call.—*R. v. TREVARTHEN* (1912), 8 Cr. App. Rep. 97, C. C. A.  
*Annotation:—Refd. R. v. Rose* (1919), 14 Cr. App. Rep. 14.

5751. —.]—It is not a misdirection to tell the jury, when prisoner on oath contradicts a witness on a crucial point, that their verdict should depend on the question which of the two they believed. When counsel has elected not to call certain persons as witnesses at the trial, as a rule, they will not be allowed to be called on appeal.—*R. v. LIVOCK* (1914), 10 Cr. App. Rep. 264, C. C. A.

*Annotation:—Refd. R. v. Rose* (1919), 14 Cr. App. Rep. 14.

5752. —.]—The ct. will not hear a witness whom applt. deliberately declined to call at the trial.—*R. v. WEISZ* (1920), 15 Cr. App. Rep. 85, C. C. A.

5753. —.]—*Inability to pay expenses.*—The ct. is not disposed to hear witnesses on the plea that deft. could not afford to call them at the trial, as, in a proper case, the police will pay their expenses.—*R. v. MACK* (1909), 2 Cr. App. Rep. 114, C. C. A.

5754. —.]—*Unless good reason for omission given.*—Permission to call fresh witnesses is not given unless some reason is given why they were not called at the trial (*LORD ALVERSTONE, L.J.*).—*R. v. MARTIN* (1908), 1 Cr. App. Rep. 33, C. C. A.

5755. —.]—The ct. will not, as a rule, permit a witness who could have been called at the trial, but was not, to be examined on the appeal.—*R. v. McGERLYNCHIE* (1909), 2 Cr. App. Rep. 183, C. C. A.

5756. —.]—*Except in special circumstances.*—Only in exceptional cases will the ct. hear witnesses who, without good reason, were not called at the trial. On an indictment for obtaining by false pretences there must be a direction on the guilty knowledge of each obtaining.—*R. v. DUTT* (1912), 8 Cr. App. Rep. 51, C. C. A.

5757. —.]—*R. v. PERRY*, No. 5652, *ante*.

5758. —.]—*R. v. STARKIE*, No. 5522, *ante*.

5761 i. *Appellant who has not given evidence at trial.*—The High Ct. declined on appeal to receive evidence which was available on the trial below when prisoner deliberately elected not to give evidence in reply to the case made against him.—*R. v. MADHUB CHUNDER GIRI* (1873), 21 W. R. 13.—*IND.*

5766 i. *Where evidence would not have affected the verdict.*—Accused were convicted of having in their possession without lawful excuse a forged Com-

monwealth Security, to wit, a £5 note, & also with having the note with intent to defraud. Accused applied for leave to appeal on the grounds (*inter alia*) that fresh evidence was forthcoming, such evidence being in support of an alibi.—*Held*: the further evidence submitted was not of such a nature as would justify the re-opening of the case, & there was nothing to show that there had been any injustice.—*STEELE v. R.* (1919), 22 W. A. L. R. 22.—*AUS.*

5772 i. *Attempt to supplement case*

5759. —.]—*Except in case of insanity.*—*R. v. BRADLEY*, No. 5668, *ante*.

5760. *Where witness refused to attend at trial.*—*R. v. FLATELEY* (1909), 2 Cr. App. Rep. 77, C. C. A.

5761. *Appellant who has not given evidence at trial.*—Prisoner who sets up an alibi & does not go into the box cannot ordinarily expect his appln. to be granted.—*R. v. MACK* (1908), 1 Cr. App. Rep. 132, C. C. A.

5762. —.]—*R. v. RUBENS* (1909), 2 Cr. App. Rep. 163; 73 J. P. Jo. 240, C. C. A.

*Annotation:—Refd. R. v. Rose* (1919), 14 Cr. App. Rep. 14.

5763. —.]—*R. v. MALVISI*, No. 5724, *ante*.

5764. —.]—Deft. who has not given evidence on his trial will not be allowed to do so on appeal.—*R. v. KING* (1914), as reported in 10 Cr. App. Rep. 44, C. C. A.

*Annotations:—Refd. R. v. Rose* (1919), 14 Cr. App. Rep. 14.  
*Mentd. R. v. Creamer* (1919), 35 T. L. R. 281.

5765. —.]—The rule of the ct. is not to hear applts. who did not give evidence below.—*R. v. ROSE* (1919), 14 Cr. App. Rep. 14, C. C. A.

5766. *Where evidence would not have affected the verdict.*—*R. v. ROUMILLEN* (1908), 1 Cr. App. Rep. 25, C. C. A.

5767. —.]—*R. v. FLUELLIN* (1908), 1 Cr. App. Rep. 30, C. C. A.

5768. —.]—*R. v. HILLARY* (1908), 1 Cr. App. Rep. 153, C. C. A.

5769. —.]—The ct. will not hear fresh evidence if it is satisfied from the proofs of the proposed witnesses that their evidence would not have affected the result of the trial.—*R. v. BRINSLEY* (1910), 4 Cr. App. Rep. 102, C. C. A.

5770. —.]—Appln. for leave to appeal refused when the ct. was of opinion that fresh evidence tendered would not have affected the verdict.—*R. v. CALDWELL* (1911), 6 Cr. App. Rep. 151, C. C. A.

*Annotation:—Refd. R. v. Rose* (1919), 14 Cr. App. Rep. 14.]

5771. —.]—The ct. will allow further evidence to be called only when it is satisfied that the evidence would or might have induced the jury to form a different opinion on the guilt of applt.—*R. v. GROSVENOR* (1914), 111 L. T. 1116; 24 Cox, C. C. 468; 10 Cr. App. Rep. 235, C. C. A.

5772. *Attempt to supplement case made at trial.*—*R. v. MORTIMER* (1908), 99 L. T. 204; 72 J. P. 349; 24 T. L. R. 745; 21 Cox, C. C. 677; 1 Cr. App. Rep. 20, C. C. A.

5773. *For cross-examination of witness—Not cross-examined at trial.*—If deft. declines to cross-examine a witness, the ct. will not grant leave to appeal in order that the witness may be cross-examined.—*R. v. DENEHURST* (1910), 4 Cr. App. Rep. 59, C. C. A.

## SUB-SECT. 4.—WHAT EVIDENCE IS ADMISSIBLE.

5774. *Letter written by prisoner—After conviction—Production of copy of destroyed letter.*—After his conviction for murder prisoner wrote from the prison in which he was confined a letter

*made at trial.*—Affidavits of facts not shown to have become known since the trial, not admissible on a motion for a new trial.—*R. v. CHUBBS* (1864), 14 C. P. 32.—*CAN.*

## PART XIV. SECT. 6, SUB-SECT. 4.

h. *Medical evidence.*—A girl went to prisoner's house with the object of having an abortion procured. To achieve this purpose prisoner had sexual connection with her repeatedly on the night of her arrival & repeatedly



which had a most material bearing on the case. The letter had been destroyed by the person to whom it was addressed. The prosecution gave notice to prisoner that upon the hearing of an appln. which he intended to make to the Ct. of Criminal Appeal for leave to appeal, an appln. would be made by the prosecution for leave to call witnesses for the purposes of proving the destruction of the letter & producing a copy in evidence:—*Held*: the evidence was admissible, & no privilege attached to the letter.—*R. v. ROBINSON*, [1917] 2 K. B. 108; 86 L. J. K. B. 773; 117 L. T. 160; 81 J. P. 152; 25 Cox, C. C. 762; 12 Cr. App. Rep. 226, C. C. A.

*Annotation*:—*Mentd.* *R. v. Rose* (1919), 14 Cr. App. Rep. 14.

**5775. Written appeal for mercy—On behalf of prisoner.**—*R. v. WEAVER*, No. 5594, *ante*.

**5776. Not communication with Home Secretary—With reference to the appeal.**—(1) On a petition to the Home Secretary, referred to the Ct. of Criminal Appeal under Criminal Appeal Act, 1907 (c. 23), s. 19 (*a*), the ct. can only act on legal evidence given at the ct. of trial or before the Ct. of Criminal Appeal. They cannot act on communications made by third parties to the Home Secretary; but they may look at such communications to see whether they should allow evidence to be called on the matters dealt with in them.

(2) It has been suggested that because counsel for the Crown in the course of his speech to the jury commented, when dealing with one incident of the case, on the fact that prisoner's wife had not been called, & said that her evidence might have been of great importance, there was here a mistrial. Before the jury considered what their verdict was to be, counsel withdrew his observation in the presence of the jury. The judge who tried the case did not comment on the matter in his summing up; but when the matter was brought to his notice he asked the jury to pay no attention to counsel's observation. It is quite impossible for us to take the view that there had been a mistrial on the ground that that observation has been made (*LORD ALVERSTONE*, C.J.).

(3) Where there has been a mistrial within the meaning of the cases, the Ct. of Criminal Appeal have the power formerly possessed by the Ct. for the Consideration of Crown Cases Reserved of issuing of writ of *venire de novo*.—*R. v. DICKMAN* (1910), 74 J. P. 449; 26 T. L. R. 640; 5 Cr. App. Rep. 135, C. C. A.

*Annotation*:—*As to* (3) *Consd.* *Crane v. Public Prosecutor*, [1921] 2 A. C. 299.

**5777. Not affidavits alleging local prejudice at trial.**—The ct. will not receive in evidence affidavits purporting to show that, owing to newspaper reports or other matters, local prejudice against applt. made a fair trial impossible.—*R. v. WILSON, LEWIS & HAVARD* (1911), 6 Cr. App. Rep. 125, C. C. A.

*Annotations*:—*Mentd.* *R. v. Blatherwick* (1911), 6 Cr. App. Rep. 281; *R. v. Crane* (1912), 7 Cr. App. Rep. 113; *R. v. Watson* (1913), 109 L. T. 335; *R. v. Christie*, [1914] A. C. 545; *R. v. Cohen* (1914), 111 L. T. 77; *R. v. Threlfall*

gave her injections into the *vagina* of a hot & weak solution of a germicide. He did nothing else, & used no instrument or drug. Twenty-two hours after her arrival at his house she expelled a *fetus*, which was somewhat putrefied, & thereafter the prisoner gave uterine & vaginal injections of a weak solution of a germicide. The girl died a few days later of peritonitis arising from a miscarriage, & prisoner was tried for murder, & conducted his own defence. There was no evidence that the acts done by the prisoner were likely to endanger human life. Prisoner did not cross-examine medical witnesses

or adduce any evidence tending to show that the putrefaction was of so advanced a stage that the death of the *fetus* must, or might, have occurred before the time of the girl's arrival at his house. On appeal to the Ct. of Criminal Appeal, medical evidence was admitted, which showed that it was extremely unlikely, & practically impossible, for putrefaction to the extent indicated to have occurred within twenty-four hours, & evidence was given that the acts done by prisoner were ordinarily likely to endanger human life.—*R. v. WALKER* (No. 1) (1915), S. R. Q. 115.—*AUS.*

(1914), 111 L. T. 168; *Bradshaw v. Waterlow*, [1915] 3 K. B. 527; *R. v. Baskerville*, [1916] 2 K. B. 658; *R. v. Willis*, [1916] 1 K. B. 933; *R. v. Wyman* (1918), 13 Cr. App. Rep. 163.

**5778. Not letter written by juror to trial judge—In respect of information arising after the trial.**—The ct. will not take notice of a letter written by a jurymen after a trial to the trial judge; written either in respect of matters which came to his knowledge after the trial or as to matters which influenced him in coming to a conclusion with regard to the verdict.—*R. v. MELIK* (1915), 11 Cr. App. Rep. 100, C. C. A.

**5779. Not evidence of jurors—To prove irregularity at trial.**—*R. v. WILLMONT*, No. 5696, *ante*.

**5780. Evidence as to conduct of jury at trial.**—On an appeal where suggestions were made as to the probability of bias on the part of two of the jurymen who tried the case, the ct. allowed evidence to be called in reference to those suggestions, but intimated that the granting of such leave must not be taken as a precedent.

The ct. has power to receive evidence on affidavit, but will not, as a rule, attach weight to such evidence unless there was opportunity to cross-examine deponent.—*R. v. HANCOX* (1913), 29 T. L. R. 331; 8 Cr. App. Rep. 193, C. C. A.

**5781.**—The ct. should be very cautious in admitting evidence of misconduct on the part of one of the jury, & certainly should not so do unless the evidence if admitted would compel the ct. to quash the conviction, & unless the appln. for leave to call such evidence is based upon substantial information.—*R. v. SYME* (1914), 112 L. T. 136; 79 J. P. 40; 30 T. L. R. 691; 24 Cox, C. C. 502; 10 Cr. App. Rep. 284, C. C. A.

**5782. Evidence disregarded by judge at trial.**—The ct. will, if it thinks it necessary, deal with & act upon evidence disregarded by the judge at the trial.—*R. v. BRAY* (1915), 11 Cr. App. Rep. 290, C. C. A.

**5783. Not medical evidence—Whether convict fit to undergo corporal punishment.**—The ct. will not hear medical evidence on the question whether a convict is fit to undergo corporal punishment.—*R. v. DUGDALE* (1922), 17 Cr. App. Rep. 55, C. C. A.

#### SUB-SECT. 5.—EFFECT OF EVIDENCE.

**5784. Conviction quashed—Where fresh evidence raises grave doubt.**—This is a case of a larceny committed in a brothel. Applt. is a man who had frequented the brothel, & who had been twice previously convicted of stealing. It is easy to understand how the police, & also the prosecution, came to suspect him of the offence in question. But unless there was evidence upon which a jury of reasonable men could properly find him guilty, the verdict cannot stand. Plans of the house have been proved before us which were not before the jury. Upon the evidence given at the trial, & the plans & the evidence as to the house given before

#### PART XIV. SECT. 6, SUB-SECT. 5.

**k. Duty of court.**—Where the Ct. of Appeal allows evidence of innocence to be given it is the ct.'s duty to scrutinise very carefully & either quash the conviction if the new evidence is convincing, or grant a new trial if the evidence raises a case of doubt, or dismiss the appeal if the evidence appears suspicious.—*R. v. SCHULZ* (1913), 13 S. R. N. S. W. 259; 30 N. S. W. W. N. 73.—*AUS.*

1. —]—On appeal on the ground of the discovery of fresh evidence since the trial it is the duty

**Sect. 6.—Calling fresh evidence: Sub-sect. 5. Sect. 7: Sub-sects. 1, 2 & 3.]**

us, it is quite impossible to say that there was not very serious doubt as to applt.'s guilt. The probable inference from the whole of such evidence is that prosecutrix, who was the only witness who identified him could not see him from the position in which, according to the evidence, she was when she says she saw him. This conviction cannot stand (*per* CUR.).—*R. v. OSBORNE* (1908), 72 J. P. 473; 1 Cr. App. Rep. 144, C. C. A.

**5785.** ———.]—*R. v. NICHOLSON*, No. 5714, *ante*.

**5786.** ———.]—Where, after hearing fresh evidence, there is a grave conflict of testimony, the ct. will lean to the side of leniency, & quash a conviction.—*R. v. WRIGHT, BRASSINGTON & MARSH* (1910), 4 Cr. App. Rep. 284, C. C. A.

**5787.** ———.]—Fresh evidence raising grave doubt is ground for quashing a conviction.—*R. v. WALKER & MALYON* (1910), 5 Cr. App. Rep. 296, C. C. A.

**5788.** ———.]—Where, on fresh evidence, the ct. was satisfied that the case set up by the prosecution at the trial failed, though an alternative case withdrawn from the jury at the trial might have succeeded, the conviction was quashed.—*R. v. WINKWORTH* (1911), 6 Cr. App. Rep. 179, C. C. A.

**5789.** ———.]—*R. v. STOKES* (1911), 7 Cr. App. Rep. 40, C. C. A.

**5790.** ———.]—Conviction quashed in view of fresh evidence before the ct. & other evidence admitted by the Crown as establishing applt.'s case.—*R. v. THOMPSON (alias PETTIT)* (1912), 7 Cr. App. Rep. 203, C. C. A.

**5791.** ———.]—If the ct. on hearing fresh evidence is of opinion that if it had been before the jury which convicted they might have acquitted, it will quash the conviction, & all the more so in a case which the trial judge has characterised as a

weak case.—*R. v. EDWARDS* (1912), 8 Cr. App. Rep. 38, C. C. A.

**5792.** ———.]—*R. v. WILLIAMS*, No. 5561, *ante*.

**5793. Conviction upheld—Where court consider fresh evidence would not secure acquittal.]**—*R. v. GERHOLD* (1908), 1 Cr. App. Rep. 104, C. C. A.

**5794.** ———.]—The ct. dismissed an appeal where the fresh evidence called conflicted with the evidence previously called on behalf of applt., & where no jury would have altered a verdict on such fresh evidence.—*R. v. DUNTON* (1908), 1 Cr. App. Rep. 191, C. C. A.

**5795.** ———.]—Unless the ct. is of opinion that the further evidence that has been called would have caused the jury to acquit, it will not quash a conviction.—*R. v. JACKSON* (1910), 4 Cr. App. Rep. 93, C. C. A.

**SECT. 7.—DETERMINATION OF APPEALS AGAINST CONVICTION.**

**SUB-SECT. 1.—IN GENERAL.**

**5796. General rule—No substitution of conviction—After acquittal.]**—The ct. on quashing a conviction for one offence, cannot substitute a conviction for another, by virtue of Criminal Appeal Act, 1907 (c. 23), s. 5 (2), of which there has been an express acquittal.—*R. v. FISHER* (1921), 91 L. J. K. B. 145; 86 J. P. 29; 66 Sol. Jo. 109; 16 Cr. App. Rep. 53, C. C. A.

**5797. Absence of motive.]**—Absence of proved motive is not a ground for quashing a conviction.—*R. v. ELLWOOD* (1908), 1 Cr. App. Rep. 181, C. C. A.

**5798. Confession by another person.]**—Leave to appeal given in view of a confession by another person of the crime of which applt. had been convicted.—*R. v. HOPKINS* (1911), 7 Cr. App. Rep. 109, C. C. A.

of the ct. to determine whether the additional evidence taken in conjunction with the evidence given at the trial would have led the jury to bring in a different verdict.—*HURLEY v. R.* (1919), 22 W. A. L. R. 25.—**AUS.**

**m. Conviction upheld—Where court consider fresh evidence would not have secured acquittal.]**—Applt. with another was convicted on charge of robbery with violence. At the trial the issue of mistaken identity was taken. After sentence a petition was presented on the ground that fresh evidence was forthcoming of a witness not called at the trial which would establish the innocence of applt. Case was referred by A.-G. to Ct. of Criminal Appeal. The witness referred to was called by applt. & gave evidence on oath. In his evidence he said that he assaulted the complainant but that nobody else was present, also he committed the robbery:—*Held*: even if jury believed this story it was inconsistent with the evidence given at the trial on which jury convicted applt.—*SLEATOR v. R.* (1914), 16 W. A. L. R. 113.—**AUS.**

**PART XIV. SECT. 7, SUB-SECT. 1.**

**n. General rule.]**—A conviction can be set aside only where there has been a miscarriage of justice by reason of a wrong decision of law.—*R. v. MURRAY & MAHONEY*, [1917] 2 W. W. R. 805.—**CAN.**

**o. ———.]**—The sound rule to apply in trying a criminal appeal where questions of fact are in issue is to consider whether the conviction is right, & in this respect a criminal appeal differs from a civil one. In the latter

case the ct. must be convinced before reversing a finding of fact by a lower ct. that the finding is wrong.—*PROTAP CHUNDER MUKERJEE v. R.* (1882), 11 C. L. R. 25.—**IND.**

**p. ———.]**—*MILAN KHAN v. SAGAI* (1895), 1 L. R. 23 Cal. 347.—**IND.**

**q. Doubt expressed by judge as to correctness of verdict.]**—On appeal against conviction on the ground that the verdict was against evidence the judge reported that he expected & thought there should have been a verdict of not guilty, & that he had material doubt as to the correctness of the verdict of guilty:—*Held*: the report was to be taken into consideration but was by no means conclusive, otherwise a conviction would always be open to doubt unless both judge & jury agreed as to the question of fact.—*R. v. MANSFIELD* (1916), 16 S. R. N. S. W. 187; 33 N. S. W. W. N. 56.—**AUS.**

**r. Surprise.]**—Prisoner, having been indicted with two others acquitted, was convicted of the murder of H., whose body was found in a field adjoining a railway on Monday, Apr. 10, apparently about three days after death, which had clearly been caused by violence. M., the chief witness for the Crown, swore that on the Friday night previously he heard cries in this field, & that not long afterwards he saw three persons walk quickly past his house from that direction, whom he recognised as prisoner & his two sons. He also stated that on the following morning he saw prisoner walking along the railway & stopping near where the body was afterwards found, his manner

being strange & excited. At the coroner's inquest, held six months before, this witness had declared himself unable to identify the person seen by him, & had not mentioned seeing prisoner on Saturday. On motion for a new trial, on the ground, among others, of surprise at these discrepancies, the ct. refused to interfere. The indictment alleged the murder to have taken place on Apr. 6, while the evidence, both at the trial & the coroner's inquest, pointed to Apr. 7, & it was stated in the affidavits that prisoner had thus been misled in directing his evidence of an *alibi* more particularly to the wrong day:—*Held*: no ground of surprise.—*R. v. HAMILTON* (1866), 16 C. P. 340.—**CAN.**

**s. Sufficiency of evidence.]**—Upon questions of fact, an appellate criminal tribunal is but held to the determination whether there was some evidence before the trial ct. or whether there was no evidence at all.—*R. v. GIROUX*, [1916] Q. R. 26 K. B. 323; 56 S. C. R. 63.—**CAN.**

**t. ———.]**—The sufficiency of evidence is not matter for decision by a Ct. of Appeal; but the absence or presence of evidence is a matter of law.—*R. v. GROSS & MILLER*, [1918] Q. R. 28 K. B. 54; 31 Can. Crim. Cas. 36.—**CAN.**

**a. ———.]**—Where a conviction is attacked upon the ground that it was made without evidence & in the absence of a plea of guilty, a question of fact arises which, like all other disputed questions of fact, must be determined by evidence; therefore the ct. is not restricted in its investigation to the record of the conviction, but may

5799. —.]—*R. v. SELBY* (1913), 48 L. Jo. 325, C. C. A.

**5800. Incorrect evidence—By material witness.**—Where a very material witness whom the jury must at least have believed, is proved to be mistaken on or to have falsified a material point, the ct. will quash the conviction.—*R. v. HULLETT* (1922), 17 Cr. App. Rep. 8, C. C. A.

**5801. Advice by counsel to plead guilty—Knowledge of jury.**—It is not a ground for quashing a conviction that the jury knows that counsel has advised deft. to plead guilty.—*R. v. BUCKLAND* (1920), 15 Cr. App. Rep. 83, C. C. A.

**5802. Identity of handwriting not proved.**—The ct. will not interfere with a conviction based upon the fact that handwriting is traced to deft. without positive proof that that handwriting is not his.—*R. v. TRELOAR* (1913), 9 Cr. App. Rep. 1, C. C. A.

#### SUB-SECT. 2.—DEFECTS IN INDICTMENT.

**5803. What is a defect in indictment—Misjoinder of defendants.**—Larceny Act, 1861 (c. 96), s. 5, does not authorise the joinder in one indictment of a court for larceny against one deft. alone with a count for another larceny against the same deft. & another person jointly. Such an indictment is bad & may be quashed after verdict.—*R. v. EDWARDS*, [1913] 1 K. B. 287; 82 L. J. K. B. 347; 108 L. T. 815; 29 T. L. R. 181; 23 Cox, C. C. 380; 8 Cr. App. Rep. 128; *sub nom.* *R. v. GILBERT*, *R. v. EDWARDS*, 77 J. P. 135; 57 Sol. Jo. 187, C. C. A.

*Annotation* :—*Consd. R. v. Thompson*, [1914] 2 K. B. 99.

**5804. — False pretences not set out.**—A conviction on an indictment essentially bad will be quashed. In this case an indictment for obtaining goods by false pretences did not aver that prisoner's name was not what he said it was, & did not aver that he knew an alleged representation to be false.—*R. v. MCCALLUM* (1914), 11 Cr. App. Rep. 3; 78 J. P. Jo. 399, C. C. A.

**5805. — Duplicity.**—In Larceny Act, 1916 (c. 50), s. 8 (1), the words "steals or with intent to steal, nips, cuts, severs, or breaks any fixture" include two distinct felonies, & a count which charges both alternatively is bad.—*R. v. MOLLOY*, [1921] 2 K. B. 364; 90 L. J. K. B. 862; 85 J. P. 233; 37 T. L. R. 611; 65 Sol. Jo. 534; 27 Cox, C. C. 34; 15 Cr. App. Rep. 170, C. C. A.

**5806. — Addition or amendment without consent of court of trial.**—No count can be added to or amendment made in a bill of indictment

without consent of the ct. of trial.—*R. v. ERRINGTON* (1922), 16 Cr. App. Rep. 148, C. C. A.

**5807. When objection should be taken—Whether after plea or after verdict.**—An indictment under Punishment of Incest Act, 1908, charged in one count that offences were committed "on divers days between Jan. 1909 & Oct. 1910," & in another count that offences were committed "on divers days between Oct. 4 & the end of Feb. 1913." At the trial, after prisoner had pleaded not guilty, & the jury had been sworn, objection was taken that the indictment was bad for duplicity. The objection was overruled, & prisoner was convicted. On appeal:—*Held*: the indictment was bad in that it charged more than one offence in each count, but as prisoner had not in fact been embarrassed or prejudiced in his defence by the presentment of the indictment in this form, there had been "no substantial miscarriage of justice," & the appeal must therefore be dismissed under Criminal Appeal Act, 1907 (c. 23), s. 4 (1).

*Qu.*: whether an objection that an indictment is bad on its face can be taken after plea or after verdict.—*R. v. THOMPSON*, [1914] 2 K. B. 99; 83 L. J. K. B. 643; 110 L. T. 272; 78 J. P. 212; 30 T. L. R. 223; 24 Cox, C. C. 43; 9 Cr. App. Rep. 252, C. C. A.

**5808. Application of proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1)—Amendment irregularly made by court.**—*R. v. COHEN*, No. 6115, *post*.

**5809. — Omission of words usually inserted to describe offence.**—In this case the only objection taken is that the indictment was bad because it omitted the words "take & carry away," which are the ordinary words in an indictment for larceny. We are clearly of opinion that this case comes exactly within the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1). It was on the clearest possible evidence that the jury convicted applt. There is no appeal on the merits. So that it is impossible to say that the omission has occasioned any actual miscarriage of justice (*per Cur.*).—*R. v. HARRIS* (1910), 5 Cr. App. Rep. 285, C. C. A.

*Annotations* :—*Distd. R. v. Edwards*, [1913] 1 K. B. 287. *Consd. R. v. Thompson*, [1914] 2 K. B. 99.

**5810. — Duplicity of offences in same count.**—*R. v. THOMPSON*, No. 5807, *ante*.

#### SUB-SECT. 3.—NO CASE TO GO TO JURY.

**5811. Conviction quashed when no evidence or guilt.**—This conviction cannot stand. Ther.

look at the affidavits of those present at the hearing as to what actually took place thereon.—*R. v. BARLOW*, [1918] 1 W. W. R. 499; 29 Can. Crim. Cas. 381.—*CAN.*

**b.** —.]—The Supreme Ct. will not consider questions which were not properly within the scope of the case presented below in questions reserved for consideration of the Ct. of Appeal.—*SCOTT v. R.* (1921), 58 D. L. R. 242; 34 Can. Crim. Cas. 187.—*CAN.*

**c. Doubtful direction as to law.**—An indictment charged accused with wounding with intent to do grievous bodily harm. The wounding was by a shot from a revolver. The jury were directed that if they thought the revolver had been fired in a spirit of bravado, not aiming at the injured person, but in a grossly careless & reckless manner, they might, though they should acquit of the crime charged, convict of "wounding," that being an offence under Criminal Code, s. 186, if committed under such circumstances, though not alleged. No amendment

of the indictment was applied for or made. The jury found a verdict of "wounding without intent." For the Crown it was contended that this verdict could be supported, under s. 372, as a verdict of "guilty," under s. 186, on the grounds (a) that the indictment necessarily meant a charge of "unlawfully wounding" with intent, & (b) that "unlawfully wounding" was a sufficient description of an offence under s. 186.—*Held*: that both these propositions were so doubtful that the case ought not to be held to come within s. 372, & that a verdict of "not guilty" ought to be entered.—*R. v. LOONEY* (1897), 16 N. Z. L. R. 269.—*N.Z.*

**d.** —.]—The ruling of the judge as to whether there was evidence was not the exercise of a discretion but a decision on a point of law, & could, therefore, be made the subject of a question reserved under sect. 270 of the Ordinance of 1903 for the consideration of the Supreme Ct.—*R. v. KHAN* (1912), T. P. D. 712.—*S. AF.*

#### PART XIV. SECT. 7, SUB-SECT. 2

**e. Whether power to amend.**—The Ct. of Criminal Appeal has no power to amend an indictment finally dealt with before a Judge of the Supreme Ct. or before a Judge of Quarter Sessions.—*R. v. BURNS* (1920), 20 S. R. N. S. W. 351; 37 N. S. W. W. N. 77.—*AUS.*

**f. Defect patent on face of indictment.**—The ct. will not arrest judgment after verdict, or reverse judgment in error, for any defect patent on the face of the indictment.—*R. v. MASON* (1872), 22 C. P. 246.—*CAN.*

**g. What is a defect in indictment—More than one offence in one count.**—Indictment bad for having charged in one count more offences than one.—*R. v. QUINN* (1918), 43 O. L. R. 385; 44 O. L. R. 707.—*CAN.*

#### PART XIV. SECT. 7, SUB-SECT. 3.

**5811 i. Conviction quashed when no evidence of guilt.**—Prisoner was convicted of having stolen a purse

**Sect. 7.—Determination of appeals against conviction: Sub-sects. 3 & 4.]**

was not sufficient evidence, when the case for the prosecution closed, to be left to the jury (*per CUR.*).—*R. v. PEARSON* (No. 1) (1908), 72 J. P. 449; 1 Cr. App. Rep. 77, C. C. A.

*Annotations:—Consd. R. v. Fraser* (1911), 76 J. P. 168; *R. v. Power*, [1919] 1 K. B. 572. *Refd. R. v. Howells & Allen* (1908), 1 Cr. App. Rep. 197.

**5812.** —[—No doubt the possession of the servant may be the possession of his master, even for criminal purposes, but not unless there is evidence that the latter was aware of & had consented to it. There is no such evidence in this case (*per CUR.*).—*R. v. PEARSON* (No. 2) (1908), 72 J. P. 451; 1 Cr. App. Rep. 79, C. C. A.

**5813.** —[—When at the close of the evidence for the prosecution there is no case to go to the jury, the ct., on a submission, ought to withdraw the case from them.—*R. v. LEACH* (1909), 2 Cr. App. Rep. 72, C. C. A.

**5814.** —[—*R. v. JACKSON & REYNOLDS* (*alias ROPER*), No. 5566, *ante*.

**5815.** —[—*R. v. WHITE* (1918), 13 Cr. App. Rep. 211, C. C. A.

**5816.** —[—*R. v. KERR*, No. 5597, *ante*.

**5817.** — **At conclusion of case for prosecution—No submission by prisoner—Evidence for defence against prisoner.**—[Where prisoner is not defended by counsel at the trial & at the conclusion of the case for the prosecution, there being no evidence against him, he does not ask that the case should be stopped, & the judge does not stop the case on his own initiative, but the case proceeds, & evidence is given for the defence which is evidence against prisoner & on which he is convicted, the Ct. of Criminal Appeal will not quash the conviction on the ground that there was no evidence against prisoner in the case for the prosecution.

On a general verdict of guilty on an indictment containing counts for housebreaking, larceny, & receiving, the ct. varied the verdict to one of receiving only, & reduced the sentence.—*R. v. GEORGE* (1908), 73 J. P. 11; 25 T. L. R. 66; 1 Cr. App. Rep. 168, C. C. A.

*Annotations:—Fold. R. v. Jackson* (1910), 74 J. P. 352. *Consd. R. v. Fraser* (1911), 76 J. P. 168. *Refd. R. v. Leach* (1909), 2 Cr. App. Rep. 72; *R. v. Power*, [1919] 1 K. B. 572.

**5818.** — **Submission by prisoner—Whether subsequent proceedings can be disregarded.**—[Applt. who had an establishment for breeding pheasants was seen to leave his house at about 3.15 a.m., having then nothing in his hands. Three hours later he was seen to return carrying

a sack which contained eleven tame pheasants. He was thereupon arrested & charged with the larceny of these pheasants. At the trial there was evidence that no one could be traced who had lost any pheasants. Counsel therefore submitted that there was no evidence of a larceny to go to the jury. The case, however, was left to the jury who convicted applt.:—*Held*: the conviction must be quashed as the facts were quite consistent with applt.'s innocence.

There was evidence before the case for the prosecution closed that no one could be found who had lost any pheasants, & on these facts was there any evidence of larceny to go to the jury? If there was really no evidence of stealing it was the duty of the judge to withdraw the case from the jury on prisoner's counsel's submission, that there was no such evidence when the prosecution closed their case. Applt.'s counsel made that submission in the ct. below, & as applt. had a right to a decision at that moment, the ct. now would ignore anything that took place during the remainder of the trial after that submission has been made (*DARLING, J.*).—*R. v. JOINER* (1910), 74 J. P. 200; 26 T. L. R. 265; 4 Cr. App. Rep. 64, C. C. A.

*Annotations:—W.F. R. v. Fraser* (1911), 76 J. P. 168; *R. v. Power*, [1919] 1 K. B. 572.

**5819.** —[—The doctrine in *R. v. Joiner*, No. 5818, *ante*, that where, at the close of the case for the prosecution, there is no evidence to go to the jury, & a submission to that effect is made, this ct. will disregard the subsequent evidence, doubted.—*R. v. FRASER* (1911), 76 J. P. 168; 7 Cr. App. Rep. 99, C. C. A.

*Annotation:—Fold. R. v. Power*, [1919] 1 K. B. 572.

**5820.** —[—If at a trial of an indictment a submission is made at the close of the case for the prosecution that there is no evidence that prisoner committed the offence, & the submission is overruled, & witnesses are called for the defence by whom evidence is given incriminating prisoner, the Ct. of Criminal Appeal is entitled on an appeal by prisoner against conviction to take into consideration the adverse evidence given by the witnesses for the defence.—*R. v. POWER*, [1919] 1 K. B. 572; 88 L. J. K. B. 593; 120 L. T. 577; 83 J. P. 124; 35 T. L. R. 283; 26 Cox, C. C. 399; 14 Cr. App. Rep. 17, C. C. A.

**5821.** —[—If on the submission by one deft. that there is no case to go to the jury, the ct. holds that there was a case, it will not interfere if the judge uses the subsequent evidence of defts. against that deft.—*R. v. HOGAN* (1922), 16 Cr. App. Rep. 182, C. C. A.

containing \$3.50 from D. The evidence showed that D. had a purse containing the money; that she stopped in a crowd to watch something that attracted attention; that there was a commotion in the crowd during which prisoner pushed her or was pushed against her; that, as this occurred, a constable saw prisoner putting his hand in a fold of her dress; that the purse was missed within a few minutes afterwards; & that prisoner, being arrested after an interval, had upon him money in bills & silver, some of which were of the denominations of the money in D.'s purse, but none of which could be identified as having been hers:—*Held*: the evidence did not raise more than a mere suspicion against prisoner, & was not sufficient in law to warrant a conviction, & prisoner discharged.—*R. v. WINSLOW* (1900), 12 Man. L. R. 649.—*CAN.*

**5811 ii.** —[—Accused was charged, under Criminal Code, s. 242, with omitting without lawful excuse to

supply his wife & infant child with necessaries & thereby causing their deaths. The omission consisted in this, that he did not go after his wife & child when he saw them go into the cold & bring them back to his house before they died from exposure:—*Held*: (1) where a woman having the exercise of free will chooses to leave the shelter provided by her husband & to go out into the cold & is frozen to death, the husband is not criminally liable. Accused had provided sufficient shelter for his family; & there was no evidence from which it could be found that the woman was not in possession of her faculties & capable of exercising her free will; (2) as to the child, who was only ten years old, he could not be said to have the exercise of his free will; & the responsibility of the accused in regard to the child was greater. But, as the child did not go out alone, but under the guidance of his mother, & as accused, though he knew that the boy left the house

in extremely cold weather, did not know that he was in danger, it could not be said that the assistance which he might have rendered was necessary to the safety of the child, therefore there was no evidence upon which the jury could properly convict accused.—*R. v. SIDNEY* (1912), 21 W. L. R. 853; 20 Can. Crim. Cas. 378; 5 D. L. R. 256; 2 W. W. R. 761.—*CAN.*

**5811 iii.** —[—Accused was convicted of perjury for asserting as witness in a former trial that the statements made by S. were not true. S. gave evidence on the trial for perjury, but his evidence at the former trial in which were the "statements" denied by accused on that trial was not put in, although counsel for the Crown had expressed a wish to put it in:—*Held*: there being no evidence that S. made such statements on the trial, the jury should have been directed to find the accused not guilty.—*R. v. SEGAL*, [1920] 2 W. W. R. 29; 53 D. L. R. 472.—*CAN.*

**5822. Court will not interfere if there was some evidence.]**—The ct. will not quash a conviction merely because the evidence is circumstantial.—*R. v. NEWSON* (1909), 2 Cr. App. Rep. 44, C. C. A.

**5823. —.]**—*R. v. JACKSON* (1910), 74 J. P. 352; 5 Cr. App. Rep. 22, C. C. A.

#### SUB-SECT. 4.—UNREASONABLE VERDICT—QUASHING CONVICTION.

**5824. As ground for quashing conviction—Verdict against weight of evidence.]**—*R. v. BURKE* (1908), 1 Cr. App. Rep. 245, C. C. A.

**5825. —.]**—In order to convict a receiver of stolen property, there must be clear evidence of some possession on the part of deft.—*R. v. LEWIS* (1910), 4 Cr. App. Rep. 96, C. C. A.

**5826. —.]**—If there is a probability that the jury believed that consent was not a defence to a charge of rape the ct. will quash the conviction.

There was not sufficient evidence before the jury to justify them in concluding that the girl did not consent (*per CUR.*).—*R. v. BRADLEY* (1910), 74 J. P. 247; 4 Cr. App. Rep. 225, C. C. A.

**5827. —.]**—The ct. will quash a conviction if it is of opinion that it is not justified by the evidence, even though it believes that the verdict was correct.—*R. v. BENNETT* (1912), 8 Cr. App. Rep. 10, C. C. A.

**5828. —.]**—*R. v. DAVIS* (1913), 9 Cr. App. Rep. 66, C. C. A.

**5829. —.]**—*R. v. HOLMES & GREGORY* (1915), 11 Cr. App. Rep. 130, C. C. A.

**5830. —.]**—*R. v. PEACOCK* (1915), 11 Cr. App. Rep. 142, C. C. A.

**5831. —.]**—*R. v. BARKER & PAGE*, No. 5908, *post*.

**5832. —.]**—As there was no other satisfactory evidence, the ct. has come to the conclusion that the verdict as regards H. cannot be supported, so the conviction in his case must be

quashed (*per CUR.*).—*R. v. GARDNER & HANCOX* (1915), 85 L. J. K. B. 206; 114 L. T. 78; 80 J. P. 135; 25 Cox, C. C. 221; 11 Cr. App. Rep. 265; *sub nom.* *R. v. GARDNER, R. v. HANCOX*, 32 T. L. R. 97; 60 Sol. Jo. 76, C. C. A.

*Annotation*:—*Mentd. R. v. Pilley* (1922), 127 L. T. 220.

**5833. —.]**—Applt. was charged at sessions with stealing money, &, in a second count, with receiving it knowing it to have been stolen. In the opinion of this ct. the evidence against applt. for larceny was very strong, but there was no evidence against him of receiving. The chairman of the sessions summed the case up to the jury as a case of larceny, & did not deal at all with the charge of receiving. The jury convicted applt. of receiving:—*Held*: in these circumstances the conviction must be quashed.—*R. v. EVANS* (1916), 85 L. J. K. B. 1176; 114 L. T. 616; 25 Cox, C. C. 342; 12 Cr. App. Rep. 8, C. C. A.

**5834. —.]**—*R. v. CALEY* (1917), 12 Cr. App. Rep. 231, C. C. A.

**5835. —.]**—*R. v. CHADWICK, MATTHEWS & JOHNSON* (1917), 12 Cr. App. Rep. 247, C. C. A.

**5836. —.]**—*R. v. HALL*, No. 5090, *ante*.

**5837. —.]**—*R. v. STANFORD* (1919), 14 Cr. App. Rep. 73, C. C. A.

**5838. —.]**—*R. v. SMITH* (1919), 14 Cr. App. Rep. 101, C. C. A.

**5839. —.]**—*R. v. ARMSTRONG* (1922), 16 Cr. App. Rep. 147, C. C. A.

**5840. —.]**—*R. v. MARGULAS* (1922), 17 Cr. App. Rep. 3, C. C. A.

**5841. — Offence charged not known to the law.]**—*R. v. SHAW*, No. 5677, *ante*.

**5842. — First verdict not accepted by judge—Case for defence subsequently proceeded with.]**—*R. v. DOLLERY* (1911), 6 Cr. App. Rep. 255, C. C. A.

**5843. Conviction not quashed—Where there was evidence on which jury could convict.]**—The ct. refused leave to appeal against a conviction where there was evidence upon which the jury might properly have arrived at their verdict.—

**5822 i. Court will not interfere if there was some evidence.]**—Evidence making a *prima facie* case for the Crown in a criminal prosecution, if unanswered, & believed by the jury, is sufficient to support a conviction.—*R. v. GIRVIN* (1911), 18 W. L. R. 482; 20 W. L. R. 130; 45 S. C. R. 167.—*CAN.*

#### PART XIV. SECT. 7, SUB-SECT. 4.

**5824 i. As ground for quashing conviction—Verdict against weight of evidence.]**—An accused was found guilty on a charge of conspiracy with a person unknown. The full ct. being of opinion that there was no evidence to show that the offences could not have been perpetrated by one person quashed the conviction.—*R. v. MALONEY* (1915), 15 S. R. N. S. W. 461; 32 N. S. W. W. N. 156.—*AUS.*

**5824 ii. —.]**—To set aside a verdict on the ground of perjury on the part of a witness for the prosecution the Ct. of Criminal Appeal must be fully satisfied as to the truth of the facts before it, & must also be satisfied that a jury would be likely to come to a different conclusion in view of the dissimilar story.—*MCGRATH v. R.* (1916), 18 W. A. L. R. 124.—*AUS.*

**5824 iii. —.]**—Conviction of deft. quashed for having counselled & procured the bribery of a peace officer on the ground of lack of evidence.—*R. v. RYAN* (1913), 23 O. W. R. 799; 4 O. W. N. 622; 9 D. L. R. 871.—*CAN.*

**5824 iv. —.]**—The K. B. Div. has jurisdiction to review the evidence upon which inferior tribunals find a

conviction in criminal cases, & to determine whether such evidence is reasonably fit to be submitted for the purpose of proving such a charge, & whether the evidence actually submitted in any particular criminal case is of a character sufficient to reasonably sustain a verdict of guilty; & the K. B. Div. will in a proper case quash a conviction where in its opinion the evidence upon which the inferior tribunal acted is unfit or insufficient to reasonably sustain the verdict of guilty. The old rule, that if there is a *scintilla* of evidence to support the finding a conviction by an inferior ct. cannot be disturbed, had been abolished.—*R. v. WATERFORD JJ.* (1909), 43 L. L. T. 170.—*IR.*

**h. — Criminal Code Act, 1893, s. 416.]**—Where a person convicted by a jury of a crime applies to the Ct. of Appeal, under Criminal Code Act, 1893, s. 416, for a new trial, on the ground of the verdict being against the weight of evidence, the rule established in regard to such an application in a civil case must be applied, & the verdict cannot be disturbed unless it is one which the jury, viewing the whole of the evidence reasonably, could not properly find.—*R. v. SYRICH* (1901), 20 N. Z. L. R. 744.—*N.Z.*

**k. —.]**—The ct. cannot interfere with the verdict of a jury unless it is satisfied that the verdict is such as twelve reasonable men, giving due weight to the presumption of law in favour of prisoner's innocence, could not properly have found. All questions of the credibility

of witnesses, &, within the above limits, of the weight to be attached to their evidence, are for the determination of the jury, & must be held to have been determined by their verdict.

—*R. v. ALLANDALE & DENNETT* (1905), 25 N. Z. L. R. 507.—*N.Z.*

**l. —.]**—*R. v. FINDLAY* (1907), 26 N. Z. L. R. 980.—*N.Z.*

**5843 i. Conviction not quashed—Where there was evidence on which jury could convict.]**—Appls. were convicted of breaking & entering the shop of W. & therein stealing the sum of £2 8s. 6d. Evidence was admitted showing that during the night that such offence was committed the store of O'D. was broken & entered & Cavour cigars & 4s. in cash belonging to O'D. had been stolen & that on the following morning an empty box of Cavour cigars had been found at W.'s shop:—*Held*: verdict of jury was not unreasonable. Assuming the evidence regarding the offence at O'D.'s store to have been wrongly admitted there had been no substantial miscarriage of justice, as there was sufficient evidence to support the verdict of the jury apart from that evidence.—*LAMBERT & DEVAUX v. R.* (1914), 16 W. A. L. R. 178.—*AUS.*

**5843 ii. —.]**—On a charge of wounding with intent to murder the evidence of identification was slight. Accused appealed against conviction on the ground that the evidence was insufficient to support the verdict:—*Held*: there was evidence of identification which would be sufficient if believed to support the verdict, & where

*Sect. 7.—Determination of appeals against conviction: Sub-secs. 4 & 5.]*

*R. v. WILLIAMSON* (1908), 24 T. L. R. 619; 1 Cr. App. Rep. 3, C. C. A.

**5844.** ———.]—*R. v. ASHFORD* (1908), 1 Cr. App. Rep. 185, C. C. A.

**5845.** ———.]—*R. v. MCNAIR*, No. 5681, ante.

**5846.** ———.]—*R. v. SIMPSON*, No. 5634, ante.

**5847.** ——— **Because judge disapproved of verdict.**]—*R. v. SCHRAGER*, No. 5640, ante.

**5848.** ———.]—When on an indictment for perjury containing several assignments a general verdict of guilty is returned, though one assignment is clearly not proved by reason of the want of corroboration, the ct. will quash the conviction. The ct. will not set aside a verdict merely because the trial judge is dissatisfied with it.

When a case is one proper for the consideration of the jury, & the jury being properly directed convict, the mere opinion of the judge that he would have found the other way, or that the verdict was not satisfactory, is not a sufficient ground for quashing the conviction (*AVORY, J.*).—*R. v. GASKELL* (1912), 77 J. P. 112; 29 T. L. R. 108; 8 Cr. App. Rep. 103, C. C. A.

**5849.** ———.]—During the absence of applt.'s husband on active service applt. wrote a letter to prosecutor alleging that he was the father of her expected child & demanding money. Applt. was convicted on a charge of demanding money with menaces & without reasonable or probable cause. The judge, in giving his cer-

tificate for an appeal, stated that he disagreed with the verdict, but wished the case to be considered by the Ct. of Criminal Appeal:—**Held:** the verdict was not unreasonable, & no miscarriage of justice had occurred; the question involved was entirely one of fact on which the finding of the jury must be accepted; & there being no allegation that the jury had been misdirected, or that there was no evidence at all to support their verdict, the appeal must be dismissed.—*R. v. PERFECT* (1917), 117 L. T. 416; 25 Cox, C. C. 780; 12 Cr. App. Rep. 273, C. C. A.

*Annotation:—Fold.* *R. v. Moor* (1920), 15 Cr. App. Rep. 31.

**5850.** ———.]—The disagreement of the judge with a verdict is not a ground for quashing a conviction.—*R. v. MOOR* (1920), 15 Cr. App. Rep. 31, C. C. A.

**5851.** ——— **Judge's view may be considered by court.**]—While it must not be supposed that the mere fact that the judge who tried the case does not approve of the verdict is a sufficient reason for asking the ct. to set it aside, it is a factor for consideration (*LORD READING, C.J.*).—*R. v. HART* (1914), 10 Cr. App. Rep. 176, C. C. A. *Annotation:—Refd.* *R. v. Scranton* (1920), 15 Cr. App. Rep. 104.

**5852.** ———.]—The fact that a judge is dissatisfied with the verdict is not sufficient by itself to justify us in setting aside the verdict (*LORD READING, C.J.*).—*R. v. SMITH* (1914), 10 Cr. App. Rep. 232, C. C. A.

**5853.** ———.]—The ct. may quash a conviction on the report of the trial judge that he

Ct. of Appeal sees that there has been no abuse of the process of trial or no neglect on the part of some one concerned in the trial, & it comes merely to a question whether the jury ought to have found a verdict of guilty or not guilty, then their verdict is unchallengeable.—*R. v. MCCALL* (1920), 20 S. R. N. S. W. 467; 37 N. S. W. W. N. 189.—**AUS.**

**5843 iii.** ———.]—In the course of carriage part of the goods were stolen. The missing goods were traced to accused, & were seized in the possession of his confederates. These goods bore the consignees shipping brand, were of like quality to, & with the goods in the bales delivered, made up the quantity ordered. A witness first claimed, in cross-examination, to identify the goods by the invoice, but on discovering the shipping brand relied on that. The invoice was not admitted as evidence. Accused was proved to have admitted to the police that he stole the goods seized, but his statement in some particulars could not be reconciled with known facts. The jury convicted him of receiving. The judge reserved the question whether there was evidence on which the jury could find the property in the goods as laid, viz. in the consignees:—**Held:** taking the evidence as a whole the jury might reasonably find that the goods were the goods of the consignees.—*R. v. REID* (1921), 17 Tas. L. R. 132.—**AUS.**

**5843 iv.** ———.]—Deceased was murdered, according to the only eyewitness, a girl of about eight years, by a dark man with a fat face, dressed in brown trousers, in the seat of which were two rents, a black shirt with white stripes, & a dark coat. Prisoner had been seen in the vicinity of the murder some 20 or 30 minutes previously. His dress corresponded with the shirt, coat, & trousers mentioned, in addition to which he wore a black hat. A knife, sworn to as having been in prisoner's possession three days before, was found on the afternoon of the murder, still wet with blood, a few feet

from the murdered woman's body. When arrested three days later, prisoner was without the dark shirt:

**Held:** the jury was justified on the evidence in coupling prisoner with the crime. In a criminal case, on an application for a new trial on the ground that the verdict is against the weight of evidence, the ct. will be governed by a consideration of whether the evidence was such that the jury, viewing the whole of the evidence reasonably, could not properly find a verdict of guilty.—*R. v. JENKINS* (1908), 14 B. C. R. 61; 9 W. L. R. 405; 14 Can. Crim. Cas. 221.—**CAN.**

**5843 v.** ———.]—The ct. should not confirm a conviction on the legal evidence as sufficient unless satisfied that the verdict would have been the same if evidence had not been wrongly admitted. This principle applies as well to cases of improper admission of evidence as to cases of mis-direction.—*RAMESH CHANDRA DAS v. R.* (1919), 1. L. R. 46 Calc. 895.—**IND.**

**5843 vi.** ———.]—Ct. refused to direct a new trial for a defect in the record when the jury were justified in convicting on the evidence in the case.—*KASIMUDDIN NASYA v. R.* (1920), 1. L. R. 47 Calc. 795.—**IND.**

**5843 vii.** ———.]—The ct. has power under Evidence Act (I. of 1872), clause 26, to examine the evidence & determine whether after the exclusion of the inadmissible evidence the residue is sufficient to justify the conviction. The ct. will not substitute its own finding for the verdict of the jury, & it must consider whether evidence improperly admitted was of such nature that it possibly might have considerably influenced the minds of the jury & whether it was reasonably certain that the jury would not have acted on the unobjectionable evidence if the wrongly admitted evidence had not been presented to them. Where the residue was by no means conclusive the ct. set aside the conviction.—*R. v. PANCHU DAS* (1920), 1. L. R. 47 Calc. 671.—**IND.**

**m.** ——— *Criminal Code Act, 1893, s. 3.*]—Applt. was, in July, 1889, tried for & convicted of a murder committed in May of that year. He was sentenced to death, but sentence was afterwards commuted to one of imprisonment for life. The above sect. provided that the Act should apply only to offences committed on & after the day of its coming into force. Parliament having been petitioned on behalf of the applt., on the ground of there being evidence tending to establish his innocence which was not produced at the trial, & of alleged unfair practices by two of the witnesses for the Crown, Criminal Code Act Amendment Act, 1895, was passed, which by sect. 2 provided that, notwithstanding anything contained in the 1893 Act, the applt. should have the right to apply to the Ct. of Appeal for a new trial, as provided in sect. 416 of the last-mentioned Act:—**Held:** a new trial could be applied for only on the ground mentioned in sect. 416—namely, of the verdict being against the weight of evidence, & not on the other grounds on which Parliament had been petitioned.—*CHEMIS v. R.* (1895), 14 N. Z. L. R. 393.—**N.Z.**

**n.** ———.]—On a motion under The Criminal Code Act, 1893, s. 416, for leave to apply to the Ct. of Appeal for a new trial of an indictment upon which the applt. had been convicted, on the ground that the verdict was against the weight of evidence, if there exists a reasonably arguable ground upon which it may be contended, not necessarily successfully, that the verdict was such that a jury, viewing reasonably the proved facts, could not properly find, then the judge presiding at the trial ought to grant leave to move the Ct. of Appeal for a new trial.—*R. v. BRUGES* (1906), 26 N. Z. L. R. 389.—**N.Z.**

**5847 i.** ——— *Because judge disapproved of verdict.*]—*R. v. BREWSTER* (No. 2) (1896), 2 Terr. L. R. 377.—**CAN.**

**o.** *Granting of leave to appeal by trial judge—Criminal Code, R. S. C.*



was not satisfied with it, though it would decline to do so on the further evidence called by applt.—*R. v. BERWICK* (1916), 12 Cr. App. Rep. 37, C. C. A. 5854. —[The judge's view (of the sufficiency of the evidence) by itself does not entitle the ct. to set aside a verdict but it is an element to be taken into consideration (*per Cur.*).—*R. v. SCRANTON* (1920), 15 Cr. App. Rep. 104, C. C. A.

*Annotation* :—*Mentd.* *R. v. Cuffin* (1922), 127 L. T. 564.

**5855. Granting of leave to appeal by trial judge**—**Not an indication of dissatisfaction with verdict.**—Leave to appeal being granted by the single judge, who was also the judge at the trial, does not imply a doubt as to the conviction being right.—*R. v. CARPENTER* (1908), 1 Cr. App. Rep. 210, C. C. A.

#### SUB-SECT. 5.—WRONGFUL ADMISSION OF EVIDENCE AT TRIAL.

**5856. General rule.**—In a criminal trial, if any evidence not legally admissible against prisoner is left to the jury, & they find him guilty, the conviction is bad: & this notwithstanding that there was other evidence before them properly admitted & sufficient to warrant a conviction.—*R. v. GIBSON* (1887), 18 Q. B. D. 537; 56 L. J. M. C. 49; 56 L. T. 367; 51 J. P. 742; 35 W. R. 411; 3 T. L. R. 442; 16 Cox, C. C. 181, C. C. R.

*Annotations* :—*Refd.* *R. v. Stephens* (1888), 58 L. T. 776; *R. v. Moore* (1892), 61 L. J. M. C. 80; *R. v. Marsham*, *Ex p. Pethick Lawrence*, [1912] 2 K. B. 362.

**5857 Conviction quashed—Evidence of other acts.**—If on an indictment for receiving stolen property an attempt be made to prove the possession of other property alleged to have been stolen

within twelve months, & the proof fail, the jury must be warned to disregard the evidence.—*R. v. HALIKIOPULO* (1909), 3 Cr. App. Rep. 272, C. C. A.

**5858.**—[On an indictment for obtaining by false pretences or other fraud, evidence of similar offences to that charged committed by deft. is only admissible a *prima facie* case being made, to negative a defence of mistake or accident or to prove a systematic course of fraudulent conduct but not to prove general bad character. Conviction quashed as evidence admitted may have influenced the jury.—*R. v. FISHER*, [1910] 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122; 22 Cox, C. C. 270; 3 Cr. App. Rep. 176, C. C. A.

*Annotations* :—*Apprvd. & Apld.* *R. v. Ellis*, [1910] 2 K. B. 746. *Consd.* *R. v. Rodley*, [1913] 3 K. B. 468. *Apprvd. & Apld.* *R. v. Kurasch*, [1915] 2 K. B. 749. *Apld.* *R. v. Wilson* (1915), 11 Cr. App. Rep. 251. *Refd.* *R. v. Ball* (1910), 5 Cr. App. Rep. 238; *Ibrahim v. R.*, [1914] A. C. 599; *R. v. Baird* (1915), 84 L. J. K. B. 1785.

**5859.**—[It is quite clear from the summing up that the jury were invited to consider whether these two cases, evidence of which had been wrongly admitted, were not very damaging to deft.'s credit & the jury could hardly have failed to draw the inference hostile to deft. on the point. We feel bound therefore to say not only that the jury may have been influenced but that they must have been influenced (*BRAY, J.*).—*R. v. ELLIS*, [1910] 2 K. B. 746; 79 L. J. K. B. 841; 102 L. T. 922; 74 J. P. 388; 26 T. L. R. 535; 22 Cox, C. C. 330; 5 Cr. App. Rep. 41, C. C. A.

*Annotations* :—*Refd.* *Barker v. Arnold*, [1911] 2 K. B. 120; *R. v. Boyle & Merchant*, [1914] 3 K. B. 339; *R. v. Mason* (1914), 111 L. T. 336; *R. v. Baird* (1915), 84 L. J. K. B. 1785; *R. v. Ratcliffe* (1919), 89 L. J. K. B. 135; *R. v. Starkie*, [1922] 2 K. B. 275; *Jenkins v. Feit* (1923), 129 L. T. 95.

1906, c. 148, s. 1021.]—The judge presiding at a criminal trial has no power to grant a new trial. Leave to move the Ct. of Appeal for a new trial may, under above sect., be given by the trial judge, but only on the ground that the verdict is against the weight of evidence.—*R. v. DI FRANCESCO* (1918), 44 O. L. R. 75; 45 D. L. R. 488.—**CAN.**

—[Where the trial judge, acting under above sect., gives leave to prisoner, after conviction, to apply to the ct. *in banco* for a new trial on the ground that the verdict was against the weight of evidence, the power of the ct. is limited to the granting of a new trial, & the question then becomes whether the verdict was such as a jury, viewing the evidence as a whole, could reasonably find.—*R. v. PEEL* (No. 1) (1920), 54 N. S. L. 329; 34 Can. Crim. Cas. 390.—**CAN.**

#### PART XIV. SECT. 7, SUB-SECT. 5.

**5856 i. General rule.**—The wrongful admission of evidence which is in its nature damaging to accused & which considering all the evidence must be taken to have influenced the decision of the justices vitiates a conviction.—*CRUDGINGTON v. COONEY*, *Ex p. COONEY*, [1902] S. R. Q. 176.—**AUS.**

**5856 ii.**—[Ct. will not lay down any strict rule that it will not entertain an appeal on the ground that evidence had been wrongly admitted unless objection to the admission of the evidence has been taken at the trial.—*R. v. O'BRIEN* (1920), 20 S. R. N. S. W. 486; 37 N. S. W. N. 154.—**AUS.**

**5856 iii.**—[Ct. of Criminal Appeal will not, as a general rule, upset a conviction on the ground that evidence is inadmissible unless exceptional circumstances are proved, & this rule more especially applies in cases where an advocate has attempted to make

use of such evidence for his own purpose.—*R. v. BRANSCOMBE* (1921), 21 S. R. N. S. W. 363.—**AUS.**

**5856 iv.**—[Under Code, s. 746, the improper admission of evidence at a criminal trial cannot be said in itself necessarily to constitute a wrong or miscarriage, but it is a question for the ct. upon the hearing of any appeal, whether in the particular case it did so or not.—*R. v. Woods* (1897), 5 B. C. R. 585.—**CAN.**

**5856 v.**—[It is the duty of the judge on a criminal trial to exclude illegal evidence, & its admission is a ground for a new trial, whether objected to or not on the trial.—*R. v. CLARKE* (1907), 2 E. L. R. 327; 38 N. B. R. 11.—**CAN.**

**5856 vi.**—[If inadmissible evidence bearing upon the particular count of the indictment under which the conviction is made is improperly received, the conviction would be bad; but, as the appeal under Criminal Code, s. 1912, is in the nature of a rehearing, the ct., disregarding all such evidence & looking only at the evidence clearly admissible, may form its own judgment on the guilt or innocence of prisoner, & affirm or quash the conviction accordingly.—*R. v. CLARKE* (1908), 9 W. L. R. 243; 1 Alta. L. R. 368.—**CAN.**

**5856 vii.**—[Where evidence has been improperly admitted or something not according to law has been done at the trial which may have operated prejudicially to accused upon a material issue, although it has not been & cannot be shown that it did, in fact, so operate, & although the evidence which was properly admitted at the trial warranted the conviction, Ct. of Appeal may order a new trial.—*ALLEN v. R.* (1911), 44 S. C. R. 331.—**CAN.**

**5856 viii.**—[Omission at a trial

to object to the reception of evidence does not preclude the right to object on a criminal appeal.—*R. v. JENNINGS & HAMILTON*, [1917] 1 W. W. R. 1073; 11 Alta. L. R. 290.—**CAN.**

**5856 ix.**—[Although a Ct. of Appeal finds that evidence was improperly admitted it is required, under Criminal Code, s. 1019, to consider its possible or probable effect upon the jury.—*R. v. LETAIN*, [1918] 1 W. W. R. 595; 29 Can. Crim. Cas. 389.—**CAN.**

**5856 x.**—[*RAMESH CHANDRA DAS v. R.* (1919), 1 L. L. R. 46 Calc. 895.—**IND.**

**5856 xi.**—[*R. v. PANCHU DAS* (1920), 1 L. L. R. 47 Calc. 671.—**IND.**

**5856 xii.**—[*R. v. TAYLOR* (No. 2) (1885), 3 N. Z. L. R. C. A. —**CAN.**

**5856 xiii.**—[*R. v. LAWRENCE* (1905), 25 N. Z. L. R. 129.—**N.Z.**

**5856 xiv.**—[Where evidence had been wrongly admitted against an accused, & it formed the basis of the case against accused, who had been convicted:—*Held*: the evidence had prejudiced accused, & the conviction should be quashed.—*R. v. BINDER* (1912), T. P. D. 373.—**S. AF.**

**5856 xv.**—[*R. v. KOTCHO, R. v. BARLEY*, [1918] E. D. L. 91.—**S. AF.**

**q. Evidence called after defence closed.**—It is competent for the Crown with or without the instructions of the ct., but with its permission, to call evidence to rebut evidence given for the defence on some new point, upon which the Crown evidence is silent, & which could not have been foreseen by prosecution. The evidence for the prosecution against an accused person, coupled with the evidence of his co-accused, was sufficient, if believed, upon which to have convicted accused; but the magistrate not being satisfied with this evidence, after the defence had been closed, caused additional



**Sect. 7.—Determination of appeals against conviction: Sub-sect. 5.]**

**5860.** ———.]—Conviction quashed on the ground that a witness had been allowed to depose to the admission by prisoner that he had committed offences unconnected with the pending charge.—*R. v. COULTER* (1910), 5 Cr. App. Rep. 147, C. C. A.

**5861.** ———.]—When on the trial of an indictment evidence relative to another indictment has been admitted the ct. will quash a conviction.—*R. v. POSNETT* (1913), 9 Cr. App. Rep. 64, C. C. A.

**5862.** ———.]—On the trial of an indictment for burglary with intent to rape, evidence of immoral conduct subsequent to the attempt alleged is not admissible against deft.—*R. v. RODLEY*, [1913] 3 K. B. 468; 82 L. J. K. B. 1070; 109 L. T. 476; 77 J. P. 465; 29 T. L. R. 700; 58 Sol. Jo. 51; 23 Cox, C. C. 574; 9 Cr. App. Rep. 69, C. C. A.

**Annotations:—***Consd. R. v. Kurasch*, [1915] 2 K. B. 749. *Refd. R. v. Burlison* (1914), 11 Cr. App. Rep. 39; *R. v. Jones* (1922), 127 L. T. 160.

**5863.** ———.]—The ct. will quash a conviction when evidence of a previous accusation of an offence similar to that charged has been improperly given, although the judge warns the jury to disregard such evidence.—*R. v. BARRON* (1914), 110 L. T. 350; 78 J. P. 184; 30 T. L. R. 187; 24 Cox, C. C. 83; 9 Cr. App. Rep. 236, C. C. A.

**5864.** ——— **Evidence of previous conviction.]**—On an appeal against the verdict of a jury convicting a prisoner of having feloniously uttered a counterfeit coin where the only evidence of guilty knowledge was the fact that prisoner had run away when followed by a policeman & where the prisoner had proved conclusively that he had not uttered another counterfeit coin to the same person a fortnight before—as was alleged—for he was in prison at the time, the ct. allowed the appeal on the ground that the judge had not expressly warned the jury that they must disregard the fact that the prisoner had been in prison before.—*R. v. LEE* (1908), 72 J. P. 253; 24 T. L. R. 627; 52 Sol. Jo. 518; 1 Cr. App. Rep. 5, C. C. A.

**Annotations:—***Consd. R. v. Warner* (1908), 73 J. P. 53. *Refd. R. v. Joyce* (1908), 72 J. P. 483. *Mentd. R. v. Laws* (1908), 72 J. P. 271.

**5865.** ———.]—Under the circumstances of this case, on a trial for larceny, where a witness, put forward by the prosecution as an accomplice, gave evidence which suggested that prisoner had

been previously concerned with him in coining offences, & the judge, who tried the case, prevented prisoner, who was not defended by counsel, from cross-examining on the point, & stopped him in the middle of his explanation of the matter, in his address to the jury, the Ct. of Criminal Appeal quashed the conviction.

*R. v. Lee*, No. 5864, *ante*, must not be taken as an authority for saying that, where some fact has come out prejudicial to prisoner, which ought not to have been given in evidence, & the judge who tries the case has not warned the jury to disregard that fact—that case is no authority for saying that on those facts only the Ct. of Criminal Appeal will quash the conviction (*DARLING, J.*).—*R. v. WARNER* (1908), 73 J. P. 53; 25 T. L. R. 142; 1 Cr. App. Rep. 227, C. C. A.

**5866.** ———.]—*R. v. WESTFALL* (1912), 107 L. T. 463; 76 J. P. 335; 28 T. L. R. 297; 23 Cox, C. C. 185; 7 Cr. App. Rep. 176, C. C. A.

**Annotations:—***Consd. R. v. Hudson*, [1912] 2 K. B. 464. *Refd. R. v. Roberts* (otherwise *Spalding*) (1920), 37 T. L. R. 69.

**5867.** ———.]—If evidence of a previous conviction of deft. is improperly given the ct. will quash a conviction which may have been due to the jury knowing the fact.—*R. v. HEMINGWAY* (1912), 77 J. P. 15; 29 T. L. R. 13; 8 Cr. App. Rep. 47, C. C. A.

**Annotation:—***Consd. R. v. Redd*, [1923] 1 K. B. 104.

**5868.** ———.]—*R. v. CURTIS*, No. 5520, *ante*.

**5869.** ———.]—Where deft. has unnecessarily let in evidence a previous conviction, the ct. will take into account its effect on the jury.—*R. v. FRANKS* (1915), 11 Cr. App. Rep. 104, C. C. A.

**5870.** ———.]—Evidence of a previous conviction of deft. improperly given may be so prejudicial to him that the ct. will decline to apply the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4.—*R. v. LANE* (1920), 15 Cr. App. Rep. 26, C. C. A.

**5871.** ——— **Evidence of previous warning.]**—Evidence of a previous caution against committing an offence of a certain kind is not admissible on the trial of an indictment for an offence of that kind.—*R. v. MULLINS* (1910), 5 Cr. App. Rep. 13, C. C. A.

**Annotation:—***Refd. Ibrahim v. R.*, [1914] A. C. 599.

**5872.** ——— **Hearsay evidence.]**—Applt. was convicted of stealing a pair of glasses in a shop. The witness for the Crown who spoke of the theft at the police ct. said that the glasses stolen were Zeiss glasses. This witness was ill at the time of the trial, & being unable to attend, his depositions given at the police ct. were read. A pair of glasses were produced from the custody of a pawnbroker,

*ALLI AHMED* (1913), T. P. D. 500.—**S. AF.**

**58641.** ——— **Evidence of previous conviction.]**—On the trial of prisoner on a charge of breaking & entering a house with intent to steal, evidence was given that prisoner had been committed for trial to a previous sitting of the ct., had absconded from bail, & gone into N.S.W., where he was arrested & sentenced to imprisonment on two charges of stealing in a house; that he had been taken back to Q. from the gaol wherein he had been confined in N.S.W., on the expiration of the term of his imprisonment. The judge, in summing up, referred to the fact that prisoner had absconded, & then got into trouble in N.S.W. Prisoner was convicted, & sentenced to a term of imprisonment.—*Held*: as the trial judge had commented on the evidence relating to the prisoner's arrest & conviction in N.S.W., the conviction should be quashed & a new trial ordered.—*R. v. EVERETT*, [1920] S. R. Q. 1.—**AUS.**

evidence to be called upon a point upon which evidence for the Crown had already been given:—*Held*: as the additional evidence had been improperly admitted & as it was impossible to hold that accused had not been prejudiced thereby, the conviction must be quashed.—*R. v. JILWANA*, [1917] E. D. L. 411.—**S. AF.**

**r.** ——— **Evidence of wife.]**—Where of two witnesses against accused one was his wife & the wife's evidence was so important that the magistrate could not fairly have been asked whether he would have convicted without it the ct. set aside the conviction.—*R. v. BROWN*, [1920] C. P. D. 20.—**S. AF.**

**s.** ——— **Consent to admission—Act 13 of 1917, s. 273.]**—Accused cannot by waiver or consent render admissible a statement expressly declared by Act 31 of 1917, s. 273, to be inadmissible.—*R. v. PERKINS*, [1920] App. D. 307.—**S. AF.**

**t.** **Conviction quashed—Evidence of similar acts.]**—Prisoner was charged

with obtaining 19s. from R. by falsely pretending that a worthless piece of paper presented & delivered by him to her was a one-pound note. At the trial eight other similar pieces of paper were admitted in evidence. As to five of these R. swore that she received them from prisoner as good notes, the other three had been found on another person not before the ct. & they could not be traced to the prisoner. R. could not pick out the five pieces of paper she had received from prisoner from others:—*Held*: these three pieces of paper were wrongly received in evidence & conviction of prisoner quashed.—*R. v. ALLEN* (1872), 11 N. S. W. S. C. R. 73.—**AUS.**

**s.** ———.]—Where accused was charged with perjury & subornation of perjury, & evidence was admitted, though not objected to at trial, that accused had also attempted to suborn other persons not connected with the charge:—*Held*: its admission must necessarily have, & had, in fact, prejudiced accused, & the conviction should therefore be quashed.—*R. v.*

which the prosecution alleged to be the stolen glasses. These glasses were identified by another witness as the property of the firm from whom the pair of glasses had been stolen, but he said that these glasses were Busch glasses. He explained the inconsistency by stating that the other witness who was ill had made a mistake at the police ct. in saying that the stolen glasses were Zeiss glasses, & that he knew this mistake had been made as the other witness had told him so. Prisoner's defence was an alibi. The ct. quashed the conviction on the ground that the judge at the trial had not told the jury to ignore the conversation spoken to between the two witnesses as being hearsay, but had, on the contrary, suggested to the jury what it was likely the witness who was ill might have said had he come into the box & given evidence, & also on the ground that as to the evidence as to the alibi, the judge had said in his summing up: "I do not wish to bias you in any way whatever, but here is a man who has set up an alibi which is no shadow of an alibi from any possible point of view."—*R. v. RUFFINO* (1911), 76 J. P. 49; 7 Cr. App. Rep. 47, C. C. A.

**5873.** — — —.]—In this case a conviction for burglary was quashed on the ground that the Chairman at quarter sessions who tried the case had in the course of the summing up admitted the hearsay testimony of a police officer, the effect of which was to refute an alibi set up by prisoner. This testimony was not admitted at the request of prisoner, & the Chairman himself told the jury that it was more satisfactory they should have heard the statement, although it did not support prisoner's statements. The ct. refused to act under the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1), as they said it was impossible for them to say that the wrongful admission of evidence might not have affected the minds of the jury.—*R. v. CAMPBELL* (1912), 77 J. P. 95; 8 Cr. App. Rep. 75, C. C. A.

**5874.** — **Statement made in presence of prisoner.**—The contents of a statement alleged to have been made in the presence of prisoner cannot be given in evidence unless & until the judge has satisfied himself, from the evidence contained in the depositions or given at the trial, that there is evidence, fit to be submitted to the jury, that prisoner by his answer to the statement, whether given in words or by conduct, acknowledged the truth of the statement. If the contents of the statement are admissible in evidence, in accordance with the above rule, the jury should be directed that they are entitled to take the statement into consideration as evidence in the case, not because the statement is evidence of the matters contained in it, but solely because of prisoner's acknowledgment of its truth.—*R. v.*

**5874 i.** — **Statement made in presence of prisoner.**—Statements made in the presence of the prisoner & denied by him as false are not admissible in evidence against him as an admission of guilt. Where the judge refused to allow counsel to interpose to show that the prisoner denied the truth of the statements made in his presence & admitted the evidence without inquiry as to its admissibility.—*Held*: the conviction must be quashed.—*R. v. STEVENS* (1904), 4 S. R. N. S. W. 727; 21 N. S. W. W. N. 245.—**AUS.**

**5877 i.** — **Incriminating evidence of co-prisoner.**—The omission of the judge to tell the jury that the statement of one prisoner is not evidence against his fellow-prisoner is a material error, & one fatal to the trial, notwithstanding

standing that the judge dealt with the evidence against each of prisoners separately.—*R. v. MIYA VALAD DAUD* (1869), 6 Bom. Cr. Ca. 10.—**IND.**

**b.** — **Confession.**—A confession having been wrongly admitted in evidence, the conviction must be quashed although prisoner afterwards admitted his guilt in the witness box whilst giving evidence.—*R. v. O'KEEFE* (1893), 14 N. S. W. L. R. 345.—**AUS.**

**c.** — — —.]—When a confession by an accused is improperly admitted in evidence, no substantial wrong or miscarriage of justice can be said to be occasioned thereby, if he went into the witness box & told there in substance the story related in the confession.—*R. v. MOKE*, [1917] 3 W. W. R. 575.—**CAN.**

**d.** — — — **No evidence that**

*NORTON*, [1910] 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 26 T. L. R. 550; 54 Sol. Jo. 602; 5 Cr. App. Rep. 65, C. C. A.

**Annotations** :—*Consd.* *R. v. Christie*, [1914] A. C. 545. *Refd.* *R. v. Atherton* (1910), 5 Cr. App. Rep. 233; *R. v. Hickey* (1911), 27 T. L. R. 441; *R. v. Stroud* (1911), 7 Cr. App. Rep. 38; *Ibrahim v. R.*, [1914] A. C. 599; *R. v. Adams* (1922), 17 Cr. App. Rep. 77. *Mentd.* *R. v. Althuler* (1915), 11 Cr. App. Rep. 243.

**5875.** — — —.]—*R. v. CHRISTIE*, No. 3811, ante.

**5876.** — **Irrelevant evidence.**—It was objected that evidence was wrongly admitted, viz. of persons who supplied goods & who were asked if they would have supplied them had they known that deft. had disposed of 100, Commercial Road. They said "No." The evidence ought not to have been admitted; it was not relevant to any issue. The Recorder, in summing up, told the jury that they ought not to pay any attention to that evidence, although he thought it ought to be admitted. We do not think there was any miscarriage of justice through its admission, & the conviction must stand (*per CUR.*).—*R. v. RICHMAN* (1910), 4 Cr. App. Rep. 233, C. C. A.

**5877.** — **Incriminating statement by co-prisoner.**—On the trial of B. & C. for burglary on a Monday night, the evidence against C. was that A., B., & C., were seen in each other's company on the Monday afternoon & the following Tuesday afternoon. The burglary was at a post office, & a large number of stamps were stolen. On the Tuesday afternoon C. was seen dealing openly with 1s. 3d. worth of stamps, & on the following Sunday with twelve halfpenny stamps. C. was searched on the Tuesday afternoon & no stamps were found on him. When C. was arrested he said that he did not know B. C. admitted when giving evidence that he did know B. A. was called by the prosecution & he swore that though he was guilty C. was innocent. Leave was obtained to treat him as a hostile witness, & a written confession made by him previously, which implicated C., was put to him under Criminal Procedure Act, 1865 (c. 18), s. 3, & so came to the minds of the jury. B. gave evidence, & a written confession made by him implicating C. was put to him in cross-examination & so came to the minds of the jury. The judge in summing up the case, directed the jury to disregard the two written confessions & advised them to acquit C., but he was found guilty. C. appealed:—*Held*: the appeal would be allowed & the conviction quashed.—*R. v. DIBBLE* (1908), 72 J. P. 498; 1 Cr. App. Rep. 155, C. C. A.

**Annotation** :—*Refd.* *R. v. White* (1922), 17 Cr. App. Rep. 60.

**5878.** **Conviction upheld — Effect of evidence negatived in summing up.**—*R. v. CROOKS* (1889), 5 T. L. R. 620, C. C. R.

**voluntary.**—Evidence held not admissible on a trial for theft, of an alleged confession of accused when virtually under arrest, as there was nothing to show that the statement was made voluntarily. Because of the improper admission of such evidence & of evidence given by the prosecution in rebuttal which was not proper rebuttal evidence, & as in the opinion of the ct. there was no other evidence to justify it, conviction was set aside.—*R. v. HUGHES*, [1921] 1 W. W. R. 119; 55 D. L. R. 697; 35 Can. Crim. Cas. 103.—**CAN.**

**e.** — — — — —.]—*R. v. JONES*, [1921] 3 W. W. R. 411; 62 D. L. R. 413; 36 Can. Crim. Cas. 208; 17 Alta. L. R. 86.—**CAN.**

**f.** — **Report of Commission — Speeches in Legislative Assembly.**—

*Sect. 7.—Determination of appeals against conviction: Sub-sect. 5.]*

**5879.** ———.]—A conviction will not be quashed if the jury is properly warned against prejudicial evidence accidentally admitted.—*R. v. LUCAS* (1908), 1 Cr. App. Rep. 234, C. C. A.

*Annotations:—Reid. R. v. Stratton* (1909), 3 Cr. App. Rep. 255; *Ibrahim v. R.*, [1914] A. C. 599.

**5880.** ———.]—Notwithstanding that the fact of a previous conviction has been illegally elicited in cross-examination, if the judge has successfully checked its influence on the mind of the jury, & the ct. is satisfied that there has been no miscarriage of justice, the ct. will not interfere.—*R. v. STRATTON* (1909), 3 Cr. App. Rep. 255, C. C. A.

**5881.** ———.]—A slight irregularity in cross-examination, amply provided against by the judge, is not a ground for appeal.—*R. v. SULLIVANT* (1909), 3 Cr. App. Rep. 265, C. C. A.

**5882.** ———.]—If when a previous conviction of a deft. on trial has, by the inadvertence of the ct. become known to the jury, they have been sufficiently cautioned against giving any weight to that information, a conviction by them will not necessarily be quashed.—*R. v. HARGREAVES* (1910), 6 Cr. App. Rep. 97, C. C. A.

**5883.** ———.]—Where a statement was put in which contained certain observations adverse to applt. & its admission was objected to by counsel at the trial, & after it had been read the judge observed: "I did not know what was in it; now I have heard it read I do not think it is evidence," & strongly cautioned the jury against taking it into account:—*Held*: the admission of this evidence had led to no substantial miscarriage of justice.—*R. v. WILSON* (1911), 6 Cr. App. Rep. 207, C. C. A.

*Annotation:—Reid. Ibrahim v. R.*, [1914] A. C. 599.

**5884.** ———.]—In answer to a question, a witness for the prosecution said: "After he had done his two years."

It was an unfortunate incident but it was not due in any way to the carelessness of counsel, who put the question quite rightly; but the witness could only fix a certain date by reference to a period of two years' imprisonment which applt. had served. The judge at once, & again in his summing up, directed the jury not to allow the question to affect them. We cannot think that the answer affected their decision (*per CUR.*).—

*R. v. DEAN & MEAGHER* (1896), 17 N. S. W. L. R. 132; 12 N. S. W. W. N. 141.—**AUS.**

**g.** ——— *Depositions on trial of another.*—At the trial of prisoner, prosecuting counsel put in a letter, addressed to the Crown Attorney, from counsel who had been retained to act for prisoner, as follows:—"I find that I will be unable to go on with this trial on Dec. 28. . . . Would you kindly see the judge & ask him if he can take it on Jan. 6. . . . I am quite willing to accept the evidence of the family, in particular those who gave evidence at the H. trial, so that it would not be necessary for you to call them." The trial was proceeded with on Dec. 29, prisoner then being represented by another counsel, when, in addition to the letter, the depositions of two witnesses taken at the trial of H., who were not members of the family, were put in without the consent of, or objection to on the part of, prisoner's counsel:—*Held*: assuming the consent in the letter, which seemed to be a concession for the proposed postponement of the trial to Jan. 6, wide enough to authorise the admission of the specified depositions, the

depositions of the two witnesses not members of the family, were improperly received.—*R. v. BROOKS* (1906), 11 O. L. R. 525; 7 O. W. R. 533; 11 Can. Crim. Cas. 188.—**CAN.**

**h.** ——— *Evidence taken at preliminary hearing.*—Prisoner was tried upon an indictment for rape & seduction. After giving evidence at the preliminary hearing the girl upon whom the crime was alleged to have been committed, died. On the trial, counsel for the Crown, without proving the evidence of the girl taken on the preliminary hearing, & without objection from counsel for prisoner, read to the jury from his brief what purported to be a copy of the girl's evidence. The jury found prisoner guilty on the first count:—*Held*: though counsel for prisoner neglects to object, it is the duty of the judge in a criminal case to see that proper evidence only is before the jury, & prisoner should be discharged.—*R. v. POWELL* (1919), 27 B. C. R. 252.—**CAN.**

**k.** ——— *Police evidence obtained by false representations.*—A conviction in the Sheriff Ct. set aside on appeal, on the ground that the evidence of

*R. v. SMITH* (1915), 84 L. J. K. B. 2153; 114 L. T. 239; 80 J. P. 31; 31 T. L. R. 617; 59 Sol. Jo. 704; 25 Cox, C. C. 271; 11 Cr. App. Rep. 229, C. C. A.

**5885.** ——— *Evidence not objected to at time.*—When prisoner is defended by counsel & he chooses, for reasons of his own, to allow such evidence to be let in without objection, he cannot come here & ask to have the verdict revised on that ground (*per CUR.*).—*R. v. DAVIS & RIDLEY* (1909), 2 Cr. App. Rep. 133, C. C. A.

**5886.** ———.]—*R. v. BENSON* (1909), 3 Cr. App. Rep. 70, C. C. A.

**5887.** ———.]—Objection to the admissibility of questions tending to prove prisoner's previous "bad character" must be taken at the trial.—*R. v. HUDSON*, [1912] 2 K. B. 464; 81 L. J. K. B. 861; 107 L. T. 31; 76 J. P. 421; 28 T. L. R. 459; 56 Sol. Jo. 574; 23 Cox, C. C. 61; 7 Cr. App. Rep. 256, C. C. A.

*Annotations:—Reid. R. v. Watson* (1913), 29 T. L. R. 450. *Mentd. R. v. Biggin*, [1920] 1 K. B. 213.

**5888.** ——— *Evidence of another offence not implicating prisoner.*—A conviction will not be quashed because a witness, in re-examination, volunteers inadmissible evidence of another offence not necessarily implicating deft.—*R. v. PRIESTLEY* (1910), 5 Cr. App. Rep. 155, C. C. A.

**5889.** ——— *Where misreception of evidence is slight.*—Where there is not any misdirection, a prisoner's admission of a previous conviction is no ground for quashing conviction nor is it a ground that slight mistakes in receiving evidence have been made.—*R. v. JOYCE & BROWN (alias BROCKWELL)* (1908), 1 Cr. App. Rep. 82, C. C. A.

**5890.** ———.]—Evidence improperly given to which neither judge nor jury pays attention not a ground for quashing a conviction, & the ct. will dismiss an appeal where there is no ground for saying that there was no evidence on which the jury could convict, or that they were in any way misdirected.—*R. v. GREEN* (1908), 1 Cr. App. Rep. 124, C. C. A.

**5891.** ———.]—Slight misdirection or improper admission or rejection of evidence is not sufficient ground to quash a conviction, unless there has been some "substantial miscarriage of justice."—*R. v. BRANN* (1908), 1 Cr. App. Rep. 256, C. C. A.

*Annotation:—Reid. R. v. Campbell* (1912), 8 Cr. App. Rep. 75.

**5892.** ——— *Reference by prosecution to inadmis-*

sible evidence. The Superintendent of Police ought not to have been admitted, his information having been obtained by means of false representations.—*KERR v. MACKAY* (1853), 1 Irv. 213; 25 Sc. Jur. 402; 2 Stuart, 388.—**SCOT.**

**1. Conviction upheld.—Evidence of another offence.—Charge as to latter withdrawn.**—It is no ground for quashing a conviction for unlawful assembly on one day, that evidence of an unlawful assembly on another day has been improperly received, if the latter charge was abandoned by the prosecuting counsel at the close of the case, & there was ample evidence to sustain the conviction.—*R. v. MAILLOUX* (1876), 3 Pug. 493.—**CAN.**

**m.** ——— *Question by judge.*—Prisoner was convicted of sodomy. During the Crown case the mother of the boy was called & gave evidence that she had examined the boy shortly after the offence was committed. In cross-examination she said, "My husband came home that night. I did not tell him of the boy's condition." She was then asked by the judge why she did not inform her husband; to which she replied that

sible documents.]—*R. v. SEHAM YOUSRY*, No. 5521, *ante*.

**5893.** ——— **Proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1), applied—Statement made in presence of prisoner.]**—*R. v. ATHERTON* (1910), 5 Cr. App. Rep. 233, C. C. A.

**5894.** ——— **—**—**]**—The jury should be directed that, a statement made by one prisoner implicating another & immediately denied, although strictly admissible as evidence, must not be accepted as evidence of the facts contained in such statement. Notwithstanding the lack of such a direction to the jury by the presiding judge at the trial, the ct. will act under the above proviso if they are satisfied that no substantial miscarriage of justice has taken place. In the absence of any reasonable explanation by applt. as to his recent possession of stolen goods, the conviction was upheld on appeal.—*R. v. CURNOCK* (1914), 111 L. T. 816; 24 Cox, C. C. 440; 10 Cr. App. Rep. 207, C. C. A.

**5895.** ——— **Statement by mother of prisoner.]**—*R. v. WILSON*, No. 5883, *ante*.

**5896.** ——— **Statement by accomplice.]**—*R. v. STROUD* (1911), 7 Cr. App. Rep. 38, C. C. A.

**5897.** ——— **Evidence of general fraudulent conduct.]**—*R. v. CUTTING* (1909), 2 Cr. App. Rep. 150, C. C. A.

**5898.** ——— **Admission of deposition.]**—*R. v. TOTTERDELL* (1910), 5 Cr. App. Rep. 274, C. C. A.

**5899.** ——— **Evidence of other offences.]**—Where owing to a general misunderstanding, on the trial of a charge of larceny, evidence was wrongfully admitted of another larceny by prisoner at precisely the same place & time, but the jury were cautioned against the confusion, & there was in the opinion of the ct. no miscarriage of justice, the ct. refused to quash the conviction.—*R. v. LOATES* (1910), 5 Cr. App. Rep. 193, C. C. A. *Annotation:—Refd. Ibrahim v. R.*, [1914] A. C. 599.

**5900.** ——— **Evidence of trial by court-martial.]**—Applt. who was entrusted with the squadron account & also with the sergeants' mess account of the regiment in which he was quartermaster-sergeant, was indicted for uttering a forged receipt in respect of the latter account. At the trial evidence was given of a conversation between applt. & his captain in which applt. said he was £60 out in his squadron accounts, & asked the captain for a loan of the money promising repayment out of his deferred pay. Applt. was convicted. Evidence was also admitted at the

she had never heard of such a thing before & did not know that a crime had been committed. Objection was taken on behalf of prisoner that the judge was not entitled to ask the witness her reason for not informing her husband:—*Held*: the evidence was admissible. Even if objectionable it would not constitute a substantial wrong or miscarriage of justice within sect. 476, Crimes Act, 1900.—*R. v. KELLY* (1907), 7 S. R. N. S. W. 518.—**AUS.**

**n.** ——— **Admission of secondary evidence.]**—Secondary evidence of a document having been given without objection prisoner's counsel afterwards asked that the evidence be withdrawn from the jury, the judge refused:—*Held*: the objection only being as to the mode of proof the case fell within the proviso to sect. 423, which provides "that no conviction shall be reversed unless for some substantial wrong or other miscarriage of justice."—*R. v. UMPLEBY* (1897), 8 N. S. W. L. R. 154; 13 N. S. W. W. N. 181.—**AUS.**

**o.** ——— **]**—A witness said he knew

the prisoner was in B. on a certain day in July, 1913, from inquiries made & what prisoner had told him. The evidence was objected to. The judge made no note of the evidence & it was disregarded. Evidence in rebuttal established that the prisoner had admitted that he was in Brisbane in July, 1913.

On appeal from the conviction on the ground that the above evidence was improperly admitted:—*Held*: the ct. would, if necessary, decide on the circumstances of the case that no substantial miscarriage of justice had actually occurred, & would dismiss the appeal under Criminal Code Act of 1913, s. 9.—*R. v. MORRIS* (No. 2), [1914] S. R. Q. 274.—**AUS.**

**p.** ——— **]**—Prisoner was indicted for unlawfully using an instrument on L. with intent to procure a miscarriage. L. was called for the prosecution to prove the charge, & in cross-examination denied that she had told A., R., & T., that before prisoner had operated on her she had been operated on by a doctor for the purpose of procuring a

trial to the effect that applt. had been tried by court-martial, but applt.'s counsel in cross-examination elicited the fact that the verdict of the court-martial against applt. had been quashed by the Judge Advocate-General. The Judge in his summing up also pointed this out to the jury, & no point was made by the prosecution that the verdict of the court-martial should be taken into consideration:—*Held*: (1) evidence of above conversation was properly admitted in order to show that about the same time as the commission of the offence with which he was charged applt. was in want of money; (2) without deciding whether the evidence as to the court-martial proceedings was properly admitted or not, no substantial miscarriage of justice had occurred, & the case came within the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1).—*R. v. WESTACOTT* (1908), 25 T. L. R. 192; 1 Cr. App. Rep. 246, C. C. A.

*Annotation:—As to (2) Refd. Ibrahim v. R.*, [1914] A. C. 599.

**5901.** ——— **Evidence of previous conviction.]**—*R. v. JOYCE & BROWN (alias BROCKWELL)*, No. 5889, *ante*.

**5902.** ——— **—**—**]**—*R. v. SOLOMON* (1909), 2 Cr. App. Rep. 80, C. C. A.

*Annotations:—Refd. Ibrahim v. R.*, [1914] A. C. 599; *R. v. Beecham*, [1921] 3 K. B. 464.

**5903.** ——— **—**—**]**—The ct. will not, in view of the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1), quash a conviction on the ground of the misreception of unimportant evidence.—*R. v. BIDDULPH* (1910), 4 Cr. App. Rep. 221, C. C. A.

**5904.** ——— **—**—**]**—If evidence of previous convictions has been admitted owing to deft.'s action at the trial, the ct. will not grant relief on that ground only.—*R. v. COLLINS* (1917), 13 Cr. App. Rep. 6, C. C. A.

**5905.** ——— **Elicited in cross-examination.]**—*R. v. STRATTON*, No. 5880, *ante*.

**5906.** ——— **—**—**]**—Under the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1), the appeal in this case was dismissed, inasmuch as having regard to the other evidence given at the trial, no substantial miscarriage of justice had actually occurred by a previous conviction of deft. which was elicited in cross-examination.—*R. v. BEECHAM*, [1921] 3 K. B. 464; 90 L. J. K. B. 1370; 85 J. P. 276; 37 T. L. R. 932; 65 Sol. Jo. 768; 16 Cr. App. Rep. 26, C. C. A.

**5907.** ——— **Evidence of handwriting.]**—*R. v. O'BRIEN* (1911), 7 Cr. App. Rep. 29, C. C. A.

miscarriage. A., R., & T., were called for the defence, & swore that L. had so told them. The doctor was then called by the Crown, & he swore that he had not operated on L.:—*Held*: the evidence of the doctor was properly admitted; but in any event prisoner's case was not so affected by the evidence as to warrant a reversal of the conviction, even if the evidence were not strictly admissible.—*R. v. ANDREWS* (1886), 12 O. L. 184.—**CAN.**

**q.** ——— **Threats made by prisoner to another person.]**—Evidence of threats made by prisoner in respect of another person was improperly admitted, but, in the circumstances, no substantial wrong or miscarriage of justice was occasioned on the trial by reason of the evidence, & therefore, under Criminal Code, s. 1019, the conviction should not be set aside or a new trial directed.—*R. v. SUNFIELD* (1907), 10 O. W. R. 1010; 15 O. L. R. 252.—**CAN.**

**r.** ——— **]**—Prisoner was convicted of murdering S. On motion for discharge of prisoner on a reserved case the questions reserved were:

*Sect. 7.—Determination of appeals against conviction: Sub-sects. 5, 6 & 7, A. (a) & (b).]*

**5908.** ——— **Evidence other than inadmissible evidence sufficient.]**—The ct. will quash a conviction, where the only evidence of guilt is an answer to the charge which may or may not be construed as an admission.

If the ct. thinks there was sufficient evidence of a larceny, even though some evidence given thereof was inadmissible, it will not quash the conviction.

Proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1), applied in such a case where invoices received by an agent in this country from consignors abroad were admitted as evidence of the contents of a box landed in England.—*R. v. BARKER & PAGE* (1915), 11 Cr. App. Rep. 191, C. C. A.

#### SUB-SECT. 6.—WRONGFUL EXCLUSION OF EVIDENCE AT TRIAL.

**5909. Conviction quashed—Evidence for defence excluded.]**—When the issue is whether applt. was carrying on a genuine business, he is entitled to put in evidence receipts bearing on that point, & if his bank books are put in, to refer to entries in them.

The evidence was admissible in law, & its exclusion has prevented applt. from putting forward a substantial part of its defence. Consequently the conviction must be quashed (LORD READING, C.J.).—*R. v. SAGAR*, [1914] 3 K. B. 1112; 84 L. J. K. B. 303; 112 L. T. 135; 79 J. P. 32; 24 Cox, C. C. 500; 10 Cr. App. Rep. 279, C. C. A.

**5910.** ——— **]**—Conviction quashed on the ground of misdirection & improper exclusion of evidence.—*R. v. HUMPHREYS* (1919), 84 J. P. 48; 14 Cr. App. Rep. 85, C. C. A.

**5911. Conviction upheld—Cross-examination stopped.—Proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1), applied.]**—The above proviso applied though a cross-examination was wrongly stopped.—*R. v. SMALLMAN* (1914), 10 Cr. App. Rep. 1, C. C. A.

“Was the evidence of statements made by prisoner at the police station properly admitted?” & “Should there be a new trial because of wrongful admission of the evidence, or any part thereof?”—*Held*: the questions should be answered adversely to prisoner & the conviction affirmed.—*R. v. STEFFOFF* (1909), 14 O. W. R. 1233; 1 O. W. N. 250; 20 O. L. R. 103.—CAN.

**s.** ——— **]**—A witness, A., when about to leave the box was noticed by the judge to be muttering; he asked the interpreter what she was saying; & this brought out a statement from the witness respecting something said by deceased to witness, tending to incriminate prisoners, & which at that stage of the trial was not admissible.—*Held*: as the *ante-mortem* statement of deceased made to A. which included the matter so improperly brought out, was afterwards admitted, no wrong or miscarriage had resulted therefrom.—*R. v. WALKER & CHINLEY* (1910), 13 W. L. R. 47.—CAN.

#### PART XIV. SECT. 7, SUB-SECT. 6.

**t. New trial granted—Evidence for defence excluded.]**—A new trial granted of a charge of carnally knowing a girl of previously chaste character & between the ages of fourteen & sixteen, for the reason that accused should have been allowed to give evidence

to show that he was not at his house, where the offence was alleged to have been committed, at the period when it might have been committed.—*R. v. McPHERSON*, [1922] 2 W. W. R. 723; 69 D. L. R. 301; 37 Can. Crim. Cas. 315.—CAN.

#### PART XIV. SECT. 7, SUB-SECT. 7.—A. (a).

**5916 i. Slight omission.—Not a ground for quashing conviction.]**—If, on the facts of the case in a murder trial, accused was either guilty of murder or not guilty on account of insanity it is not a reversible error for the judge to omit any direction to the jury that in the event of their finding accused to have been sane at the time of the commission of the offence, they should also consider whether or not what he did amounted to manslaughter.—*R. v. OLKHOVIK*, [1920] 35 Can. Crim. Cas. 35; 56 D. L. R. 499.—CAN.

**s. Omission calculated to mislead jury—Ground for quashing conviction.]**—The omission by the judge in his charge to the jury, to mention the fact of the original witnesses named in the first information having been abandoned by the prosecution of two of them having given evidence for the defence, & of the witnesses actually examined for the prosecution being entirely new witnesses, is a sufficient misdirection to justify the setting aside of the conviction.—*DASARATH MANDAL*

#### SUB-SECT. 7.—MISDIRECTION.

##### A. Insufficient Direction.

##### (a) In General.

**5912. When calculated to mislead jury—Ground for quashing conviction.]**—*R. v. WANN*, No. 5661, *ante*.

**5913.** ——— **]**—An inadequate summing up may be a ground for quashing a conviction.—*R. v. MCGILL* (1914), 10 Cr. App. Rep. 267, C. C. A.

**5914.** ——— **]**—*ANON.*, No. 5588, *ante*.

**5915.** ——— **]**—Even in a case where corroboration is not legally essential, a confusion in the summing up upon the nature & meaning of corroboration, may invalidate a conviction.—*R. v. RUDGE* (1923), 17 Cr. App. Rep. 113, C. C. A.

**5916. Slight omission.—Not a ground for quashing conviction.]**—An omission by the judge to call attention to a slight discrepancy between a witness's evidence at the trial & that at the coroner's inquisition is not misdirection.—*R. v. BEAL* (1912), 8 Cr. App. Rep. 95, C. C. A.

**5917.** ——— **]**—*R. v. BROWNHILL*, No. 5627, *ante*.

**5918.** ——— **]**—Mere omission to deal with a point of evidence is not necessarily misdirection.—*R. v. MACLEAN* (1923), 17 Cr. App. Rep. 79, C. C. A.

**5919. Non-direction may amount to misdirection—Except in a simple case.]**—In a simple case the judge is entitled to ask the jury whether they will dispense with his summing up.—*R. v. NEWMAN* (1913), 9 Cr. App. Rep. 134, C. C. A.

**5920.** ——— **]**—Applt. was convicted of high treason upon an indictment which charged him, *inter alia*, with adhering to, aiding, & comforting the King's enemies. He was by birth a German subject, but became a naturalised British subject in 1905. From that time up to the year 1914, he acted as German consul at Sunderland. On Aug. 4, 1914, a state of war existed between England & Germany as from 11 p.m. on that date. There was evidence at the trial that on Aug. 5 applt. had given advice & assistance which enabled German subjects liable to be called upon for military service in Germany to return there. The direction given by the judge to the jury was,

*v. R.* (1907), 1 L. R. 34 Calc. 325.—IND.

**5920 i. Non-direction may amount to misdirection.]**—Prisoners, who had been drinking, came on deceased's lawn & commenced to shout, sing & use profane & insulting language towards him. He twice warned them away, & finally appeared with a loaded gun threatening to shoot. A rush was made towards where he stood, when he took hold of the barrel of the gun & struck one of prisoners with the stock. The gun was discharged into his body, & there was evidence that prisoners then maltreated him. Next day he was taken to a hospital where he died. The judge in charging the jury instructed them that prisoners were doing an unlawful act in trespassing on the property of deceased, & if they were actuated by malice it would be murder, if not it was manslaughter, drawing their attention especially to Criminal Code, ss. 256 & 259 (b). Prisoners were found guilty of murder:—*Held*: the judge should have drawn the attention of the jury to sect. 259, sub-sect. (d), & directed them to find whether or not prisoners knew, or ought to have known, that their acts were likely to cause death, & his failure to do so was non-direction for which prisoners were entitled to a new trial.—*R. v. GRAVES* (1912), 12 E. L. R. 332; 9 D. L. R. 30, 175.—CAN.

**5920 ii.** ——— **]**—In some circum-

in effect, that, if applt. knew of the declaration of war between England & Germany at the time when he was giving such advice & assistance, they must find him guilty, & that he was lawfully entitled to act as he did, even after war was declared, was no defence:—*Held*: the direction to the jury should have been that they must consider whether, in acting as he did, the intention & purpose of applt. was evil & that he intended to aid & comfort the King's enemies, or whether he acted in good faith to his country & under the belief that it was his duty to assist German subjects to return to Germany; no direction on this point had been given to the jury, & the conviction must therefore be quashed.—*R. v. AHLERS*, [1915] 1 K. B. 616; 84 L. J. K. B. 901; 112 L. T. 558; 79 J. P. 255; 31 T. L. R. 141; 24 Cox, C. C. 623; 11 Cr. App. Rep. 63, C. C. A.

**5921. — Larceny.**—At the end of a trial for larceny on several different occasions, which had lasted four days, the assistant Recorder omitted to direct the jury, saying that they had heard the case, that he expected they had had enough of it, & that anything he could say would be of little use. The prisoner complained of the method of identification adopted, & as to some of the charges his evidence went to establish an *alibi*. The jury found the prisoner guilty. On appeal the conviction was quashed on the ground that in the circumstances the assistant Recorder should have directed the jury on the question of identification & should have told them that if they thought that upon the evidence some of the charges could not be supported they might, if they saw fit, acquit the prisoner.—*R. v. FINCH* (1916), 85 L. J. K. B. 1575; 115 L. T. 458; 25 Cox, C. C. 537; 12 Cr. App. Rep. 77, C. C. A.

**5922. —**—A conviction will be quashed for non-direction on a vital point of fact.—*R. v. KURASCH* (1917), 13 Cr. App. Rep. 13, C. C. A.

**5923. —**—*R. v. HAMILTON*, No. 5711, *ante*.

**5924. — Receiving.**—*R. v. EVANS*, No. 5833, *ante*.

**5925. —**—Non-direction, on charges of receiving stolen goods with guilty knowledge, may amount to misdirection leading to the quashing of a conviction.—*R. v. BARTLETT, BRADBERRY & GREEN* (1920), 14 Cr. App. Rep. 157, C. C. A.

**5926. —**—A grave omission to direct the jury on a vital point of law cannot be made good merely by counsel's calling attention to it at the termination of the summing up.—*R. v. WILLETT* (1922), 16 Cr. App. Rep. 146, C. C. A.

**5927. Defence an alibi.**—Direction as to identification necessary.—When the sole defence is an *alibi*, identification by a single witness must be conducted with great care & the summing up must deal carefully with the facts of the identification.—*R. v. MILLICHAMP* (1921), 16 Cr. App. Rep. 83, C. C. A.

(b) *As to Necessary Ingredients of Offence.*

**5928. Larceny—Intent to steal.**—A. sold a horse to B. There was a dispute between A. & B. as to the price at which the horse was sold, & eventually A., after repeated efforts to obtain what he said was owed to him by B., threatened to take the horse back, & eventually did so. A.

was convicted of larceny. The Ct. of Criminal Appeal quashed the conviction on the ground that there was no proper summing up on the question of "felonious intent," & also no proper evidence of "felonious intent" to go to the jury.—*R. v. CLAY* (1909), 74 J. P. 55; 3 Cr. App. Rep. 92, C. C. A.

**5929. —**—On a charge of larceny, when the facts are compatible with an honest mistake on deft.'s part, there must be a direction on intent to steal.—*R. v. STURGESS* (1913), 9 Cr. App. Rep. 120, C. C. A.

**5930. — Guilty knowledge.**—When a man is jointly indicted with his paramour for stealing the goods of her husband at or about the time of her leaving the latter, the jury must be clearly directed as to the proof of his guilty knowledge & should not have topics of prejudice connected with his immorality addressed to them.—*R. v. BLOOM* (1910), 74 J. P. 183; 4 Cr. App. Rep. 30, C. C. A.

**5931. — Intention to pass property.**—Where larceny by a trick is alleged, the jury should be directed on the question whether there was an intention to pass the property, or merely to part with possession.—*R. v. SPINNEY* (1923), 17 Cr. App. Rep. 95, C. C. A.

**5932. — Cheque & proceeds.**—On a trial for larceny of a cheque, it is a misdirection not to distinguish between the instrument & the proceeds thereof. The attention of the jury should be drawn to the specific facts that they must find in order to convict.—*R. v. HAMPTON* (1915), 84 L. J. K. B. 1137; 113 L. T. 378; 24 Cox, C. C. 722; 11 Cr. App. Rep. 117, C. C. A.

**5933. Obtaining by false pretences—Intent to defraud.**—On a charge of obtaining by false pretences, the nature of the offence, as differing from mere dishonesty, ought to be explained to the jury.—*R. v. BAKER* (1910), 4 Cr. App. Rep. 152, C. C. A.

**5934. —**—On an indictment for obtaining money by false pretences, it is essential that the jury should understand that there should be no conviction without an intent to defraud, & unless such intent is clear from the facts, they should be directed on the point; they should also be directed that the obtaining must be due to the false pretence alleged.—*R. v. FERGUSON* (1913), 9 Cr. App. Rep. 133, C. C. A.

*Annotation:—Consd.* *R. v. Bentote* (1918), 13 Cr. App. Rep. 149.

**5935. —**—On an indictment for obtaining by false pretences, it is not always essential that the jury should be directed in so many words that there must be an intent to defraud.—*R. v. CARR* (1916), 12 Cr. App. Rep. 140, C. C. A.

**5936. —**—Except in the clearest case, there must be a direction to the jury on a charge of obtaining by false pretences that an intent to defraud must be proved before they can convict.—*R. v. SECOMBE* (1917), 12 Cr. App. Rep. 275, C. C. A.

**5937. —**—Proviso to sect. 4 of the Criminal Appeal Act, 1907 (c. 23), applied when there was no direction on the intent to defraud.—*R. v. BENTOTE* (1918), 13 Cr. App. Rep. 149, C. C. A.

**5938. —**—A direction on "intent to defraud" should put the issue of fraud clearly

stances non-direction to a jury may be substantially & in effect misdirection, & therefore may be misdirection absolutely, & consequently involve a question of law within the meaning of Criminal Code, s. 1914.—*R. v. MURRAY & MAHONEY*, [1917] 2 W. W. R. 805.—*CAN.*

PART XIV. SECT. 7, SUB-SECT. 7.—  
A. (b).

b. *General rule.*—It is the duty of the judge in a criminal trial with a jury to define to the jury the crime charged & to explain the difference between it & its cognate offences, if

any. Failure to so instruct the jury is good cause for granting a new trial, & the fact that counsel for the accused took no exception to the Judge's charge is immaterial.—*R. v. WONG ON & WONG GOW* (1904), 24 C. L. T. 384; 10 B. C. R. 555.—*CAN.*



*Sect. 7.—Determination of appeals against conviction: Sub-sect. 7, A. (b) & (c) & B. (a) & (b).]*

before the jury.—*R. v. SUMMERSKILL* (1918), 13 Cr. App. Rep. 170, C. C. A.

**5939. — Guilty knowledge.]—***R. v. DUTT*, No. 5756, *ante*.

**5940. — Nature of pretence.]—**The direction as to a false pretence alleged must be precise.—*R. v. HEATH* (1912), 7 Cr. App. Rep. 247, C. C. A.

**5941. Receiving—Guilty knowledge.]—**On an indictment for receiving stolen property, if there is evidence that it was found in the deft.'s possession, the jury must be carefully directed on the question whether he had any knowledge where it was.—*R. v. HIGGINBOTTOM* (1912), 8 Cr. App. Rep. 79, C. C. A.

**5942. — Possession.]—**Joint possession must not be presumed; an omission to deal with the law on the point may be a misdirection resulting in a miscarriage of justice.—*R. v. FLATMAN* (1913), 8 Cr. App. Rep. 256, C. C. A.

**5943. — Onus of proof.]—**When deft. accused of receiving stolen goods property gives evidence, it is especially important that the direction should deal accurately with the law of onus in such cases.—*R. v. LEWIS* (1919), 14 Cr. App. Rep. 33, C. C. A.

**5944. Demanding property on forged document—Guilty knowledge.]—***R. v. SMITH*, No. 5838, *ante*.

**5945. Perjury.]—***R. v. GASKELL*, No. 5848, *ante*.

**5946. User for purpose of betting.]—**User of a place by a person not the owner or occupier for the purpose of betting with persons resorting thereto is not within the Betting Act, 1853 (c. 119), s. 3, unless the sanction of some one in authority or his servant is proved.

Applt. was tried for unlawfully using a room in the F., M., for the purpose of betting with persons resorting thereto, in contravention of sect. 3 of the Act. The barman, K., was expressly forbidden to allow betting. The servants in charge of the hotel—K. & B.—knew that applt. was carrying on the business of betting in the room:—*Held*: the word "use" meant user with the sanction of the landlord or of his servants, & as the judge had failed to point this out to the jury, who may have thought that mere use of the premises in the ordinary way was enough to justify a conviction, & that the sanction of the landlord or his servants was not necessary, or that deft. was liable in any case if he carried on ready-money betting in the room. The conviction must be quashed.—*R. v. MOSS* (1910), 74 J. P. 214; 26 T. L. R. 323; 3 Cr. App. Rep. 112, C. C. A.

**5947. Attempt to commit crime.]—**On an indictment charging an attempt to commit a crime it may be a misdirection not to distinguish an

attempt in law from an intention or a threat.—*R. v. LANDOW* (1913), 109 L. T. 48; 77 J. P. 364; 29 T. L. R. 375; 23 Cox, C. C. 457; 8 Cr. App. Rep. 218, C. C. A.

(c) *Case for Defence not put to Jury.*

**5948. Whether ground for quashing conviction.]**

—The prisoner was convicted of murder. At the trial the judge in his summing up omitted all mention of the defence raised on behalf of the prisoner:—*Held*: as it could not be said on the facts that if the attention of the jury had been directed to the defence by the judge the result of the trial would have been & ought to have been different, the omission to refer to the defence had not led to a miscarriage of justice. In determining whether there has been a miscarriage of justice, the ct. may consider what the applt. has said in his notice of appeal, although it may not be entitled to consider what is stated therein in determining whether the verdict is unreasonable or cannot be supported having regard to the evidence.—*R. v. NICHOLLS* (1908), 73 J. P. 11; 25 T. L. R. 65; 1 Cr. App. Rep. 167, C. C. A.

**5949. —.]—**A judge in summing up is bound to put the defence, however weak, before the jury.—*R. v. DINNICK* (1909), 74 J. P. 32; 26 T. L. R. 74; 3 Cr. App. Rep. 77, C. C. A.

*Annotations:—Folld. R. v. Hill* (1911), 28 T. L. R. 15. *Expld. R. v. Trueman* (1913), 9 Cr. App. Rep. 20. *Folld. R. v. Immer, R. v. Davis* (1917), 118 L. T. 416.

**5950. —.]—***R. v. RICHARDS*, No. 5718, *ante*.

**5951. —.]—**On an indictment for receiving stolen property with guilty knowledge, great care must be taken when the accused is clearly not guilty of the theft, & the theft is not recent, having regard to the object stolen, to put his account clearly before the jury.—*R. v. FIELD* (1910), 4 Cr. App. Rep. 190, C. C. A.

**5952. —.]—***R. v. RUFFINO*, No. 5872, *ante*.

**5953. —.]—***R. v. HILL*, No. 5670, *ante*.

**5954. —.]—**Where an issue at the trial is the identity of certain goods with those alleged to have been stolen, it is a grave misdirection to assume such identity, & where one of the questions in dispute was never left to the jury, the ct. will quash a conviction.—*R. v. HILL* (1912), 7 Cr. App. Rep. 250, C. C. A.

*Annotation:—Consd. R. v. Smith* (1914), 11 Cr. App. Rep. 19.

**5955. —.]—**Where the defence is that the property alleged to be stolen has been abandoned, there must be a specific direction to the jury on this point.—*R. v. WHITE* (1912), 107 L. T. 528; 76 J. P. 384; 23 Cox, C. C. 190; 7 Cr. App. Rep. 266, C. C. A.

**5956. —.]—**If the ct. considers that deft.'s case was not fully put to the jury, it may quash

#### PART XIV. SECT. 7, SUB-SECT. 7.— A. (c).

**5948 i. Whether ground for quashing conviction.]—**Where accused is undefended at the trial, the judge must be careful to point out to the jury the leading points in favour of the defence, but where accused has himself made an elaborate address to the jury & has refused throughout a long trial to have counsel an appellate ct. should not be astute in finding points overlooked by the trial judge in his charge.—*R. v. KELLY* (1916), 35 W. L. R. 46; (1917), 1 W. W. R. 46; 54 S. C. R. 220.—*CAN.*

**5948 ii. —.]—**If the omission of the judge in his charge to the jury to refer to confirmatory circumstances brought out in evidence upon an *alibi* claim was such as to prejudice seriously accused & to make the judge's statement of the evidence misleading to the

jury, it is proper to grant a new trial on a case reserved.—*R. v. HYDER* (1917), 29 Can. Crim. Cas. 172.—*CAN.*

**5948 iii. —.]—**The theory of the defence & the evidence favourable to the defence should be put before the jury in such a way as to ensure their appreciation of the points at issue. But every bit of evidence & every inconsistency therein need not be pointed out to the jury.—*R. v. BAUGH* (1917), 38 O. L. R. 559; 33 D. L. R. 191; 28 Can. Crim. Cas. 146.—*CAN.*

**5948 iv. —.]—**It is the duty of a trial judge to put the defence fairly before the jury so that it may appreciate what it is & determine the weight to be given to the evidence in support of it.—*R. v. PARKIN*, [1922] 1 W. W. R. 732; 66 D. L. R. 175; 37 Can. Crim. Cas. 35; 31 Man. L. R. 438.—*CAN.*

**5948 v. —.]—**Where the medical opinion was that the injuries of deceased were not, in the case of a man in ordinary health, dangerous to life.—*Held*: the judge should have specially called the attention of the jury to such opinion.—*PANCHU DAS v. R.* (1907), 1 L. R. 34 Calc. 698; 11 C. W. N. 666.—*IND.*

**5948 vi. —.]—**The omission by the judge in his charge to the jury, to mention the fact of the original witnesses named in the first information having been abandoned by the prosecution, of two of them having given evidence for the defence, & of the witnesses actually examined for the prosecution being entirely new witnesses, is a sufficient misdirection to justify the setting aside of the conviction.—*DASARATH MANDAL v. R.* (1907), 1 L. R. 34 Calc. 325.—*IND.*



a conviction.—*R. v. WILSON (alias WHITTINGDALE)* (1913), 9 Cr. App. Rep. 124, C. C. A.

5957. —[.]—*ANON.*, No. 5588, *ante*.

5958. —[.]—On the trial of an indictment for receiving stolen goods with guilty knowledge the jury should be expressly asked to consider whether deft.'s explanation of his possession of the goods soon after the theft of them is reasonable or not. An attempt to evade arrest should not be unduly insisted upon as evidence of guilt.—*R. v. HAMPSON* (1915), 11 Cr. App. Rep. 75.

5959. —[.]—Whatever line of defence is taken by counsel at a trial, it is for the judge to leave to the jury all the questions which appear to him to arise upon the evidence, whether they have been raised by counsel or not. The ct. must not exclude from consideration any view of the facts of a case other than that presented by prisoner in giving evidence.—*R. v. HOPPER*, [1915] 2 K. B. 431; 84 L. J. K. B. 1371; 113 L. T. 381; 79 J. P. 335; 31 T. L. R. 360; 59 Sol. Jo. 478; 25 Cox, C. C. 34; 11 Cr. App. Rep. 136, C. C. A.

*Annotations*:—*Distd. R. v. Clinton* (1917), 12 Cr. App. Rep. 215. *Refd. R. v. Beard* (1920), 84 J. P. 129.

5960. —[.]—When a deft. charged with larceny disputes the identity of property found in his possession with that stolen, there must be a clear direction to the jury on the issue of identity.—*R. v. BRUHIN* (1915), 11 Cr. App. Rep. 276, C. C. A.

5961. —[.]—A summing up in effect recommending a verdict of guilty which does not adequately put the prisoner's case will be quashed.—*R. v. FRAMPTON* (1917), 12 Cr. App. Rep. 202, C. C. A.

5962. —[.]—The rule that a summing up must carefully put the defence is specially strict when deft. is not represented by counsel. A summing up is sufficient if it is not unfair to the accused & if points are not withheld which it is reasonable to suppose are not already properly before the jury (*DARLING, J.*).—*R. v. IMMER, R. v. DAVIS* (1917), 118 L. T. 416; 26 Cox, C. C. 186; 13 Cr. App. Rep. 22, C. C. A.

—[.]—On a charge of receiving stolen property, whether the jury believe the deft.'s explanation or not, the onus of proof lies on the prosecution. To ignore the evidence for the defence amounts to a misdirection.—*R. v. BADASH* (1917), 87 L. J. K. B. 732; 118 L. T. 179; 26 Cox, C. C. 155; 13 Cr. App. Rep. 17, C. C. A.

5964. —[.]—The defence must be put to the jury in summing up.

In charges of fraud, there must be a direction on the intent.—*R. v. THOMPSON* (1921), 16 Cr. App. Rep. 6, C. C. A.

5965. —[.]—A *bonâ fide* belief by the accused that he has a legal claim to property is a good defence to the charge of larceny thereof, & must be submitted to the jury.—*R. v. CLAYTON* (1920), 15 Cr. App. Rep. 45.

5966. **Sufficient to put substantial defence.**—[.]—Omission in a summing up to tell a jury in terms what the defence is does not amount to misdirection.

#### PART XIV. SECT. 7, SUB-SECT. 7.— B. (a).

5969 i. **Summing up to be considered as a whole.**—[.]—The Ct. of Criminal Appeal in considering objections to the summing up will regard the whole of the summing up in the light of the conduct of the trial, the questions raised by the prosecution & the defences set up.—*R. v. TEMPLETON*, [1922] St. R. Qd. 165.—**AUS.**

5969 ii. —[.]—A trial judge is justified in refusing to direct the jury specifically that "besides being satisfied that the facts proven were con-

sistent with prisoner's guilt, they must also be with any other rational explanation, theory or hypotheses," if the charge made this principle sufficiently obvious to the jury in other language.—*R. v. COOK* (1914), 14 E. L. R. 471; 18 D. L. R. 706; 23 Can. Crim. Cas. 50.—**CAN.**

5970 i. **Defective summing up not necessarily a ground for quashing a conviction.**—[.]—To sanction interference with the verdict on misdirection ct. must be satisfied that omission of some specific evidence caused jury to be misled or that they would not have returned verdict of guilty if their

attention if the issues in the case are in substance put to the jury in the summing up.—*R. v. BRADSHAW, R. v. EDWARDS, R. v. JONES* (1910), 4 Cr. App. Rep. 280, C. C. A.

5967. —[.]—*R. v. TRUEMAN*, [1913] 3 K. B. 164; 82 L. J. K. B. 916; 109 L. T. 413; 77 J. P. 428; 29 T. L. R. 599; 23 Cox, C. C. 550; 9 Cr. App. Rep. 20.

*Annotation*:—*Refd. R. v. Syme* (1911), 112 L. T. 136.

5968. —[.]—On a charge of murder by shooting with a revolver the defences raised were that applt. was in such a drunken state that the offence should be reduced to manslaughter, & alternatively that the shooting that took place during a struggle was purely accidental. On appeal from a verdict of manslaughter it was contended that the judge misdirected the jury by disregarding to a great extent the defence of accident & directing the jury mainly on the question of manslaughter:—*Held*: the judge was right in not putting the defence of accident too prominently before the jury, as counsel for applt. had obviously, in his discretion, relied mainly on the defence of manslaughter; there had been no misdirection which would justify the ct. in quashing the conviction; & the appeal must be dismissed.—*R. v. GORGES* (1915), 85 L. J. K. B. 1049; 114 L. T. 77; 25 Cox, C. C. 218; 11 Cr. App. Rep. 259, C. C. A.

#### B. Misdirection of Fact.

##### (a) In General.

5969. **Summing up to be considered as a whole.**—[.]

—*R. v. CRIPPEN*, No. 5524, *ante*.

5970. **Defective summing up not necessarily a ground for quashing a conviction.**—[.]—Though some expressions used by the judge may be open to criticism, if looking at the summing up as a whole, it cannot be said there has been any substantial misdirection, & if the ct. is satisfied with the result of the trial it will not interfere (*ALVERSTONE, C.J.*).—*R. v. DODDS* (1908), 1 Cr. App. Rep. 65; 72 J. P. Jo. 352, C. C. A.

5971. —[.]—*R. v. COHEN*, No. 6115, *post*.

5972. —[.]—Where there is a direct conflict of testimony, if the main issue is put fairly to the jury, the ct. will not interfere merely on account of some want of clearness in the summing up.—*R. v. GOLDING* (1910), 4 Cr. App. Rep. 83, C. C. A.

5973. —[.]—Despite too strong or immoderate remarks in a summing up, the ct. will not quash a conviction unless there has been a miscarriage of justice.—*R. v. HEPWORTH* (1910), 4 Cr. App. Rep. 128, C. C. A.

5974. —[.]—The ct. will not grant leave to appeal if, despite unhappy expressions in the summing up likely to injure the defence, it is of opinion that, on the whole, there was no misdirection.—*R. v. CARTER* (1912), 7 Cr. App. Rep. 192, C. C. A.

##### (b) Serious Misdirection.

5975. **Serious misstatement of fact a ground for quashing.**—[.]—*W. & C. were indicted for stealing*

attention had been drawn to it by the judge.—*SULLIVAN v. R.* (1913), 15 W. A. L. R. 23.—**AUS.**

5970 ii. —[.]—Misdirection in order to form a ground for quashing a conviction must be a misdirection in law & not a misdirection in fact. A judge is entitled to make in his summing up such observations on the evidence as he thinks fit.—*JEFFRIES v. R.* (1916), 18 W. A. L. R. 143.—**AUS.**

#### PART XIV. SECT. 7, SUB-SECT. 7.— B. (b).

5975 i. **Serious mis-statement of fact**

*Sect. 7.—Determination of appeals against conviction: Sub-sect. 7, B. (b) & (c) & C. (a).]*

certain property & receiving it, well knowing it to have been stolen. W. pleaded guilty & C. not guilty. It appeared that C., when arrested, was with a barrow on which was the stolen property. C. told the detectives that he had obtained the property from K., of 55, East Street. He had, in fact, obtained it from W., of 55, East Street, & the defence was that he was innocently employed in carting the property at the instance of W. W. was called for the prosecution & supported C.'s defence. The judge, in summing up to the jury, said: "Where is K.? Why does not K. come here & tell you all about it?" C. was convicted, but obtained leave to appeal. On the appeal he obtained leave to call W., who said that he had married a widow named K. & was known to C. as "S. K." The ct. said that they believed this evidence, & as they could not say the verdict would have stood if the mistake had not been made, they allowed the appeal, & the prisoner was discharged.—*R. v. COLEMAN* (1908), 72 J. P. 425; 24 T. L. R. 798; 1 Cr. App. Rep. 50, C. C. A.

5976. *S. P. R. v. SOVOSKI* (1908), 72 J. P. 435; 1 Cr. App. Rep. 98, C. C. A.

*Annotation:—Mentd. R. v. Norton* (1910), 5 Cr. App. Rep. 65.

5977. *S. P. R. v. MASON* (1909), 73 J. P. 250; 2 Cr. App. Rep. 59, C. C. A.

5978. *S. P. R. v. MARTIN* (1909), 2 Cr. App. Rep. 98, C. C. A.

5979. *S. P. R. v. SIMPSON* (1909), 3 Cr. App. Rep. 54, C. C. A.

5980. *S. P. R. v. RODDA* (1910), 74 J. P. 412; 26 T. L. R. 539; 5 Cr. App. Rep. 85, C. C. A.

5981. *S. P. R. v. FELDMAN* (1910), 5 Cr. App. Rep. 214, C. C. A.

5982. *S. P. R. v. BUNDY* (1910), 75 J. P. 111; 5 Cr. App. Rep. 270, C. C. A.

*Annotation:—Fold. R. v. Finch* (1916), 85 L. J. K. B. 1575.

5983. *S. P. R. v. JOHNSON* (1910), 6 Cr. App. Rep. 82, C. C. A.

5984. *S. P. R. v. BROOKS* (1911), 6 App. Cr. Rep. 263, C. C. A.

5985. *S. P. R. v. ELLSOM* (1911), 76 J. P. 38; 28 T. L. R. 1; 7 Cr. App. Rep. 4, C. C. A.

5986. *S. P. R. v. SAVIDGE* (1911), 76 J. P. 32; 7 Cr. App. Rep. 34, C. C. A.

5987. *S. P. R. v. CORRIGAN* (1912), 8 Cr. App. Rep. 4, C. C. R.

5988. *S. P. R. v. HAGAN (alias SMITH)* (1913), 9 Cr. App. Rep. 25, C. C. A.

*Annotation:—Mentd. R. v. Schama, R. v. Abramovitch* (1914), 112 L. T. 480.

5989. *S. P. R. v. MYERS* (1913), 9 Cr. App. Rep. 264, C. C. A.

5990. *S. P. R. v. HUMPHREYS* (1919), 84 J. P. 48; 14 Cr. App. Rep. 85, C. C. A.

*a ground for quashing.*—*R. v. MURPHY* (1913), 13 S. R. N. S. W. 646.—**AUS.**

5975 ii. ————*R. v. WILSON* (1914), 14 S. R. N. S. W. 7; 31 N. S. W. W. N. 12.—**AUS.**

5975 iii. ————*JACKMAN v. R.* (1914), 16 W. A. L. R. 8.—**AUS.**

**PART XIV. SECT. 7, SUB-SECT. 7.—**  
**B. (c).**

5993 i. *Slight mis-statement of evidence not ground for quashing—No substantial miscarriage of justice.*—*R. v. SNOW* (1918), S. A. L. R. 173.—**AUS.**

5993 ii. ————*R. v. HOGUE* (1917), 39 O. L. R. 427.—**CAN.**

**PART XIV. SECT. 7, SUB-SECT. 7.—**  
**C. (a).**

c. *General rule—Charge to be viewed*

*as a whole.*—A ct. of appeal where the question is misdirection of the jury, must look at the charge to the jury as a whole & with regard to the circumstances under consideration, & where a trial judge in his charge has made use of expressions which it might be supposed would, if taken alone, lead the jury to believe that the evidence of the accused himself is not sufficient to prove an alibi unless it is corroborated, but a perusal of the whole charge shows that the alleged error is at the worst merely technical, & that no substantial wrong has been done to the accused, a new trial should not be ordered.—*R. v. MILLER*, [1923] 2 W. W. R. 625; 40 Can. Crim. Cas. 130; 32 B. C. R. 298.—**CAN.**

6006 i. *Jury clearly misdirected—Conviction quashed—Unless jury must have given same verdict on proper direction.*—

5991. *S. P. R. v. SHAW* (1923), 17 Cr. App. Rep. 139.

5992. *S. P. R. v. ADAMS* (1923), 17 Cr. App. Rep. 77, C. C. A.

*(c) Slight Misdirection.*

5993. *Slight misstatement of evidence not a ground for quashing—No substantial miscarriage of justice.*—The ct. will not re-try a case on the evidence at the trial properly submitted to the jury & criticised by counsel. Slight mis-statements of effect of evidence by the judge not a ground of appeal. Judge giving his opinion on the facts not a mistake in law.—*R. v. MARTIN* (1908), 1 Cr. App. Rep. 52, C. C. A.

5994. *S. P. R. v. BRANN*, No. 5891, *ante*.

5995. *S. P. R. v. MARTIN*, No. 5978, *ante*.

5996. *S. P. R. v. PARKER* (1909), 2 Cr. App. Rep. 118, C. C. A.

5997. *S. P. R. v. SMITH & GRAINGER* (1909), 2 Cr. App. Rep. 214, C. C. A.

5998. *S. P. R. v. DONOGHUE* (1909), 3 Cr. App. Rep. 187, C. C. A.

5999. *S. P. R. v. KAMS* (1910), 4 Cr. App. Rep. 8, C. C. A.

*Annotation:—Mentd. R. v. Landow* (1913), 8 Cr. App. Rep. 218.

6000. *S. P. R. v. SYERS* (1910), 4 Cr. App. Rep. 42, C. C. A.

6001. *S. P. R. v. BUTLER* (1910), 4 Cr. App. Rep. 137, C. C. A.

6002. *S. P. R. v. MONK* (1912), 7 Cr. App. Rep. 119, C. C. A.

6003. *S. P. R. v. FISHER & GROUT* (1913), 9 Cr. App. Rep. 164, C. C. A.

6004. *S. P. R. v. WOLFF*, No. 6159, *post*.

6005. *S. P. R. v. SCOTT*, No. 6138, *post*.

*C. Misdirection in Law.*

*(a) In General.*

6006. *Jury clearly misdirected—Conviction quashed—Unless jury must have given same verdict on proper direction.*—On an indictment for larceny the prisoner was convicted of larceny as a bailee. Appeal on the ground of misdirection:—*Held*: misdirection was a question of law, & therefore leave to appeal need not have been obtained, & in order to determine whether there had been a misdirection or not, the lines upon which the case for the prosecution had been conducted at the trial must be considered, & following the above rule, there had been no misdirection; & as in the opinion of the ct. no miscarriage of justice had been caused, Criminal Appeal Act, 1907 (c. 23), s. 4 (1) would apply. *Semble*: although there may be a misdirection, unless the misdirection causes a substantial miscarriage of justice, an

To sanction interference with the verdict on misdirection, ct. must be satisfied that omission of some specific evidence caused jury to be misled or that they would not have returned verdict of guilty if their attention had been drawn to it by the judge.—*SULLIVAN v. R.* (1913), 15 W. A. L. R. 23.—**AUS.**

6006 ii. ————*JEFFRIES v. R.* (1916), 18 W. A. L. R. 143.—**AUS.**

6006 iii. ————*Four persons were jointly charged with an offence & convicted & the Ct. of Criminal Appeal was of opinion that there had been a failure on the part of the judge to adequately state to the jury the facts which rendered the case against one of accused less strong than the case against the others. The ct. being unable to come to the con-*

appeal against a conviction may be dismissed.—*R. v. MEYER* (1908), 99 L. T. 202; 24 T. L. R. 621; 21 Cox, C. C. 673; 1 Cr. App. Rep. 10; 72 J. P. Jo. 256, C. C. A.

*Annotations* :—*Refd.* *R. v. Coleman* (1908), 24 T. L. R. 798; *R. v. Mortimer* (1908), 24 T. L. R. 745; *R. v. Wann* (1912), 7 Cr. App. Rep. 135. *Mentd.* *R. v. O'Sullivan* (1908), 1 Cr. App. Rep. 35.

**6007.** ————.]—On the trial of an indictment for manslaughter there was evidence that prisoner had inflicted injuries upon the deceased more than a year & a day before the date of the death, & also certain further injuries within that period which tended to accelerate the death. The judge directed the jury that they might find prisoner guilty even if they thought that the death was wholly caused by the earlier injuries. The jury convicted prisoner. Upon an appeal against the conviction on the ground of misdirection :—*Held* : although upon a proper direction the jury would probably have found that the later injuries accelerated the death, as it was not certain that they would have done so, & as the ct. were not entitled under Criminal Appeal Act, 1907 (c. 23), s. 4 (1), to substitute themselves for the jury & find the facts necessary for conviction, they could not say that there had been no substantial miscarriage of justice, so as to entitle them to dismiss the appeal upon that ground.—*R. v. DYSON*, [1908] 2 K. B. 454; 77 L. J. K. B. 813; 99 L. T. 201; 72 J. P. 303; 24 T. L. R. 653; 52 Sol. Jo. 535; 21 Cox, C. C. 669; 1 Cr. App. Rep. 13, C. C. A.

*Annotations* :—*Refd.* *R. v. Stoddart* (1909), 73 J. P. 348; *R. v. Ellsom* (1911), 76 J. P. 38; *Mentd.* *Ibrahim v. R.*, [1914] A. C. 599; *Crane v. Public Prosecutions Director*, [1921] 2 A. C. 299.

**6008.** ————.]—*R. v. COHEN*, No. 6115, *post*.

**6009.** ————.]—The ct. will not dismiss the appeal under Criminal Appeal Act, 1907 (c. 23), s. 4 (1), in a case where there has been substantial misdirection, unless they can say that the jury, if properly directed, would have returned the same verdict.—*R. v. STODDART* (1909), 73 J. P. 348; 25 T. L. R. 612; 53 Sol. Jo. 578; 2 Cr. App. Rep. 217, C. C. A.

*Annotations* :—*Appld.* *R. v. Norton*, [1910] 2 K. B. 496. *Consd.* *R. v. Ellsom* (1911), 76 J. P. 38. *Foll.* *R. v. Vassileva* (1911), 6 Cr. App. Rep. 228. *Refd.* *R. v. Bradshaw*, *R. v. Edwards*, *R. v. Jones* (1910), 4 Cr. App. Rep. 280; *R. v. Brownlow* (1910), 74 J. P. 240; *R. v. Pratley* (1910), 4 Cr. App. Rep. 159; *R. v. Hill* (1911), 76 J. P. 49; *R. v. Savidge* (1911), 76 J. P. 32; *R. v. Horn* (1912), 76 J. P. 270; *R. v. Monk* (1912), 7 Cr. App. Rep. 119; *Ibrahim v. R.*, [1914] A. C. 599; *R. v. Schama*, *R. v. Abramovitch* (1914), 112 L. T. 480; *R. v. Finch* (1916), 85 L. J. K. B. 1575; *R. v. Immer*, *lt. v. Davis* (1917), 118 L. T. 416; *R. v. Hill* (1918), 82 J. P. 194; *R. v. Sanders* (1919), 14 Cr. App. Rep. 11.

**6010.** ————.]—The prisoner was convicted of larceny, before the Recorder of Liverpool, at Liverpool Quarter Sessions, on Oct. 5, & sentenced to six months' imprisonment with hard

labour. Appeal against conviction on the ground of misdirection.

Even though we may consider that the Recorder gave a wholly wrong direction to the jury, we are convinced that on the facts a jury properly directed would have given the same verdict, & we must uphold the conviction (*per cur.*).—*R. v. MORGAN* (1911), 7 Cr. App. Rep. 63, C. C. A.

**6011.** ————.]—*R. v. COURT* (1912), 7 Cr. App. Rep. 127, C. C. A.

**6012.** ————.]—On a charge of indecent assault, when consent is a good defence, it is a grave misdirection to cause the jury to believe that because the defence has not set up consent they may convict, though, in fact, they think there was consent, & where the direction brought about a miscarriage of justice, the ct. quashed the conviction.—*R. v. HORN* (1912), 76 J. P. 270; 28 T. L. R. 336; 7 Cr. App. Rep. 200, C. C. A.

*Annotation* :—*Mentd.* *R. v. Hopper* (1915), 79 J. P. 335.

**6013.** ————.]—On an indictment for larceny by a trick the jury must be specifically directed on the point whether there was an intention to pass the property. Though the ct. may agree with the verdict it will quash a conviction unless it is satisfied that, with a proper direction on the law, the jury must necessarily have arrived at it.—*R. v. HILLIARD* (1913), 83 L. J. K. B. 439; 109 L. T. 750; 23 Cox, C. C. 617; 9 Cr. App. Rep. 171, C. C. A.

**6014.** ————.]—Where a jury have been misdirected on any question of law the conviction will be quashed unless the Crown show that, on a right direction, the jury must have come to the same conclusion.—*R. v. SBARRA* (1918), 87 L. J. K. B. 1003; 119 L. T. 89; 82 J. P. 171; 34 T. L. R. 321; 26 Cox, C. C. 305; 13 Cr. App. Rep. 118, C. C. A.

*Annotation* :—*Mentd.* *R. v. Smith*, [1918] 2 K. B. 415.

**6015.** ————.]—Proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1) applied despite a grave irregularity in procedure at the trial & a mistaken direction on the *onus* of proof.—*R. v. THOMAS* (1922), 17 Cr. App. Rep. 34, C. C. A.

*Annotation* :—*Refd.* *lt. v. Harrison* (1923), 17 Cr. App. Rep. 156.

**6016. Misdirection on immaterial point—Conviction upheld.**—Misdirection on an immaterial point of law is not a ground for quashing a conviction.—*R. v. HUNTING & WARD* (1908), 73 J. P. 12; 1 Cr. App. Rep. 177, C. C. A.

**6017.** ————.]—An immaterial misdirection is not a ground for giving leave to appeal.—*R. v. KLEISS* (1910), 4 Cr. App. Rep. 101, C. C. A.

**6018. Misdirection on one count—May invalidate conviction on another count.**—When the jury are directed that they may consider together distinct counts for different offences & there has been misdirection on one, the ct. will quash a conviction.—*R. v. MORGAN* (1917), 13 Cr. App. Rep. 2, C. C. A.

clusion that the jury, if adequately directed, would have concluded that the facts proved were inconsistent with his innocence, directed a new trial in the case of that accused person.—*R. v. TEMPLETON*, [1922] St. R. Qd. 165.—*AUS.*

**6008 iv.** ————.]—*R. v. BLYTHE* (1909), 14 O. W. R. 688; 1 O. W. N. 33; 19 O. L. R. 386; 15 Can. Crim. Cas. 224.—*CAN.*

**6016 i. Misdirection on immaterial point—Conviction upheld.**—On a charge of conspiracy, evidence was given by the Crown witnesses of certain statements made by some of

accused. Witnesses were called by accused to prove that when the statements were alleged to have been made accused were in places other than those at which the interviews were stated to have taken place. Judge when summing up told jury that they might perhaps come to the conclusion that the Crown witnesses were speaking truly when they said that the interviews had taken place & that the statements had been made, although they might have been mistaken as to the time & dates. Accused appealed on the ground that this was a misdirection. Ct. of Criminal Appeal refused to interfere with the verdict.—

*R. v. REEVE* (1917), 17 S. R. N. S. W. 81; 34 N. S. W. N. 123.—*AUS.*

**6016 ii.** ————.]—Failure to point out to the jury on the trial of an indictment to commit rape, the only issue involved being the identity of prisoner, that on such an indictment the law permits the finding of a lesser offence than the one charged, is not error or non-direction for which a new trial will be granted.—*lt. v. CLARKE* (1907), 2 E. L. R. 327; 38 N. B. R. 11.—*CAN.*

**6016 iii.** ————.]—*R. v. HAYNES* (1914), 14 E. L. R. 457; 23 Can. Crim. Cas. 101.—*CAN.*

*Sect. 7.—Determination of appeals against conviction: Sub-sect. 7, C. (b) i., ii., iii., iv. & v.]*

(b) *What amounts to Misdirection.*

i. *As to Onus of Proof.*

**6019. General Rule.]**—Upon the trial of an indictment for receiving stolen goods well knowing the same to have been stolen, the onus always remains upon the prosecution. The judge in directing the jury, should tell them that, upon the prosecution establishing that the person charged was in possession of goods recently stolen, they might, in the absence of any explanation by the accused of the way in which the goods came into his possession, which might reasonably be true, convict prisoner; but, if an explanation were given which the jury thought might reasonably be true, although they were not convinced of its truth, prisoner was entitled to be acquitted, inasmuch as the Crown would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused.—*R. v. SCHAMA, R. v. ABRAMOVITCH* (1914), 84 L. J. K. B. 396; 112 L. T. 480; 70 J. P. 184; 31 T. L. R. 88; 59 Sol. Jo. 288; 24 Cox, C. C. 591; 11 Cr. App. Rep. 45, C. C. A.

*Annotations:—Consd. & Fold. R. v. Badash* (1918), 87 L. J. K. B. 732; *Refd. R. v. Aubrey* (1915), 11 Cr. App. Rep. 182; *R. v. Millington* (1915), 11 Cr. App. Rep. 86; *R. v. Bailey* (1917), 13 Cr. App. Rep. 27; *R. v. Norris* (1917), 86 L. J. K. B. 810; *R. v. Hamilton* (1918), 87 L. J. K. B. 734; *R. v. Sanders* (1919), 14 Cr. App. Rep. 11.

**6020. —.]**—On an indictment for receiving stolen property with guilty knowledge there is no onus on deft. to prove that he received the property honestly.—*R. v. AUBREY* (1915), 11 Cr. App. Rep. 182, C. C. A.

**—.]**—If lawful possession, within Larceny Act, 1861 (c. 96), s. 58, is established, the onus is upon the prosecution to show that deft. had a guilty purpose.—*R. v. WARD*, [1915] 3 K. B. 696; 85 L. J. K. B. 483; 114 L. T. 192; 80 J. P. 16; 60 Sol. Jo. 27; 25 Cox, C. C. 255; 11 Cr. App. Rep. 245, C. C. A.

*Annotation:—Consd. R. v. Jenkins, R. v. Evans-Jones* 87 J. P. 115.

**6022. —.]**—In a direction on receiving stolen property with guilty knowledge, circumstances calling for an explanation by deft. must not be confused with circumstances absolutely establishing guilt. It is a serious misdirection to lead the jury to suppose that they must ask themselves:

#### PART XIV. SECT. 7, SUB-SECT. 7.— C. (b) i.

**6019 i. General rule.]**—On a trial for murder, where the evidence is circumstantial, & some of the material facts proved are of such a character that it is possible to draw from them inferences bearing either four or against the defence set up, it is the province of the jury to draw the inferences, & it is misdirection for which a new trial will be granted for the trial judge to tell the jury that the only inferences that should be drawn are those tending to establish the guilt of prisoner.—*R. v. COLLINS* (1907), 3 E. L. R. 361; 38 N. B. R. 218.—**CAN.**

**6019 ii. —.]**—On the defence of insanity on a charge of murder it is a misdirection, justifying a new trial, for the judge to instruct the jury that such defence must be established beyond a reasonable doubt. The degree of proof required is not as great as that required to overcome the presumption of innocence in an accused.—*R. v. CLARK*, [1921] 2 W. W. R. 446; 61 S. C. R. 608; 59 D. L. R. 12.—**CAN.**

#### PART XIV. SECT. 7, SUB-SECT. 7.— C. (b) ii.

**6024 i. Intent to defraud.]**—On a charge of stealing accused was found guilty of fraudulent appropriation. Judge, when summing up said to jury if they found that as a reasonable man, accused must have known that the effect of what he did was to defraud they were at liberty to find that he had a fraudulent intention & the appropriation was fraudulent:—*Held*: wrong direction. Conviction quashed.—*R. v. COOPER*, [1914] 14 S. R. N. S. W. 426; 31 N. S. W. W. N. 164.—**AUS.**

**d. Murder.]**—On a trial in which accused person was charged with murder the judge misdirected the jury in two parts of his summing up, although the law was correctly stated by the judge towards the end of the summing up. The jury brought in a verdict of manslaughter with a recommendation to mercy:—*Held*: in view of the jury's verdict the conviction should be quashed.—*GATTIE R.* (1919), 22 W. A. L. R. 11.—**AUS.**

**e. Attempt to administer drugs—With intent to procure abortion.]**—On a

“Has deft. proved himself innocent?”—*R. v. BRAIN* (1918), 13 Cr. App. Rep. 197, C. C. A.  
*Annotation:—Refd. R. v. Sanders* (1919), 14 Cr. App. Rep. 11.

**6023. —.]**—*R. v. SANDERS*, No. 6199, *post*.

“to Necessary Ingredients of Offence.

**6024. Intent to defraud.]**—It is a clear misdirection to instruct a jury that a statute under which an indictment is laid does not require an intent to defraud to be proved, when in fact it does.—*R. v. BROWNLOW* (1910), 74 J. P. 240; 26 T. L. R. 345; 4 Cr. App. Rep. 131, C. C. A.

**6025. Conspiracy.]**—A man, his wife, & two sons were indicted for conspiring to cheat & defraud the creditors of the wife. It appeared that the wife carried on a business of buying the parts of bicycles, putting them together, & selling the bicycles. She became a bkpt. in 1910. The husband managed the business; the sons were employed in the business at a weekly salary. The case for the prosecution was that the creditors had been defrauded by the mother selling to the sons in the years 1908, 1909, & 1910, bicycles under value, the sons reselling the bicycles at a profit. It appeared from the evidence that the mother sold bicycles to the sons at a less sum than she sold them to agents for the retail trade. Appls. were convicted, but the father & the two sons appealed. On appeal their convictions were quashed on the ground that the language of the summing up to the jury was such that the jury might have thought that the fact that the sons were allowed to buy the bicycles at less than other customers was sufficient to justify the conviction, even although the bicycles were sold to them at or over cost price, & to justify the convictions the jury would have to come to the conclusion that the bicycles were sold below cost price.—*R. v. CRANE* (1911), 75 J. P. 415; 6 Cr. App. Rep. 185, C. C. A.

**6026. —.]**—On a charge of conspiracy it is misdirection to discuss the case of each deft. separately without reference to the alleged concert.—*R. v. BAILEY & UNDERWOOD* (1913), 9 Cr. App. Rep. 94, C. C. A.

iii. *On joint Indictment—Distinction between Co-Defendants.*

**6027. Omission to distinguish between co-defendants.]**—The only evidence on which B. was convicted of receiving a gun, well knowing that it

charge of attempting to administer a drug or other noxious thing with intent to procure a miscarriage, the record disclosed sufficient evidence to justify the inference that accused attempted to obtain noxious substances from a physician, that he believed that he had got them & tried to get the woman to take them:—*Held*: the conviction should be sustained, although the charge to the jury overlooked the fact that the charge against accused was one of an attempt only & submitted to it the question whether the substances were in fact drugs or other noxious things within Criminal Code, s. 305, & there was not sufficient evidence to support a reasonable inference to that effect.—*R. v. PERTBONE*, [1918] 2 W. W. R. 806; 13 Alta. L. R. 463; 41 D. L. R. 411.—**CAN.**

#### PART XIV. SECT. 7, SUB-SECT. 7.— C. (b) iii.

**6027 i. Omission to distinguish between co-defendants.]**—Statements made by S., one of several prisoners, were admitted in evidence. They were commented upon by counsel for the other prisoners

was stolen, was that of G., who said that S. & B. together sold him the stolen gun for 5s. G. admitted previous convictions. The judge who tried the case against S. & B. together, told the jury that 5s. was a ridiculous price for the gun; but he omitted to caution the jury that if that were so, it was as much evidence of guilty knowledge on the part of G., who bought the gun, as it was on the part of B., who sold it, & that the sole evidence against B. was that of G., who might be an accomplice. There was abundant evidence against S., but the judge did not properly distinguish between the cases against the two prisoners. On these grounds the conviction of B. was quashed.—*R. v. BEAUCHAMP* (1909), 73 J. P. 223; 25 T. L. R. 330; 2 Cr. App. Rep. 20, 40, C. C. A.

**6028.** —.]—When defts. are tried together & set up different defences the direction to the jury must clearly state the difference.—*R. v. ROWAN* (1910), 5 Cr. App. Rep. 279, C. C. A.

**6029.** —.]—On a joint indictment for larceny on receiving stolen property the cases made against each deft. must be carefully distinguished to the jury.—*R. v. ASHWORTH* (1911), 6 Cr. App. Rep. 112, C. C. A.

**6030.** —.]—On a joint indictment for receiving stolen property, the evidence of the guilty knowledge of each deft. must be carefully distinguished in the summing up.—*R. v. PRITCHARD* (1913), 109 L. T. 911; 23 Cox, C. C. 682; 9 Cr. App. Rep. 210, C. C. A.

**6031.** —.]—When two or more persons are jointly indicted the direction must carefully distinguish between the case of each, & it is a grave misdirection to suggest wrongly that if one is guilty another must also be guilty.—*R. v. GRAHAM* (1919), 14 Cr. App. Rep. 7, C. C. A.

**6032.** —.]—If a deft. jointly charged with another for conspiracy sets up an alibi or mistaken identity, the jury must not be allowed to assume that the former must be convicted, if the latter is convicted; there must be a direction that the co-deft. may be convicted of conspiracy with a person unknown.—*R. v. HIGGINS* (1919), 14 Cr. App. Rep. 28, C. C. A.

**6033.** —.]—When defts. are jointly indicted but not all on all charges, the jury must be directed to discriminate carefully between the respective allegations.—*R. v. TWIGG* (1919), 14 Cr. App. Rep. 71, C. C. A.

**6034.** —.]—In the case of co-defts., the jury must, if necessary, be carefully charged to distinguish between their cases.—*R. v. LOVETT & FLINT* (1921), 16 Cr. App. Rep. 37, 41, C. C. A.

in his address to the jury & by the A.-G. in his reply.

The judge in summing up also commented upon the statements & refused to tell jury that they were not evidence against the other prisoners. Afterwards on consideration he advised the jury not to allow the statements of S. to affect their minds in considering the cases of the other prisoners, & concluded his summing up with the same caution:—*Held*: conviction sustained.—*R. v. SCOTT* (1879), 2 N. S. W. S. C. R. N. S. 290.—**AUS.**

**6027 ii.** —.]—A failure to direct the jury that statements made by one of accused are only evidence against him who made them is a misdirection entitling that other accused to a new trial, where there has been substantial wrong or miscarriage.—*R. v. MURRAY & MAHONEY*, [1917] 2 W. W. R. 805.—**CAN.**

**6027 iii.** —.]—The omission of the judge to tell jury that the statement

of one prisoner is not evidence against his fellow-prisoner is a material error, & one fatal to the trial, notwithstanding that the judge dealt with the evidence against each of the prisoners separately.—*R. v. MIYA VALAD DAUD* (1869), 6 Bom. C. Ca. 10.—**IND.**

#### PART XIV. SECT. 7, SUB-SECT. 7.— C. (b) v.

**6041 i.** *Expression of view of facts by judge—Amounting to withdrawal of facts from jury.*—Where the judge by telling the jury that there was no evidence on which they could return a verdict of manslaughter told them, in effect, that the acts done by prisoner were likely to endanger human life, that question being one of fact for the jury, there was a misdirection, & miscarriage of justice had occurred, & a new trial was ordered.—*R. v. WALKER* (No. 1) (1915), S. R. Q. 115.—**AUS.**

**6041 ii.** —.]—A summing up to jury in which judge gave no aid to

**6035.** — **Marital coercion.**—Conviction of married woman, who was indicted jointly with her husband for larceny, quashed on the ground that her defence, that she acted under the coercion of her husband, was not left to the jury with such a direction as would enable them to apply their minds to the true legal position.—*R. v. CAROUBI* (1912), 107 L. T. 415; 76 J. P. 262; 28 T. L. R. 248; 23 Cox, C. C. 177; 7 Cr. App. Rep. 149, C. C. A.

#### iv. Direction to Jury to Convict.

**6036. Positive direction to convict.**—On an indictment for attempted rape, a positive direction to the jury to convict of indecent assault is a ground for quashing.

Great care is necessary in trying cases of this kind, as juries generally hold strong views in favour of the woman who has been attacked. It ought to have been left to the jury whether or not the prisoner committed an indecent assault upon the prosecutrix. The fact that he did not leave the question of indecent assault to the jury was a misdirection. A judge must not put himself in the position of the jury as regards the decision of facts. The proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1), does not apply where the judge decides facts instead of the jury.—*R. v. WEST* (1910), 4 Cr. App. Rep. 179, C. C. A.

*Annotation*:—*Folld. R. v. Beeby* (1911), 6 Cr. App. Rep. 138.

**6037.** —.]—It is a misdirection to tell the jury that unless they believe that the witnesses for the prosecution have committed perjury, they must find a verdict of guilty, when there is another possible explanation of the facts.—*R. v. TAYLOR* (1914), 11 Cr. App. Rep. 41, C. C. A.

**6038. Recommendation to convict—Judge's opinion as to guilt of accused.**—*R. v. RANGLES*, No. 5624, *ante*.

**6039.** —.]—*R. v. FRAMPTON*, No. 5961, *ante*.

#### v. Other Cases.

**6040. Expression of view of facts by judge.**—*R. v. MARTIN*, No. 5993, *ante*.

**6041.** — **Amounting to withdrawal of facts from jury.**—A judge should not express his view of the facts of a case in such a way to lead the jury to believe that the questions of fact are withdrawn from them.—*R. v. BEEBY* (1911), 6 Cr. App. Rep. 138, C. C. A.

**6042.** —.]—It is not a misdirection to make a suggestion as to the facts of a case different to that made by the prosecution & by the defence.—*R. v. BENTLEY* (1913), 9 Cr. App. Rep. 109, C. C. A.

the jury in the arrangement of the facts which were spoken to by the witnesses, & himself found facts which he should have put to the jury, was pronounced defective, & verdict founded thereon was set aside.—*R. v. RAM GOPAL DHUR* (1868), 10 W. R. 7.—**IND.**

**6041 iii.** —.]—It is a misdirection for the judge to express his opinion on various questions of fact without telling jury that his opinion is not binding on them & that they are the sole judges of fact.—*NATABAR GHOSH v. R.* (1908), 1 L. R. 35 Cal. 531.—**IND.**

**1. Direction as to intending consequences.**—In a trial with a jury under Penal Code, s. 366, the judge on the question of intent charged the jury in the following words:—"It remains only to consider the question of intent. The charge was that the girl was kidnapped in order that she might be forced or seduced to illicit intercourse. As to this, it is sufficient to say that

*Sect. 7.—Determination of appeals against conviction: Sub-sect. 7, C. (b) v.; sub-sect. 8, A. & B.]*

**6043. Statement that "affirmation is stronger than negation."**—It is a misdirection to tell the jury, in general terms, that affirmative is stronger than negative evidence.—*R. v. HOUSE* (1921), 16 Cr. App. Rep. 49, C. C. A.

*Annotation:—Apld. R. v. Coleman* (1922), 16 Cr. App. Rep. 73.

**6044.** —.]—*R. v. COLEMAN* (1921), 16 Cr. App. Rep. 73, C. C. A.

**6045. Equivocal expression treated as admission of guilt.**—In a case where a prisoner was convicted of stealing £3 8s. from the person, a detective gave evidence at the trial that he said to prisoner when charged: "Do you care to tell me where you have put the money?" Prisoner said, "I have got no money." The detective told him that he was going to his lodgings, & prisoner then said, "You will find £1 7s. 6d. in my box; my girl has got the key." The judge who tried the case, in summing up, said, "Subsequently, however, he, prisoner, said, 'I may as well tell you that I have £1 7s. 6d.' I suppose he meant 'still remaining.'" The judge also said, "Now, that statement of prisoner's as to the remainder of the money being in his box, coupled with prosecutor's tale, can only point in one direction." He also said, "When he wrote that letter, a statement of his defence to the magistrate, he apparently quite forgot that he had told the officer that he had the £1 7s. 6d. left of the money he took from prosecutor." In another passage the judge spoke of the £1 7s. 6d. as "belonging to E.," the prosecutor. The Ct. of Criminal Appeal quashed the conviction on the ground that the judge who tried the case had misdirected the jury by treating prisoner's statement to the detective as a confession, when it was consistent with his being not guilty.—*R. v. JOYCE* (1908), 72 J. P. 483; 25 T. L. R. 8; 1 Cr. App. Rep. 142, C. C. A.

**6046.** —.]—*R. v. VASSILEVA* (1911), 6 Cr. App. Rep. 228, C. C. A.

**6047.** —.]—It is a misdirection to treat as an admission of guilt an expression which is consistent with innocence.—*R. v. SCHOFIELD* (1917), 12 Cr. App. Rep. 191, C. C. A.

**6048. Direction as to intending consequences—Of accidental act.**—Prisoner was indicted for shooting with intent to resist his lawful apprehension. The defence was that prisoner's gun went off accidentally. In his summing up, the judge directed the jury that a man must be taken to intend the natural consequences of his acts, & that it was for the prisoner & not for the prosecu-

tion, to satisfy them that the gun went off accidentally. Prisoner was convicted:—*Held*: the conviction must be quashed as the judge's direction might have been understood by the jury as laying down a proposition of law which was not correct—namely, that a person must be taken to intend the consequences, not only of his intentional, but also of his accidental, acts.—*R. v. DAVIES* (1913), 29 T. L. R. 350; 8 Cr. App. Rep. 211, C. C. A.

**6049. Failure to warn jury to disregard inadmissible evidence.**—*R. v. LEE*, No. 5864, *ante*.

**6050. As to doctrine of marital coercion.**—In this case, where the evidence showed that a wife committed a theft in the presence of her husband, a recorder directed the jury that if they thought that the theft was the result of a preconcerted scheme between husband & wife, that would tend to rebut the presumption that the wife was acting under the coercion of her husband & was entitled to be acquitted:—*Held*: the fact of such a preconcerted scheme might be evidence & strong evidence that the wife was acting under the coercion of her husband. Accordingly the conviction was quashed on the ground of misdirection on the part of the recorder.—*R. v. CAROUBI* (1912), 107 L. T. 415; 76 J. P. 262; 23 Cox, C. C. 177; 7 Cr. App. Rep. 149, C. C. A.

**6051. Direction as to which witness jury might believe.**—*R. v. LIVOCK*, No. 5751, *ante*.

**6052.** —.]—A statement to a jury that it is for them to decide "which side" they believe should be accompanied by a careful direction on the particular facts of the case.—*R. v. BURTON* (1922), 17 Cr. App. Rep. 5, C. C. A.

**6053. Direction that defence did not suggest identity of true offender.**—It is not a misdirection if the judge points out that the defence makes no suggestion that some other person than the defendant is guilty.—*R. v. READE* (1910), 5 Cr. App. Rep. 82, C. C. A.

**6054. Failure to inform jury of power to convict for lesser offence.**—Applt. was convicted for wounding with intent to murder, & was sentenced by Ct. to five years' penal servitude. Though no notice of appeal on a point of law had been given, leave obtained to raise the point that the judge at the trial omitted to tell the jury that it was open to them to convict him of the lesser offence of unlawful wounding. It was submitted that the Ct. could deal with the point under Criminal Appeal Act, 1907 (c. 23), s. 5 (2).

The point could only be raised now as a suggested misdirection, but there was no misdirection in this case, & a judge was not bound in every case to tell the jury that they were at liberty to convict

no other inference is possible under the circumstances. When a man carries off a young girl at night from her father's house, the presumption is that he did so with the intent indicated above. It would be open to him, if he had admitted the kidnapping, to prove that he had some other object, but no other object is apparent on the face of the facts:—*Held*: this amounted to a misdirection of the jury. The question of intent was a question of fact, but the way in which it had been put to the jury left them no option but adopt the view taken by the judge.—*R. v. HUGHES* (1891), 1 L. R. 14 All. 25.—*IND.*

**6054 i. Failure to inform jury of power to convict for lesser offence.**—On a trial for murder the jury are entitled under Crimes Act (N.S.W. No. 40), s. 23 (2), to bring in verdict of manslaughter even though on the evidence the case is one of murder or nothing, & therefore when in answer to a question by the

jury whether they were at liberty to find any other verdict than guilty or not guilty judge told them they were not:—*Held*: this was a misdirection.—*BROWN v. R.* (1913), 17 C. L. R. 570.—*AUS.*

**6054 ii.** —.]—Deft. was convicted of rape. On a case reserved, it was objected that when the jury came & asked if they were limited to a verdict of guilty or not guilty, the judge had not informed them they could bring in a verdict of indecent assault or common assault or of attempt to commit rape, & in effect had limited them to a verdict of guilty or not guilty:—*Held*: the judge in not informing the jury that they had an alternative mode of finding had encroached on the function of the jury by withdrawing from them their power to find a lesser offence & there must be a new trial.—*R. v. SCHERF* (1908), 8 W. L. R. 219; 13 B. C. R. 407.—*CAN.*

**g. Comment on prisoner not giving evidence.**—By judge—*Canada Evidence Act*, 1893, s. 4, sub-s. 2.—At the trial prisoner did not testify on his own behalf & the judge in his charge to the jury, contrary to above sect., commented upon that fact, although, when his attention was drawn to it, he recalled the jury & withdrew his comment:—*Held*: prisoner had a right to have his case submitted to the jury without the comment & having been deprived of that right, there was a substantial wrong done to him which could not be undone by calling back the jury & withdrawing the comment.—*R. v. COLEMAN* (1898), 30 O. R. 93.—*CAN.*

**h.** — By counsel.—It is the duty of the judge in a criminal case carefully to protect accused from damaging insinuations which may not in terms invite a consideration of accused's failure to testify but make indirect & covert allusions to his



of a lesser offence, unless that point was substantially raised by the evidence (*per cur.*).—*R. v. VAUGHAN* (1908), 1 Cr. App. Rep. 25, C. C. A. 6055. —]—It is not a misdirection to abstain from pointing out to the jury that they have the power to find a lesser cause than that charged.—*R. v. NAYLOR* (1910), 74 J. P. 460; 5 Cr. App. Rep. 19, C. C. A.

#### SUB-SECT. 8.—ABSENCE OF OR SUFFICIENCY OF CORROBORATION.

##### A. In General.

#### 6056. Evidence of accomplice—General rule.]—

If after the proper caution by the judge, the jury nevertheless convict the prisoner, this Ct. will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated. In considering whether or not the conviction should stand, this Ct. will review all the facts of the case, & will bear in mind that the jury had the opportunity of hearing & seeing the witnesses when giving their testimony. But the Ct., in the exercise of its powers, will quash a conviction even when the judge has given to the jury the warning or advice above mentioned if Ct., after considering all the circumstances of the case, thinks the verdict "unreasonable" or that it "cannot be supported having regard to the evidence" (LORD READING, C.J.).—*R. v. BASKERVILLE*, [1916] 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. 453; 80 J. P. 446; 60 Sol. Jo. 696; 25 Cox, C. C. 524; 12 Cr. App. Rep. 81, C. C. A.

*Annotations*.—*Reid*. *R. v. Wyman* (1918), 13 Cr. App. Rep. 163; *R. v. Feigenbaum*, [1919] 1 K. B. 431; *R. v. Smith* (1919), 14 Cr. App. Rep. 74; *R. v. Wakeley* (1919), 84 J. P. 31; *R. v. Warren* (1919), 14 Cr. App. Rep. 4; *R. v. Schiff* (1920), 15 Cr. App. Rep. 63; *R. v. Howard* (1921), 15 Cr. App. Rep. 177; *Thomas v. Jones*, [1921] 1 K. B. 22; *R. v. Crocker* (1922), 92 L. J. K. B. 428; *R. v. Rudge* (1923), 17 Cr. App. Rep. 113.

6057. —]—Conviction quashed on the ground of insufficient corroboration of an accomplice's evidence.—*R. v. EVEREST* (1909), 73 J. P. 269; 2 Cr. App. Rep. 130, C. C. A.

*Annotations*.—*Consd.* *R. v. Blatherwick* (1911), 6 Cr. App.

Rep. 281; *R. v. Crane* (1912), 7 Cr. App. Rep. 113; *R. v. Cohen* (1914), 111 L. T. 77; *R. v. Baskerville*, [1916] 2 K. B. 658; *R. v. Willis*, [1916] 1 K. B. 933; *R. v. Wyman* (1918), 13 Cr. App. Rep. 163. *Reid*. *R. v. Warren* (1909), 73 J. P. 359; *R. v. Threlfall* (1914), 111 L. T. 168.

6058. —]—Corroboration of an accomplice's evidence must be material. The slighter it is, the more distinct should be the direction to the jury as to it. Deft. on trial should be informed of his right to give evidence. It is not sufficient that the accomplice has said something which is true.—*R. v. WARREN* (1909), 73 J. P. 359; 25 T. L. R. 633; 2 Cr. App. Rep. 194, C. C. A.

*Annotation*.—*Reid*. *R. v. Graham* (1922), 17 Cr. App. Rep. 40.

6059. —]—When a jury finds that the explanation of a deft. charged with feloniously receiving stolen property may reasonably be true, the ct., if it thinks that there was no corroboration of an accomplice's evidence, will quash the conviction.—*R. v. NORRIS* (1916), 86 L. J. K. B. 810; 116 L. T. 160; 25 Cox, C. C. 601; 12 Cr. App. Rep. 156, C. C. A.

6060. Several assignments of perjury—No corroboration as to one assignment.]—*R. v. GASKELL*, No. 5848, *ante*.

6061. Slight corroboration—Subsequent doubt as to prosecutors' evidence.]—When corroboration of prosecutor's evidence is very weak &, after conviction, doubt has been thrown on that evidence, the ct. may quash the conviction.—*R. v. BAKER* (1913), 9 Cr. App. Rep. 136, C. C. A.

6062. Statutory corroboration absent—Children Act, 1908, c. 67, s. 30 (a).]—*R. v. CHRISTIE*, No. 3811, *ante*.

6063. — Criminal Law Amendment Act, 1885 (c. 69), s. 2 (1).]—*R. v. GOLDSTEIN* (1914), 11 Cr. App. Rep. 27, C. C. A.

*Annotation*.—*Mentd.* *R. v. Hughes* (1923), 87 J. P. 140.

##### B. Warning by Judge.

6064. Necessity for—Evidence of accomplice.]—*R. v. TATE*, [1908] 2 K. B. 680; 77 L. J. K. B. 1043; 99 L. T. 620; 72 J. P. 391; 52 Sol. Jo.

sentence.—*R. v. GALLAGHER*, [1922] 1 W. W. R. 1183; 63 D. L. R. 629; 37 Can. Crim. Cas. 83; 17 Alta. L. R. 519.—CAN.

k. Comment by judge on failure of accused at preliminary hearing to disclose defence.]—*R. v. MAH HONG HING* (1920), 3 W. W. R. 314; 53 D. L. R. 356.—CAN.

l. Nondirection may be misdirection.]—Nondirection may be misdirection according to the circumstances of each case.—*R. v. TRUPCHUK*, [1923] 3 W. W. R. 86; 40 Can. Crim. Cas. 227.—CAN.

#### PART XIV. SECT. 7, SUB-SECT. 8.—A.

m. Evidence of accomplice—Who is an accomplice.]—Certain persons were engaged in a scheme for forging bank-notes & sought assistance of L., who knew something of photo-lithography, for preparation of a plate from which to print notes. L. was told all details of the scheme & promised £50 if he could reproduce a certain drawing on a plate so that prints could be made from it & £2,500 when the notes were printed. L. said he would like to make some experiments & was given £10 for the purpose. He made no experiment & did not return the money nor inform the police. Some months afterwards another man supplied the necessary plates & the forgeries were printed & uttered.

At the trial of applt. for forging & uttering a £5 note L. was called as

witness for the Crown & gave evidence implicating the accused. Chairman of Quarter Sessions directed jury that L. was not an accomplice & his evidence did not require corroboration.—*Held*: direction was erroneous, & there was ample evidence on which jury might have found L. was an accomplice. Conviction set aside & new trial ordered.—*R. v. FERGUSON & KING*, [1916] 17 S. R. N. S. W. 69.—AUS.

n. Evidence of "trap."]—A conviction for selling liquor without a licence set aside, when the sole evidence of the sale was that of a trap, & the circumstances were such as to render this evidence unreliable.

If detectives are to be employed, every precaution should be taken that their evidence be corroborated, for unless there is such corroboration cts. could wisely hesitate to accept their statements as true.—*R. v. MAHLAMANI* (1895), 10 E. D. C. 9.—S. AF.

o. —]—If a person is convicted on the uncorroborated evidence of traps the conviction may be set aside.—*R. v. FILANIUS*, [1916] T. P. D. 415.—S. AF.

p. —]—Applt. & another were charged with contravening Act 38 of 1896, s. 66, by supplying intoxicating liquor to a prohibited person. The principal evidence for the prosecution was given by the person supplied, a police trap, who had been handed marked coins. The trap was out of sight of the detectives for 20 minutes. Magistrate rejected the evidence of

the trap so far as it sought to implicate second accused but convicted applt. None of the marked money was found on applt.—*Held*: having regard to the circumstances & the great caution which should be shown in accepting uncorroborated evidence of traps, conviction should be quashed.—*RENAUD v. DURBAN CHIEF CONSTABLE*, [1921] 42 N. L. R. 354.—S. AF.

q. Indecent behaviour to girl.]—Where a person was charged with the offence of behaving in a lewd & indecent manner towards a girl under puberty & convicted, the ct. quashed the conviction on the ground that the only evidence adduced of the girl's age was her own uncorroborated statement.—*LOCKWOOD v. WALKER*, [1910] S. C. (J.) 3.—SCOT.

r. Statutory corroboration absent—Attempt to have unlawful carnal knowledge of a child.]—*R. v. BOWES* (1909), 14 O. W. R. 1214; 1 O. W. N. 253; 20 O. L. R. 111.—CAN.

#### PART XIV. SECT. 7, SUB-SECT. 8.—B.

6064 i. Necessity for—Evidence of accomplice.]—It is not only a desirable practice that jurors should be warned against accepting uncorroborated evidence of an accomplice, but if it should appear at any trial that the warning has not been given, & there is an absence of corroborative evidence, the Ct. of Criminal Appeal should set aside the conviction, & deal with the case under the provisions of the Act which enables the ct., if it thinks a proper



*Sect. 7.—Determination of appeals against conviction: Sub-sect. 8, B.; sub-sect. 9.]*

699; 21 Cox, C. C. 693; 1 Cr. App. Rep. 39, C. C. A.

*Annotations:—*Refd. *R. v. Beauchamp* (1909), 73 J. P. 223; *R. v. Kams* (1910), 4 Cr. App. Rep. 8; *R. v. Cohen* (1914), 111 L. T. 77; *R. v. Baskerville*, [1916] 2 K. B. 658.

6065. ———. ———.]—*R. v. BEAUCHAMP*, No. 6027, ante.

6066. ———. ———.]—The ct. will quash a conviction unless the jury are expressly directed that there must be corroboration of an accomplice's evidence.—*R. v. MASON* (1910), 5 Cr. App. Rep. 171, C. C. A.

6067. ———. ———. **Sexual offence.**]—On a charge of sexual offence, the jury must be distinctly cautioned to be careful how they accept the uncorroborated evidence of the prosecutrix.—*R. v. BROWN* (1910), 6 Cr. App. Rep. 24, C. C. A.

*Annotations:—*Refd. *R. v. Stone* (1910), 6 Cr. App. Rep. 89. *Mentd.* *Bradshaw v. Waterlow*, [1915] 3 K. B. 527.

6068. ———. ———. **Consenting party.**]—In an indictment under the Punishment of Incest Act, 1908 (c. 45), if there is evidence to go to the jury that the female was a consenting party, they must be clearly cautioned that, if they come to that conclusion, her evidence must be corroborated, as she then becomes an accomplice.—*R. v. STONE* (1910), 6 Cr. App. Rep. 89, C. C. A.

6069. ———. ———. **Larceny—Evidence of receiver of stolen property.**]—Where on the trial of a charge of larceny the only evidence against deft. is that of the person who receives the stolen property, & there is a suspicion that he knew that the property was stolen, his evidence must not be left to the jury as that of an untainted witness, but they should be warned that if they think that he was an accomplice there ought to be corroboration of his story.—*R. v. JENNINGS* (1912), 7 Cr. App. Rep. 242, C. C. A.

6070. ———. ———.]—*R. v. BRYANT* (1917), 13 Cr. App. Rep. 49, C. C. A.

case appears, to direct a new trial.—*R. v. MOELLER* (1913), 13 S. R. N. S. W. 613.—AUS.

6064 ii. ———. ———.]—Evidence in corroboration of the evidence of an accomplice must be independent testimony which affects accused by connecting him, or tending to connect him, with the crime. It must be evidence which implicates him, that is, which confirms in some material particulars not only the evidence that the crime has been committed but also that accused committed it. Where the judge told the jury that they should be satisfied that the accomplice was corroborated in some material particular with reference to the crime charged but did not tell them that it should be evidence implicating the accused, a new trial was granted.—*R. v. DOUGHTY & SHORTAL* (1916), 16 S. R. N. S. W. 570; 33 N. S. W. W. N. 180.—AUS.

6064 iii. ———. ———.]—On a charge of murder based on evidence that accused procured an abortion with the consent of the woman on whom the operation was performed, resulting in the woman's death, the judge when summing up referred to various parts of the evidence as corroborative, & later summarised those different points as amounting to corroboration of the account given by the deceased woman without pointing out to the jury that mere corroboration of details in the account amounting only to the probability that an offence had been committed would not be sufficient, & that where corroboration was sought for the law required evidence which connected accused with the crime; Ct. of

Appeal quashed the conviction.—*R. v. NAUGHTON* (1920), 20 S. R. N. S. W. 259; 37 N. S. W. W. N. 40.—CAN.

6064 iv. ———. ———.]—When the jury have been cautioned as to acting upon the unconfirmed testimony of accomplices, no fault can be found with the admission of their evidence. In an indictment for soliciting P. & S. to steal money of the G. Bank, the jury were told that the testimony of the accomplices was not sufficiently corroborated to warrant a conviction, whereupon they came into ct. stating that they thought the prisoner guilty, but that he ought not to be convicted on the evidence. They were then told that they ought to acquit; but after a short interval they returned a verdict of guilty. Before recording their finding, the presiding judge recommended them not to convict on the evidence saying, however, that they could do so if they thought proper; they nevertheless adhered to their verdict:—*Held*: no ground for a new trial. The rule that if the verdict be sufficiently sustained by evidence, the ct. are not required to interfere, asserted & acted upon.—*R. v. SEDDONS* (1866), 16 C. P. 389.—CAN.

6064 v. ———. ———.]—K. was convicted of being an accessory before the fact to the murder for which accused was being tried, & that fact was proved at the trial of accused:—*Held*: K. was an accomplice, & the trial judge should have cautioned the jury against acting on K.'s evidence unless it was found by them to be corroborated in some material part by other evidence; & the trial judge having refused so to do, a new trial was directed.—*R. v.*

6071. ———. ———.]—A statement by a co-deft. who is an accomplice of another deft. is not corroboration of the evidence of other accomplices against that deft. On the point of corroboration by an accomplice there must be a proper direction.—*R. v. HOWARD* (1921), 15 Cr. App. Rep. 177, C. C. A.

6072. ———. ———.]—When two persons are tried together & the evidence discloses a possibility that one of them may be an accomplice of the other or of a third person, the usual warning to the jury about corroboration must be given.—*R. v. HEATHFIELD* (1923), 17 Cr. App. Rep. 80, C. C. A.

6073. ———. **Warning by counsel for prosecution sufficient.**]—If a jury has been sufficiently warned by counsel for the Crown of the necessity for corroboration of certain evidence, a conviction will not be quashed merely because the warning was not repeated in the summing up.—*R. v. QUINN* (1911), 6 Cr. App. Rep. 269, C. C. A.

6074. ———. **Unless sufficient corroboration in fact existed—Proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1) applied.**]—Misdirection—no caution to jury as to evidence of accomplice.

The summing up is a most inartistic performance. It did not give the jury the usual warning with regard to accomplices, & it contains the chairman's own views, some of which are absurd. We cannot say a single word in its favour, but at the same time we think that it has not caused a miscarriage of justice. The circumstances of the case are inconsistent with innocence, & though we think that this is the kind of summing up which ought not to have been delivered, yet the case comes within the proviso to sect. 4 of the above Act (*DARLING, J.*).—*R. v. BOWLER* (1909), 2 Cr. App. Rep. 168, C. C. A.

6075. ———. ———.]—If there is sufficient corroboration of an accomplice's evidence, the ct. will not interfere, despite the want of a proper caution to the jury, if there is no reason to fear a miscarriage of justice.—*R. v. KIRKHAM* (1909),

*RATZ* (1913), 24 W. L. R. 908; 4 W. W. R. 1231.—CAN.

6064 vi. ———. ———.]—The question whether or not a judge, in charging a jury, should caution them that the evidence of an accomplice should be corroborated, is not a matter for a ct. to review on a case reserved, for it is not a question of law, but of practice, though a practice which should not be omitted.—*R. v. ANDREWS* (1886), 12 O. R. 184.—CAN.

6067 i. ———. ———. **Sexual offence.**]—A man was tried for a sexual offence on a girl of ten to sixteen years of age & was convicted. Corroboration of the girl's story, which is not legally necessary, was absent. Judge omitted to warn jury of the danger of convicting on her uncorroborated evidence:—*Held*: conviction should be quashed & verdict & judgment of acquittal should be entered, on the ground that a miscarriage of justice had occurred by reason of the omission to warn the jury.—*HARGAN v. R.* (1919), 27 C. L. R. 13.—AUS.

6067 ii. ———. ———.]—While on the trial of charges of indecent assault & carnal knowledge of a girl under fourteen, corroborative evidence is not necessary, yet the judge should warn the jury to be careful in acting on the evidence of children of tender years concerned in the offence; it is not necessary that the judge should use the actual words "warn" or "caution," provided his conduct of the case does in fact give the jury such warning or caution.—*R. v. PARKIN*, [1922] 1 W. W. R. 732; 66 D. L. R. 175; 37 Can. Crim. Cas. 35; 31 Man. L. R. 438.—CAN.

73 J. P. 406; 25 T. L. R. 656; 2 Cr. App. Rep. 253, C. C. A.

**6076.** ———.—]—The jury ought to be directed that a child of tender years who gives unsworn evidence under Children Act, 1908 (c. 67), s. 30, ought to be corroborated, but if there is in fact good corroboration of such evidence the ct., in view of the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4, will not quash a conviction.—*R. v. MURRAY* (1913), 30 T. L. R. 196; 9 Cr. App. Rep. 248, C. C. A.

**6077.** ———.—]—Where at a trial the evidence of a child of tender years, which is given under Children Act, 1908 (c. 67), s. 30, & Criminal Justice Administration Act, 1914 (c. 58), s. 28 (2), is of importance, the judge should direct the jury not to convict upon it; unless it is corroborated by some other material evidence in support of it implicating the accused. In the absence of such a direction a conviction of the accused must be quashed.

*Semble*: if the evidence in corroboration is so ample & so clear that the ct. is bound to come to the conclusion that, despite a proper direction as to the necessity for corroboration, the jury must have returned a verdict of "Guilty," the absence of such a direction will not vitiate the conviction.—*R. v. DAVIES* (1915), 85 L. J. K. B. 208; 114 L. T. 80; 25 Cox, C. C. 225; 11 Cr. App. Rep. 272; 79 J. P. Jo. 556, C. C. A.

*Annotations*:—**Fold.** *R. v. Lyons* (1921), 15 Cr. App. Rep. 144. **Refd.** *R. v. Schiff* (1920), 15 Cr. App. Rep. 63.

**6078.** ———.—]—The ct. will not quash a conviction merely because there has not been a specific direction to the jury that the evidence of a child who is not sworn under Children Act, 1908 (c. 67), s. 30, must be corroborated—if, in fact, there has been corroboration. But such a direction should be given.—*R. v. SCHIFF* (1920), 15 Cr. App. Rep. 63, C. C. A.

#### SUB-SECT. 9.—MISCONSTRUCTION OF VERDICT.

**6079. General rule—Verdict & recommendation to be considered as a whole.**—]—The verdict & recommendation of a jury must be considered as a whole. If they find specifically guilty, the verdict cannot be set aside because they express doubts on points of detail. If a verdict is on its face inconsistent, this ct. can refuse to allow it to stand.—*R. v. CHARLTON* (1911), 6 Cr. App. Rep. 119, C. C. A.

**6080. Verdict not explicit—Court will give effect to intention of jury.**—*R. v. RAWLINGS*, No. 6149, *post*.

**6081. Same act charged in separate counts—General verdict of guilty—Confined to least offence.**—]—When the same act is differently charged in

various counts the ct. may construe a verdict of guilty upon all as if it was limited to the least offence alleged. Applt. was convicted of obtaining goods by false pretences, & of obtaining credit by fraud. The indictment contained three counts; in the first applt. was charged with obtaining three horses by false pretences, in the second he was charged with obtaining credit by false pretences, & in the third with obtaining credit by fraud other than false pretences. The judge when the jury found applt. guilty on all three counts, sentenced him for both offences, three years' penal servitude, for the false pretences, & 12 months' imprisonment with hard labour for obtaining credit by fraud:—*Held*: the offence was either the one or the other. That the conviction for obtaining goods by false pretences, & the sentence of three years' penal servitude must be quashed, & the sentence of 12 months' imprisonment with hard labour must remain.—*R. v. JOHNSTON* (1913), 9 Cr. App. Rep. 262, C. C. A.  
*Annotations*:—**Refd.** *R. v. Norman* (1914), 112 L. T. 784; *R. v. Smith* (1915), 11 Cr. App. Rep. 81.

**6082. Obtaining by false pretences—Intent to defraud negatived.**—]—An inconsistent verdict cannot stand.

Applt. was indicted of obtaining goods by false pretences, of attempting to obtain certain other goods by false pretences, & on a third count of obtaining credit by false pretences under Debtors Act, 1869 (c. 62), s. 13 (1). Applt. had ordered furniture of prosecutors. The latter, before completing the order, demanded of him a reference. Applt. sent in reply three distinct names. Two of these represented, to his knowledge, an identical person, which was the false pretence averred. Applt.'s defence was that he had no intent to defraud & had no intention of obtaining credit, but had intended to pay cash for the goods. On counts 1 & 2 he was found not guilty. On the third count the judge put the following questions to the jury: Did deft. obtain credit by false pretences? Did he do so with intent to defraud? The jury answered the former question in the affirmative & the latter in the negative. Contended for applt. that the verdict amounted to not guilty, as the jury expressly negatived any intent to defraud. Fraud is necessary in the offence.

There cannot be an offence within the statute unless there is an intent to defraud. It may be that the jury ought to have found that there was fraud. But they have found that there was not fraud. Their two findings do not constitute a verdict of guilty.—*R. v. MUIRHEAD* (1908), 73 J. P. 31; 25 T. L. R. 88; 53 Sol. Jo. 164; 1 Cr. App. Rep. 189, C. C. A.

*Annotations*:—**Refd.** *R. v. Brownlow* (1910), 74 J. P. 240; *Morison v. London County & Westminster Bank*, [1914] 3 K. B. 356.

#### PART XIV. SECT. 7, SUB-SECT. 9.

**a. Ambiguous verdict.**—]—Prisoner was indicted under Criminal Code Act, ss. 269 & 271, upon a charge of forging & uttering an acknowledgment of the receipt of money. Prisoner, as agent for M., had incurred a debt of £5, & the creditor, G., demanded payment from him. He thereupon made & signed in G.'s name a receipt for £5 from himself. Prisoner then sued M. for the £5 which he alleged he had paid to G., & produced the false receipt in support of his claim. He recovered judgment. G. swore that he had not authorised prisoner to sign the receipt. The jury found the following verdict: "We find accused guilty of forging & using a receipt, but do not consider it was done with any criminal intent"—*Held*: the verdict was ambiguous,

for it might have meant that the jury thought prisoner had no intent to defraud, in which case, as that was not a necessary ingredient of the offence, it was a verdict of "guilty"; or it might have meant that they believed he honestly thought he had authority to sign & use the receipt, in which case it was probably equivalent to a verdict of "not guilty"; & under the circumstances a new trial should be ordered.

*Qu.*: whether on a case stated under sect. 412 the ct. is entitled when the verdict of the jury is ambiguous to apply to its full extent the rule in civil cases, & after looking at the evidence to construe the verdict, to enter a verdict of "guilty"; but for the purpose of determining whether the verdict should be entered for

prisoner or whether there should be a new trial the ct. may properly look at the evidence.—*R. v. STEWART* (1908), 27 N. Z. L. R. 682; 30 N. Z. L. R. 1025.—**N.Z.**

**t.** ———.—]—Defence of one of two prisoners jointly indicted for theft was that he was too drunk to form a criminal intent. The other admitted the theft & did not allege drunkenness. There was no evidence or plea of insanity on the part of either of the prisoners. Jury returned a verdict "guilty with no criminal intent. Act committed while under the influence of temporary insanity":—*Held*: verdict was ambiguous & uncertain & new trial ordered.—*R. v. ADAMS & CARR* (1916), 35 N. Z. L. R. 356.—**N.Z.**

*Sect. 7.—Determination of appeals against conviction: Sub-sects. 9 & 10.]*

**6083.** ———.]—When on a charge of obtaining by false pretences the ct. thinks that it is doubtful whether the jury intended to answer the specific question "Was there an intent to defraud?" in the affirmative, it will quash a conviction.—*R. v. HUNT* (1918), 13 Cr. App. Rep. 155, C. C. A.

**6084. Malicious damage—Malice Negatived.]**—Prisoner was indicted under the Malicious Damage Act, 1861 (c. 97), s. 20, for having cut & destroyed certain trees the property of his landlord. Prisoner was to leave his cottage on Sept. 29, & on the night of Sept. 28, he went into his garden & cut down the trees, being, as he said, under the impression that he was entitled to do so as he had planted them himself. The jury found the prisoner guilty, but added that he had done what he did in ignorance. The Chairman of quarter sessions declined to accept that verdict, & he again summed up the case to the jury, who eventually found the prisoner guilty, but recommended him to mercy. There was no proper shorthand note of the proceedings of the trial:—*Held*: (1) the provision of the Criminal Appeal Act, 1907 (c. 23), s. 16, as to shorthand notes of proceedings being taken at the trial was directory merely, & the taking of a shorthand note was not essential to the validity of the proceedings; (2) there was so much doubt as to whether the jury did not intend to negative malice that it would not be safe to allow the conviction to stand.—*R. v. RUTTER* (1908), 73 J. P. 12; 25 T. L. R. 73; 1 Cr. App. Rep. 174, C. C. A.

*Annotation*:—*As to* (1) *Reid*. *R. v. Elliott* (1909), 73 J. P. Jo. 252.

**6085. Verdict of guilty—Wrongly entered—Under mistake of law.]**—Where the ct. of trial, under a mistake of law, enters a verdict of guilty, when it should have entered one of not guilty, the ct. will not apply the proviso to sect. 4 of Criminal Appeal Act, 1907 (c. 23), though it is satisfied that the former verdict was correct.—*R. v. JOHNSON* (1913), 9 Cr. App. Rep. 57, C. C. A.

**6086.** ——— **On findings of jury.]**—Prisoner was indicted for stealing seven live fowls, the property of the High Sheriff of Worcestershire. An execution had been levied on the goods of prisoner's wife, & while the sheriff's officer was in possession under the execution of certain live fowls then on the premises prisoner came & took away seven of them. In answer to questions left to them by the chairman of quarter sessions, the jury found (1) that the seven fowls taken by prisoner were his own property, & (2) that they were seized by the sheriff as part of the property of prisoner's wife under the impression that they were her goods. The chairman directed a verdict of guilty to be entered, but gave a certificate for leave to appeal:—*Held*: on the findings of the jury the proper verdict was one of not guilty.—*R. v. KNIGHT* (1908), 73 J. P. 15; 25 T. L. R. 87; 53 Sol. Jo. 101; 1 Cr. App. Rep. 186, C. C. A.

**6087. Accessory before fact to burglary—Guilty**

**knowledge negatived.]**—Applt. & one K. were convicted of burglariously entering a dwelling-house, the jury having found in the case of applt. that he had handed a jemmy to K. with the knowledge that it was wanted for a burglary, though he did not know that it was wanted for this particular burglary:—*Held*: on this finding applt. was not an accessory before the fact to the burglary, & therefore his conviction must be quashed.—*R. v. LOMAS* (1913), 110 L. T. 239; 78 J. P. 152; 30 T. L. R. 125; 58 Sol. Jo. 220; 23 Cox, C. C. 765; 9 Cr. App. Rep. 220, C. C. A.

**6088. Offence under Children Act, 1908 (c. 67), s. 17—Finding of negligence only.]**—A verdict of "negligence" on an indictment under the above Act, s. 17, is a verdict of not guilty as mere negligence is not an offence within that sect.—*R. v. CHAINBY*, [1914] 1 K. B. 137; 83 L. J. K. B. 306; 109 L. T. 752; 78 J. P. 127; 30 T. L. R. 51; 23 Cox, C. C. 620; 9 Cr. App. Rep. 175, C. C. A.

#### SUB-SECT. 10.—IRREGULARITY AT TRIAL.

**6089. Irregular constitution of court.]**—Conviction quashed as being *coram non jndice*, some of the convicting justices sitting only by virtue of their names being added after the demise of the Crown issuing a Commission, to a schedule in that commission.—*R. v. HOLDICH* (1920), 37 T. L. R. 330; 15 Cr. App. Rep. 122, C. C. A.

**6090. Joint trial—Separate indictments—Conviction quashed—Order for retrial.]**—Applt. was indicted for receiving goods knowing them to be stolen, & another man was charged in a separate indictment with stealing the goods. The two prisoners were tried together & convicted:—*Held*: the proceedings were a nullity, & the Ct. of Criminal Appeal in quashing the conviction had power under the Criminal Appeal Act, 1907 (c. 23), to order applt. to be tried according to law.—*CRANE v. PUBLIC PROSECUTOR*, [1921] 2 A. C. 299; 90 L. J. K. B. 1160; 125 L. T. 642; 85 J. P. 245; 65 Sol. Jo. 642; 27 Cox, C. C. 43; 15 Cr. App. Rep. 183; *sub nom.* *R. v. CRANE*, 37 T. L. R. 788, H. L.

*Annotations*:—*Reid*. *R. v. Morton* (1920), 15 Cr. App. Cas. 30; *R. v. Hammer*, [1923] 2 K. B. 786.

**6091. Two indictments—Trial of one on evidence as to the other.]**—Where there has been a conviction after grave irregularity at the trial not discovered for some time, the ct. will quash the conviction without regard to the merits of the case.

Applt. was convicted of feloniously receiving stolen property. There were two indictments against applt.: the first with reference to twenty-three baskets of strawberries, the property in which was laid in the London & South Western Ry. by a first count, & in W., by a second count, & the second indictment with reference to ten baskets of strawberries, the property in which was laid by different counts in the London & South Western Ry. & R. & H. The prisoner was

#### PART XIV. SECT. 7, SUB-SECT. 10.

**a. Jurymen sworn in name of another.]**—On a trial for larceny, one jurymen answered to & was sworn & served in the name of another. The fact was discovered after the jury retired but before they gave their verdict. Prisoner who was undefended was found guilty:—*Held*: mistake did not invalidate the conviction.—*R. v. MERCER* (1870), 9 N. S. W. S. C. R. 57.—*AUS.*

**b. Jurors & triers having acted**

*as special constables at time offence committed.]*—Applt. was convicted by the Ct. of Quarter Sessions on a charge that he unlawfully assaulted F. & thereby did him bodily harm. The offence was alleged to have taken place during the course of a popular disturbance, & nine of the jurors who tried applt. had on the day of the offence acted as special constables. These jurors having been challenged on this account by applt., two triers, who had also acted as special constables on that day, had tried the cause of the

challenge & determined that the jurors so challenged were impartial. Applt. appealed from his conviction alleging (*inter alia*) that the jury & the triers were biased by reason that such triers & nine of the jury had acted as special constables & that there was evidence to show that applt. was not present at the time the offence was alleged to have been committed:—*Held*: as no application for a change of venue was made, & as the triers had decided that there was no cause for challenge of the jurors it was not competent

given in charge of the jury on the second indictment, but counsel opened, & he was tried on the first indictment. The mistake had only quite recently come to light & no one noticed it at the trial:—*Held*: the conviction must be quashed as having been irregular, & having regard to what had happened, that there should not be any further proceedings in respect of either of the indictments.

—*R. v. LONG* (1912), 8 Cr. App. Rep. 17, C. C. A.

**6092. Consent of Attorney-General not obtained—Explosive substances Act, 1883 (c. 3), ss. 2, 7 (1).—**Appl't. was convicted under sect. 2 of the above Act for unlawfully & maliciously causing an explosion. By sect. 7 of that Act, a person so charged cannot be indicted without the consent of the A.-G. No such consent was applied for or obtained:—*Held*: as the consent of the A.-G. had not been obtained, the ct. below had no jurisdiction to try the indictment, & as the appeal could not be dismissed under Criminal Appeal Act, 1907 (c. 23), s. 4 (1), upon the ground that there had been no substantial miscarriage of justice, the conviction must be quashed.—*R. v. BATES*, [1911] 1 K. B. 964; 80 L. J. K. B. 507; 104 L. T. 688; 75 J. P. 271; 27 T. L. R. 314; 55 Sol. Jo. 410; 22 Cox, C. C. 459; 6 Cr. App. Rep. 153, C. C. A.

*Annotation*:—*Consd.* *R. v. Metz* (1915), 84 L. J. K. B. 1462.

**6093. Improper arraignment—Coinage offences—Effect of proviso to s. 4 (1) of Criminal Appeal Act, 1907 (c. 23).—***R. v. RUSSELL* (1910), 6 Cr. App. Rep. 78, C. C. A.

**6094. Plea of guilty improperly entered—Order for retrial.**—Plea of guilty improperly entered. Conviction & judgment set aside & annulled, & appl't. ordered to appear at the next session of the Central Criminal Court to plead & answer the indictment.—*R. v. BAKER* (1912), 28 T. L. R. 363; 7 Cr. App. Rep. 217; 76 J. P. Jo. 184, C. C. A.; *subsequent proceedings*, 7 Cr. App. Rep. 252, C. C. A.

*Annotations*:—*Consd.* *Crane v. Public Prosecutor*, [1921] 2 A. C. 299. *Refd.* *R. v. Ingleson* (1914), 11 Cr. App. Rep. 21; *R. v. Golathan* (1915), 84 L. J. K. B. 758. *Mentd.* *R. v. Wakefield*, [1918] 1 K. B. 216; *R. v. King* (1920), 15 Cr. App. Cas. 13; *R. v. Lloyd* (1923), 17 Cr. App. Rep. 184.

**6095. ———.**—*R. v. LLOYD*, No. 5065, *ante*.

**6096. ———.**—A prisoner pleaded guilty to an indictment charging him in the first count with stealing horses & in the second count with receiving the horses knowing them to have been stolen. On being asked whether he had anything to say why sentence should not be passed upon him he stated that he was guilty of taking the horses not knowing that they were stolen. He was then sentenced:—*Held*: the plea of "guilty" was wrongly entered & all proceedings at the trial consequent on that plea were bad; a plea of "not

guilty" must be entered, & the case must go back for trial.—*R. v. INGLESON*, [1915] 1 K. B. 512; 84 L. J. K. B. 280; 112 L. T. 313; 24 Cox, C. C. 527; 11 Cr. App. Rep. 21; 78 J. P. Jo. 521, C. C. A.

*Annotations*:—*Refd.* *R. v. Rhodes* (1914), 11 Cr. App. Rep. 33; *R. v. Golathan* (1915), 84 L. J. K. B. 758; *Crane v. Public Prosecutor*, [1921] 2 A. C. 299. *Mentd.* *R. v. King* (1920), 15 Cr. App. Cas. 13.

**6097. ———.**—A prisoner is not to be taken to admit an offence with which he is charged unless he pleads guilty to the charge in unmistakable and unambiguous terms. Where the ct. holds that the proceedings which have culminated in the conviction appealed against are abortive & void the ct. may at its discretion direct that appl't. shall be tried for the offence with which he was charged, & may order that he shall be kept in custody until such trial.—*R. v. GOLATHAN* (1915), 84 L. J. K. B. 758; 112 L. T. 1048; 79 J. P. 270; 31 T. L. R. 177; 24 Cox, C. C. 704; 11 Cr. App. Rep. 79, C. C. A.

*Annotations*:—*Refd.* *R. v. Wakefield*, [1918] 1 K. B. 216; *Crane v. Public Prosecutor*, [1921] 2 A. C. 299.

**6098. Suggestion by judge—As to plea prisoner should make.**—On a plea of not guilty there ought to be no suggestion by the ct. that that plea should be withdrawn, or that there should be a plea of guilty.—*R. v. KING* (1920), 15 Cr. App. Rep. 13, C. C. A.

**6099. Alteration of date in indictment—Without formal amendment.**—*R. v. MANNING* (1923), 17 Cr. App. Rep. 85, C. C. A.

**6100. Personation of juror—By person not on panel—Order for retrial.**—When, at a criminal trial a qualified juror, duly summoned, was personated by a man who was not on the panel & who was not qualified to serve as a juror that amounts to a mistrial, & the Ct. of Criminal Appeal will grant a *venire de novo*.—*R. v. WAKEFIELD*, [1918] 1 K. B. 216; 87 L. J. K. B. 319; 118 L. T. 576; 82 J. P. 136; 34 T. L. R. 210; 62 Sol. Jo. 309; 26 Cox, C. C. 222; 13 Cr. App. Rep. 56, C. C. A.

*Annotations*:—*Consd.* *R. v. Bottomley* (1922), 87 J. P. 26. *Refd.* *Bannister v. Clarke*, [1920] 3 K. B. 598; *Crane v. Public Prosecutor*, [1921] 2 A. C. 299.

**6101. Misnomer of jurymen—Jurymen qualified to serve.**—The mere misnomer of a jurymen in his jury summons & in the calling of the jury does not bring about a mistrial, where it is not shown that but for the misnomer the prisoner would have challenged the jurymen & would have done so successfully.—*R. v. BOTTOMLEY* (1922), 127 L. T. 847; 87 J. P. 26; 38 T. L. R. 805; 27 Cox, C. C. 302; 16 Cr. App. Rep. 184, C. C. A.

**6102. Alleged misconduct of juror.**—*R. v. SYME*, No. 5781, *ante*.

**6103. Separation of juror—Owing to illness.**—*R. v. CRIPPEN*, No. 5524, *ante*.

further to question the impartiality of the jury.—*YAMAMOTO HIDESABURO v. R.* (1921), 24 W. A. L. R. 54.—*AUS.*

**c. Omission to challenge juror.**—If def't. omit to challenge a juror on the ground that such juror entertains a hostile feeling against him, he cannot after a verdict of guilty ask on that ground to get the verdict quashed & to have a new trial.—*R. v. HARRIS* (1898), Q. R. 7 Q. B. 569.—*CAN.*

**d. Improper challenges.**—Under Code, s. 928, after the list of jurors has been called & gone through, a number having been directed at the instance of the Crown to stand aside, & a complete jury not obtained, although the Crown may not have exhausted its number of peremptory challenges, it cannot challenge peremptorily on

the second going through of the panel. If it does so, the jury is improperly constituted, & a substantial wrong done to accused entitling him to a new trial.—*R. v. CHURTON*, [1919] 1 W. W. R. 774.—*CAN.*

**e. Communication by judge to jury—Not in open court—Absence of prisoner & his counsel.**—Prisoner was charged with perjury. The presentment contained three assignments. After the jury had retired to consider their verdict & after they had been absent several hours, they sent a message to the judge, who had also left the ct. asking a question on a matter material to one of the issues being tried. The judge, without communicating with prisoner or his counsel, sent an answer in writing by

the sheriff to the jury. This answer was merely a repetition of what the judge had said in his direction & contained no new matter. The jury brought in a general verdict of guilty. Some days afterwards prisoner's attorney on discovering that a communication had taken place between the judge & jury asked the judge to state a special case upon the ground that the trial was rendered a nullity by reason of the communication:—*Held*: the communication between judge & jury being on a matter material to the issue should have taken place in open ct. in the presence of the prisoner or his counsel, & as it had taken place in the absence of the prisoner & his counsel the trial was a nullity.—*R. v. FITZGERALD* (1889), 15 V. L. R. 40.—*AUS.*

*Sect. 7.—Determination of appeals against conviction: Sub-sect. 10.]*

**6104. Irregular communication with jury.—By Clerk of Assize.**—*R. v. WILLMONT*, No. 5696, *ante*.

**6105. — Possible conversation with other persons.**—If a juror, after the judge had summed up in any criminal trial, separates himself from his colleagues, & not being under the control of the ct., converses or is in a position to converse with other persons, it is an irregularity which renders the whole proceedings abortive. Hence, where a juror, when the jury retired to consider their verdict, separated himself from them & left the precincts of the ct. for a short time, & then rejoined them, the conviction was quashed. But the prosecution was at liberty to recommence the proceedings. An explanatory letter of the juror was not admissible in evidence in the Ct. of Criminal Appeal.—*R. v. KETTERIDGE*, [1915] 1 K. B. 467; 84 L. J. K. B. 352; 112 L. T. 783; 79 J. P. 216; 31 T. L. R. 115; 59 Sol. Jo. 163; 24 Cox, C. C. 678; 11 Cr. App. Rep. 54, C. C. A.

*Annotations:—*Consd. *Fanshawe v. Knowles*, [1916] 2 K. B. 538. *Distd. R. v. Twiss*, [1918] 2 K. B. 853.

**6106. — Conversation with prosecutors & witness.**—Appl't, who was charged with gross

indecentcy with male persons, appealed against a sentence on the ground that one or more of the jury had spoken with one of the prosecutors, the male persons in question, & also with a witness for the prosecution during the adjournment of the ct.:—*Held*: there had been no misdirection, & there was no evidence that the conversation by the juror had led to any miscarriage of justice.—*R. v. TWISS*, [1918] 2 K. B. 853; 88 L. J. K. B. 20; 119 L. T. 680; 83 J. P. 23; 35 T. L. R. 3; 62 Sol. Jo. 752; 26 Cox, C. C. 325; 13 Cr. App. Rep. 177, C. C. A.

**6107. Omission to interpret evidence.—To foreign prisoner.**—Where a prisoner who understands little or no English is tried for a criminal offence, & is undefended by counsel, all the evidence at the trial must be interpreted to him, & compliance with this rule cannot be waived by prisoner. If he is defended by counsel the safer course is that the evidence should be interpreted unless prisoner or his counsel expresses a wish to dispense with the translation, & the judge assents to this course. He should not assent unless satisfied that prisoner knows the nature of the case to be made against him, & in any case any substantial departure from, or addition to, the evidence appearing on the

*1. Irregular communication to jury.*—Conviction will be quashed where any information is given to jury whilst visiting the *locus in quo*. The judge in the criminal ct. must find as a fact that the alleged tampering took place.—*R. v. POSTER* (1898), 1 W. A. L. R. 21.—**AUS.**

*g. Irregular conduct of juror.—Conversation with prosecutor.*—When a private prosecutor & one of the impanelled jurors have had an unpremeditated & innocent conversation, which could not bias the juror's opinion nor affect his mind or judgment, although such conversation is improper it cannot have the effect of avoiding the verdict & constituting ground for allowing a new trial.—*R. v. HARRIS* (1898), Q. R. 7 Q. B. 569.—**CAN.**

*h. —*—In a trial for murder by shooting the jury attended church in charge of a constable, & the clergyman directly addressed them, referring to the case of a man hanged for murder in P. E. L., & urging if they had the slightest doubt of the guilt of prisoner they were trying, to temper justice with equity:—*Held*: although the remarks of the clergyman were highly improper, it could not be said that the jury were so influenced by them as to affect their verdict.—*PREPPER v. R.* (1888), 15 S. C. R. 401.—**CAN.**

*k. —*—It is highly undesirable that a juror should have any communication with anybody who is not a juror upon the subject-matter of the trial. The mere fact that one of them is addressed by a stranger to whom apparently the juror makes no reply or whose remarks the juror does not look upon as worthy of consideration cannot have the effect of invalidating a trial. A casual question to a police officer in charge of the jury cannot be any ground for invalidating the trial. If the presence of the constable has not in any way affected the deliberations of the jurors either by interfering with or inconveniencing them, accused is not prejudiced. The judge in twice sending the clerk of the Crown to the jury if he could give them further assistance, there being 17 charges, was only doing his duty.—*Re BONOMALLY GUPTA* (1916), 1 L. R. 44 Cal. 723.—**IND.**

*1. Separation of jury.*—Prisoner was tried before the Y. county ct. on a charge of larceny & found guilty. During the trial the jury, while in

charge of two constables, were allowed to separate by walking on different sides of the street. One or two other separations of a similar nature were complained of, but there was nothing to show that any of them had any conversation with any person, not a juror, in reference to the case. This was brought to the notice of the county ct. judge, & an application was made to him to delay passing sentence, & to treat the verdict as a nullity. This application was refused, & prisoner was sentenced & remanded to gaol, pending his removal to the penitentiary. An order to the keeper of the gaol having been obtained under Consolidated Statutes, c. 41, upon the return of this order:—*Held*: the separation of the jury was such as to avoid the verdict.—*Ex p. Ross* (1881), 21 N. B. R. 257.—**CAN.**

*m. —*—One of a jury, in a case of felony, after the case for the prosecution had closed, supposing the trial was over, separated from the rest, & went a distance of about a mile from the precincts of the ct., without permission, but was brought back to the jury-box in about an hour & three-quarters, & the trial was continued:—*Held*: no mis-trial.—*R. v. O'NEILL* (1843), 2 L. T. O. S. 77.—**IR.**

*n. Jurors allowed access to newspapers containing reports of trial.—Trial for murder.*—Resp. was tried for murder & convicted & sentenced to death. Afterwards an application was made to Supreme Ct. of the Colony sitting *in banco*, for a rule to show cause why a *venire facias de novo* should not issue for the trial of prisoner. On further affidavits the rule was made absolute & it was ordered that a suggestion should be made on the record to effect that after jury had been empanelled & before verdict, jurors were allowed during adjournments of the ct. for the night by officers of sheriff having charge of them, to have access to a free perusal of certain newspapers having reports of the evidence from day to day, & that the last-mentioned trial by reason of the matters so suggested was not according to law, but was irregular & void. This suggestion was followed by an entry purporting to be an order that for this cause the judgment & verdict be vacated & that sheriff cause a new jury to come:—*Held*: the above order vacating the judgment upon the verdict & for a *venire facias de novo* was invalid;

(1) because this was substantially an attempt to grant a new trial on the ground that the conviction was unsatisfactory by reason of irregularity in the conduct of the trial, & the discretion to grant new trials does not extend to cases of felony; (2) the Supreme Ct. sitting *in banco* had no jurisdiction to take cognisance as a ct. of appeal of the judgment pronounced at the session of oyer & terminer which had come to an end before the session *in banco* began; (3) the evidence was insufficient in that on mere hearsay information, it showed only possible access by the jury to newspapers without showing that the newspapers contained matter tending to influence the jury improperly or that they were ever used by the jury. The cases in which a verdict upon a charge of felony has been held to be a nullity & a *venire facias de novo* awarded have been cases of defect of jurisdiction in respect of time, place, or person, or cases of verdicts so insufficiently expressed or so ambiguous that a judgment could not be founded thereon, but there is no authority of holding a verdict of conviction or acquittal in case of felony delivered before a competent tribunal in due form to be a nullity by reason of some conduct on the part of the jury considered unsatisfactory by the ct. If irregularity occurs in the conduct of a trial not constituting a ground for treating the verdict as a nullity the remedy to prevent a failure of justice is by application to the authority with whom rests the discretion either of executing the law or commuting the sentence.—*A.-G. FOR NEW SOUTH WALES v. MURPHY* (1870), 21 L. T. 598.—**AUS.**

*o. Endorsement of document supplied to jury.*—The jury may be allowed to take the indictment with it when it retires to consider its verdict. The fact that in the second of the present cases the indictment handed to the jury was endorsed with the verdict "guilty" on the first case tried before another jury was held not to have caused any injustice to accused, since every one of the jurymen must in all probability have been aware of the result of that trial.—*R. v. PARKIN*, [1922] 1 W. W. R. 732; 66 D. L. R. 175; 37 Can. Crim. Cas. 35; 31 Man. L. R. 438.—**CAN.**

*p. Failure to supply refreshments to jury.*—No substantial miscarriage

depositions should be interpreted to prisoner though his counsel does not apply for this to be done. A Chinaman, who did not understand English, was convicted of murder. He was defended by counsel, both at the police ct. & at the trial: at the police ct. all the evidence was interpreted to him, but this was not done at the trial. No application was made either by prisoner or his counsel that the evidence at the trial might be translated, & with the exception of prisoner's own evidence, the evidence at the trial did not depart from that recorded in the depositions:—*Held*: (1) the omission to translate the evidence was a matter of practice, & not of law, & no irregularity had been committed which would justify the quashing of the conviction; (2) even if there had been an irregularity, the conviction must be upheld on the ground that no substantial miscarriage of justice had actually occurred.—*R. v. LEE KUN*, [1916] 1 K. B. 337; 85 L. J. K. B. 515; 114 L. T. 421; 80 J. P. 166; 32 T. L. R. 225; 60 Sol. Jo. 158; 25 Cox, C. C. 304; 11 Cr. App. Rep. 293, C. C. A.

**6108. Unsworn statement—By person in court—Interrupting a witness.**—Such an irregularity as the interposition of a person in ct. interrupting

of justice is occasioned by failure to supply a jury with refreshment during a period of eight hours.—*R. v. MURRAY & MAHONEY* (No. 2), [1917] 1 W. W. R. 404; 10 Alta. L. R. 275; 27 Can. Crim. Cas. 247; 33 D. L. R. 702.—**CAN.**

**q. Presence of constable in jury-room during deliberation.**—In view of Code, s. 959 (2) & (3), it was held that the fact that the constable in charge of a jury was in the room with them for a considerable time while they were considering their verdict, did not necessitate the discharging of the jury & trying accused over again, it being evident that the trial judge was of opinion, agreed with by the ct., that as the constable did not speak to the jurors or in any way seek to influence their verdict during the time he was in the room, his mere presence there could not lead to any miscarriage of justice.—*R. v. CORRIGAN*, [1919] 2 W. W. R. 81.—**CAN.**

**r. Presence of constables & caterer in jury-room during deliberation.**—Prisoner was tried for murder. Crown prosecutor informed the jury that it was competent for them to bring in verdict of guilty with a strong recommendation to mercy. During jury's deliberation two constables & person who catered for the jury was present, but there was no evidence of interference with the jury. Jury found prisoner guilty of manslaughter with a strong recommendation to mercy. Application for prisoner was made under Crimes Act, 1908, s. 442, for an order reserving for the opinion of the Ct. of Appeal whether the presence of two constables & F. in the jury-room during deliberations vitiated the verdict of the jury:—*Held*: application should be refused as the presence of constables & caterer was met by Crimes Act, s. 427.—*R. v. PARKINSON* (1915), 34 N. Z. L. R. 636.—**N.Z.**

**s. Matters incapable of proof opened to jury by Crown.**—A.-G., in opening the case for the Crown, outlined evidence of the most damaging character against accused, & pointed to blood-stained clothing of one of them, which had been brought into ct., but failed to prove his statements, the Crown witnesses whom he intended to call not being competent by reason of her being the wife of prisoner referred to. The question reserved in regard to this was, whether it was non-direction or other error in law on the part of the trial judge to omit to direct

a witness & making an unsworn statement about the case in hearing must be objected to by counsel at once. It is essential that the shorthand writer should take down & transcribe every word said at the trial by those whom it is their duty to report & record every incident thereat.—*R. v. AUSTIN & DAVIES* (1916), 12 Cr. App. Rep. 171, C. C. A.

**6109. Neglect to inform prisoner of right to give evidence.**—*R. v. WARREN*, No. 6058, *ante*.

**6110.**—*R. v. YELDHAM* (1922), 128 L. T. 28; 27 Cox, C. C. 315; 17 Cr. App. Rep. 18, C. C. A.

**6111.**—*R. v. GRAHAM* (1922), 17 Cr. App. Rep. 40, C. C. A.

**6112. Prisoner deprived of right to cross-examine—& give evidence in rebuttal.**—Where a witness is recalled after the summing up & interrogated

the jury that these matters were not in evidence & ought to be wholly disregarded in deciding the guilt or innocence of accused:—*Held*: the production in ct. of the clothing, coupled with the declaration that the stains on them were stains of human blood, was calculated to have the most profound effect upon the jury; & a substantial wrong was done in not withdrawing them & clearly & explicitly warning the jury against being influenced by them.—*R. v. WALKER & CHINLEY* (1910), 13 W. L. R. 47.—**CAN.**

**t. Improper verdict—Jury recalled.**—Prisoners were charged with larceny of certain goods & with receiving the same goods. Jury found both prisoners guilty of larceny & receiving & were discharged. Objection was then taken on behalf of one of the prisoners that verdict was irregular. Jury who had not left precincts of ct. were recalled by judge & returned verdict of larceny against each prisoner upon which prisoners were sentenced:—*Held*: the first verdict was illegal, & second verdict a nullity & conviction must be set aside.—*R. v. ATKINSON & CLUTTON* (1907), 7 S. L. N. S. W. 713.—**AUS.**

**a. Interpreter wrongly sworn.**—On trial of a Chinese who did not understand English an interpreter was produced by the Crown, to whom the usual oath of the Gospel was administered. While the jury were deliberating it transpired that the interpreter was not a Christian, although on previous occasions when he had acted as interpreter he had been sworn on the Bible he knew nothing about an oath except the name. Prisoner having been convicted ct. sustained the conviction.—*R. v. AH FOO* (1861), 8 N. S. W. S. C. R. 343.—**AUS.**

**b. Witness affirming—No proper foundation for affirmation.**—Upon the trial of deft. upon a charge of theft, the person whose property was said to have been stolen was called as a witness by the Crown, & upon the usual oath being recited to him, said, "I affirm." He then affirmed, in the usual form, & gave his evidence. It appeared from his examination in chief that he was a clergyman, not in active service. Upon the cross-examination, he refused to give any reason for affirming instead of taking an oath, & the presiding judge sustained him in his refusal. Deft. was convicted, but a case was stated for the opinion

of the ct.:—*Held*: a proper foundation was not laid to permit the witness to affirm. A witness must take an oath unless he objected to do so on the ground of conscientious scruples; & he must so state, that is, his objection must be expressed to the ct.—*R. v. DEAKIN* (1911), 19 W. L. R. 43; 17 B. C. R. 13; 2 D. L. R. 282; 19 Can. Crim. Cas. 62.—**CAN.**

**c. Accused questioned as to previous conviction—Question not answered.**—On a trial upon an indictment accused gave evidence on his own behalf, & in the course of cross-examination was asked a question by Crown counsel, the answer of which would have involved an admission that he had been previously convicted. No circumstances existed that would have rendered the question a proper one, & the judge instructed accused not to answer & disallowed the question. After argument, in the course of which Crown counsel asserted within the hearing of the jury that accused had been in gaol six years before. The judge told the jury to dismiss the matter from their minds. Accused was convicted:—*Held*: as accused had not in fact answered the question the conviction must stand.—*R. v. REIMER* (1910), 12 W. A. L. R. 91.—**AUS.**

**d. Accomplice giving evidence—Conditions as to recommendation for pardon.**—A judge may, even after a *prima facie* case has been made out, direct that an accomplice be examined on the understanding that if he gives his evidence in an unexceptionable manner he shall be recommended for pardon. The judge in stating conditions to an accomplice about to give evidence as to his recommending a pardon, appeared to give witness the impression that unless he told the same story to the ct. as he did previously to the magistrate a recommendation for pardon would not be given:—*Held*: by the statements made the witness was fettered in his answers so as to constitute the doing of "something not according to law" at the trial, within the meaning of Criminal Code, s. 1019, which resulted in a "substantial wrong or miscarriage" of justice entitling the accused to a new trial.—*R. v. ROBINSON* (1921), 30 B. C. R. 369; 70 D. L. R. 755.—**CAN.**

**e. Improper summing up by counsel for Crown.**—Resp. was convicted on a charge of murder, the evidence



*Sect. 7.—Determination of appeals against conviction: Sub-sects. 10 & 11, A., B., C. & D.]*

the prisoner has a right to cross-examine him & to give evidence in rebuttal.—*R. v. HOWARTH* (1918), 82 J. P. 152; 13 Cr. App. Rep. 99, C. C. A.

**6113. Comment by counsel—On omission to call wife of prisoner.]—***R. v. DICKMAN*, No. 5776, ante.

**6114. Consideration by jury of irrelevant matters.]—**On proof that the jury in finding their verdict have considered matters which they ought not to have regarded the ct. will quash the conviction.—*R. v. NEWTON* (1912), 28 T. L. R. 362; 7 Cr. App. Rep. 214; 76 J. P. Jo. 184, C. C. A.

Application of proviso to s. 4 (1) of Criminal Appeal Act, 1907 (c. 23), see Sub-sect. 11, post.

**SUB-SECT. 11.—APPLICATION OF PROVISIO TO SECT. 4 (1) OF CRIMINAL APPEAL ACT, 1907 (c. 23).**

#### *A. Defective Indictment.*

See Part XIV., Sect. 7, sub-sect. 1, ante.

#### *B. Wrongful Admission or Exclusion of Evidence.*

**Defective indictment.]—**See Part XIV., Sect. 7, sub-sect. 2, ante.

**Wrongful admission of evidence.]—**See Part XIV., Sect. 7, sub-sect. 5, ante.

#### *C. Absence of or Sufficiency of Corroboration.*

See Part XIV., Sect. 7, sub-sect. 8, B., ante.

being purely circumstantial. He appealed to the full ct. of Supreme Ct. of N.S.W. The judge stated in his report that he had no reason to think that the evidence did not fully justify the conviction. Full ct. had held that certain conduct of the Crown prosecutor during his address to the jury amounted to an invitation to them to assume that certain evidence which had been rejected had been given & a persistence in that invitation notwithstanding the judge's rebuke. They also thought that the case for the prosecution was very weak. On those grounds they quashed the conviction. On appeal by the Crown to High Ct. three months after conviction.—*Held*: new trial should be directed.—*R. v. EYLES*, [1917] 23 C. L. R. 1.—AUS.

**f. —.]—**Question reserved for the opinion of Supreme Ct. *in banc* by the judge. Whether comment by counsel for Crown in his address to the jury with regard to prisoner not giving evidence on his own behalf was proper.—*Held*: this was a comment forbidden by statute & distinctly unfavourable to prisoner.—*R. v. KING* (1905), 1 W. L. R. 348.—CAN.

**g. —.]—**Where the judge, at the trial of a criminal charge before a jury, rules that evidence tendered for the defence which is material, & is such that, if the jury believe it, they will not be justified in convicting accused, is properly admissible, but counsel for the Crown, in addressing the jury, tells the jury that that evidence is not admissible & should not have been allowed, & the jury find a verdict of "guilty," a new trial should be granted, because the jury may have been led, by the statement of the counsel, to believe that they should pay no attention to that evidence in considering their verdict.—*R. v. WEBB* (1914), 27 W. L. R. 313.—CAN.

**h. —.]—**The question whether a summing up by a Crown counsel was so inflammatory or improper as to

prejudice the fair trial of the accused is not one which may be reserved for an appellate ct.—*R. v. KELLY* (1916), 35 W. L. R. 46; 11 W. W. R. 46.—CAN.

**k. Improper comment by judge.]—**Prisoner was convicted of receiving certain cheques. A witness called by Crown had been previously convicted before the same judge of receiving one of the same cheques. On the previous trial this witness had given evidence on his own behalf. When witness was called judge stated he had before him his notes of the evidence given by this witness at the previous trial, & in his summing up he told jury that if the evidence given by the witness differed from the story he told when he was convicted he would have asked witness some questions.—*Held*: judge had given evidence of what the witness had said at the previous trial & conviction set aside.—*R. v. THOMPSON* (1907), 7 S. R. N. S. W. 764.—AUS.

#### **PART XIV. SECT. 7, SUB-SECT. 11.—D.**

**6115 i. General rule—Effect on jury.]—**Prisoner, who was tried & convicted of murder, although he had ample time & opportunity to tell all he knew concerning the crime both to the authorities & others, maintained a complete silence respecting it with the exception of some bald assertions of his innocence, until he went upon the witness stand at the trial to give evidence on his own behalf, when he admitted being present at the doing of the deed, but charged it upon G., a young companion, who was with him, & who, before & at the trial, had alleged prisoner's guilt. The judge, in charging the jury, told them that they were entitled to take this continued silence of prisoner into consideration, & after deciding whether or not such silence proceeded from a consciousness of guilt & a desire to supply a defence upon the Crown, which it might not be able to meet,

#### *D. Misdirection by Trial Judge.*

**6115. General rule—Effect on jury.]—**Amendment of indictment wrongly made, but "no substantial miscarriage of justice":—*Held*: proviso to sect. 4 of the above Act, came into operation.

A faulty summing up is not necessarily a ground for quashing a conviction; upon the construction of sect. 4 (1) of the above Act; if there is a wrong decision of any question of law applt. has the right to have his appeal allowed, unless the case can be brought within the proviso. In that case the Crown have to show that, on a right direction, the jury must have come to the same conclusion. A mistake of the judge as to fact, or an omission to refer to some point in favour of prisoner, is not, however, a wrong decision of a point of law, but merely comes within the very wide words "any other ground," so that the appeal should be allowed according as there is or is not a "miscarriage of justice." There is such a miscarriage of justice not only where the ct. comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, & when, on the facts & with a correct direction, the jury might fairly & reasonably have found applt. not guilty. Then there has been not only a miscarriage of justice but a substantial one, because applt. has lost the chance which was fairly open to him of being acquitted, & therefore, as there is no power of the ct. to grant a new trial, the conviction has to be quashed. If, however,

they might therefrom draw an inference as to his guilt or innocence. He further instructed them that this continued silence of prisoner was an element that might assist them in determining the amount of credence that ought to be given by the story told by prisoner in the witness box:—*Held*: the charge was correct in both respects; &, even if erroneous, as in the opinion of the ct. no substantial wrong or miscarriage had been occasioned thereby, such error was cured by Code, s. 746 (f).—*R. v. HIGGINS* (1902), 36 N. B. R. 18.—CAN.

**6115 ii. —.]—**Whether the judge's direction to the jury was or was not strictly justified in the circumstances of the case, there was no ground for setting aside the conviction, having regard to Criminal Code, s. 1019.—*R. v. HOO SAM* (1912), 20 W. L. R. 571; 1 W. W. R. 1049.—CAN.

**6115 iii. —.]—**Deft. was charged with procuring a woman to become a prostitute, & was tried before a judge & jury. The evidence of the prosecutrix was, that she had gone away with deft. & lived with him in a cabin, immediately adjoining which was another cabin where lived another Chinaman with another woman; that deft. had left the prosecutrix, & carried away all her clothing; & her clothing was found in his bag when he was arrested. The judge charged the jury that it was a matter of common knowledge that one of the most usual ways of forcing women to embark in the business of prostitution was by taking away their clothes. There was no evidence to show that this was a common practice. The portion of the charge above set out was not objected to at the trial.—*Held*: the conviction should be affirmed. The portion of the charge referred to was objectionable, but no substantial wrong was done to deft. The Crown was not bound to prove what deft.'s motive for taking away the clothes was; the jury could infer a motive; &, on the



the ct. in such a case comes to the conclusion that, on the whole of the facts & with a correct direction, the only reasonable & proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the judge, not being a wrong decision of a point of law.—*R. v. COHEN* (1909), 3 Cr. App. Rep. 180, C. C. A.

*Annotation*:—*Appl. R. v. Thompson*, [1914] 2 K. B. 99.

**6116.** ———.]—*R. v. BOWLER*, No. 6074, *ante*.

**6117.** ———.]—*R. v. MORGAN*, No. 6018, *ante*.

**6118.** ———.]—*R. v. MCKONE* (1913), 9 Cr. App. Rep. 181, C. C. A.

**6119.** ———.]—*R. v. TOTTY*, No. 5684, *ante*.

**6120.** ———.]—*R. v. SIMMONDS* (1917), 144 L. T. Jo. 79, C. C. A.

**6121.** ———.]—*R. v. SBARRA*, No. 6014, *ante*.

**6122.** ———.]—Although information of previous convictions against applts. was inadvertently given to the jury, the ct., being of opinion on the evidence that in any event the jury must inevitably have arrived at the same verdict of guilty, & that consequently there had been no "substantial miscarriage of justice," refused to exercise their power under the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4, to quash the verdict.—*R. v. WILLIAMS & WOODLEY* (1920), 89 L. J. K. B. 557; 123 L. T. 270; 84 J. P. 90; 64 Sol. Jo. 309; 26 Cox, C. C. 608; 14 Cr. App. Rep. 135; *sub nom. R. v. WILLIAMS*, *R. v. WOODLEY*, 36 T. L. R. 251, C. C. A.

*Annotations*:—*Consd. R. v. Beecham*, [1921] 3 K. B. 464.

*Refd. R. v. Jones* (1922), 127 L. T. 160.

**6123. Insufficient direction—Larceny or false pretences.**—*R. v. MEYER*, No. 6006, *ante*.

**6124. Omissions in summing up.**—*R. v. FARRINGTON*, No. 5720, *ante*.

**6125.** ———.]—*R. v. BENTOTE*, No. 5937, *ante*.

**6126. On immaterial point of law.**—*R. v. HUNTING & WARD*, No. 6016, *ante*.

**6127. Misstatements in summing up.**—Misstatements in a summing up will be considered with the question whether there has been a miscarriage of justice.—*R. v. PRATLEY* (1910), 4 Cr. App. Rep. 159, C. C. A.

**6128. Offence not charged in indictment—Receiving goods stolen by wife from husband.**—*R. v. TOTTERDELL*, No. 5898, *ante*.

**6129. Not leaving question of fact to jury.**—*R. v. WEST*, No. 6036, *ante*.

**6130.** ———.]—*R. v. BEEBY*, No. 6041, *ante*.

**6131.** ———.]—When a false pretence is alleged

in a document, the interpretation thereof is not a matter of law for the ct. but of fact for the jury.

It should have been left to the jury to say whether applt. had made the statements with the intent to lead persons to a belief which was false (*per CUB.*)—*R. v. ROSENSON* (1917), 12 Cr. App. Rep. 235, C. C. A.

**6132. As to necessity for corroboration—Of child's evidence.**—*R. v. MURRAY*, No. 6076, *ante*.

**6133. Effect of admitted statement.**—*R. v. CURNOCK*, No. 5894, *ante*.

**6134. —Against co-defendant.**—The prosecution is not confined under Larceny Act, 1916 (c. 50), s. 43 (1), to evidence of the bare facts of the finding of "other" stolen property; but may give the same evidence as would be admissible on an indictment in respect of that property.

Proviso to Criminal Appeal Act, 1907 (c. 23), s. 4, applied despite misdirection as to the effect of statement made by one deft. as evidence against his co-deft.—*R. v. SMITH*, [1918] 2 K. B. 415; 87 L. J. K. B. 1023; 119 L. T. 584; 26 Cox, C. C. 321; 13 Cr. App. Rep. 151; *sub nom. R. v. SMITH*, *R. v. CURRIER*, 34 T. L. R. 480, C. C. A.

**6135. Suggestion of previous convictions.**—In a summing up, care should be taken not to use expressions suggesting that deft. had been previously convicted, where there is no evidence to that effect. Proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1).—*R. v. BURNELL* (1914), 10 Cr. App. Rep. 222, C. C. A.

**6136. As to one-man company.**—*R. v. GRUBB*, [1915] 2 K. B. 683; 84 L. J. K. B. 1744; 113 L. T. 510; 79 J. P. 430; 31 T. L. R. 429; 59 Sol. Jo. 547; 25 Cox, C. C. 77; 11 Cr. App. Rep. 153, C. C. A.

*Annotations*:—*Refd. R. v. Bottomley* (1922), 87 J. P. 26; *R. v. Cuffin* (1922), 127 L. T. 564.

**6137. Suggestions of counsel as to offence ignored.**—*R. v. GORGES*, No. 5968, *ante*.

**6138. Misstatement of evidence.**—A slight misstatement of the evidence in a summing up may not be ground for quashing a conviction.—*R. v. SCOTT* (1917), 13 Cr. App. Rep. 52, C. C. A.

**6139. Mistake in referring to evidence.**—Applt. was convicted on an indictment for attempting to have carnal knowledge of a girl under thirteen years of age, for indecent assault, & for indecent assault occasioning bodily harm. Evidence for the Crown at the trial was brought to show that both applt. & the girl were suffering from a discharge due to gonorrhœa. Analyses of both discharges had been obtained, & part of the cross-examination of the doctor who sent the discharges for analysis was directed to prove that there were no *gonococci* in the girl's discharge. There were

evidence, could not have done otherwise than convict, irrespective of what the judge said. The lack of objection to the charge, at a time when the matter could have been instantly rectified, while not necessarily fatal to an appeal, was a matter which the ct. ought to consider both in its relation to the general practice as to new trial, & the probable effect which the words complained of had upon those who heard them. Criminal Code, s. 1019, covered the case, there having been no substantial wrong or miscarriage.—*R. v. LEW* (1912), 19 W. L. R. 853; 1 D. L. R. 99.—*CAN.*

**6115 iv.** ———.]—Where upon the facts a ct. of appeal is of opinion that the jury, if it had been properly directed, would have returned the same verdict, a conviction will not be interfered with on the ground of misdirection.—*R. v. LETAIN*, [1918] 1 W. W. R. 505; 29 Can. Crim. Cas. 389.—*CAN.*

**6115 v.** ———.]—*R. v. McDONALD* (1920), 53 D. L. R. 730.—*CAN.*

**1. Omission to direct jury on immaterial point of law.**—On a trial for the murder of a police officer, there was evidence that E. & J. had set out from their home, during the night when deceased was killed, with the intention of committing theft; J. & his wife testified that, on returning home, E. had told them that a man, whom he supposed to be a secret police constable, had pointed a pistol at him & told him to "go to hell," & that he had shot him. The defence was rested entirely upon *alibi*, & accused testified on his own behalf, stating that he had been at home during the whole of the night in question, but making no mention of any facts concerning the shooting. In his charge, the judge reviewed the evidence, in a general way, & told the jury that, upon the evidence adduced, they must either convict or acquit

of the crime of murder; that they could not return a verdict of manslaughter; that, if they believed J.'s account of what happened to be substantially true, they should convict of murder; & he did not instruct the jury as to what, in law, constituted manslaughter nor as to circumstances on which the verdict might be reduced to manslaughter. E. was convicted of murder.—*Held*: on the evidence the charge of the judge was right, & the omission to instruct the jury in respect to manslaughter did not occasion any substantial wrong or miscarriage which could justify the setting aside of the conviction nor a direction for a new trial.—*R. v. EBERTS* (1912), 22 W. L. R. 901; 3 W. W. R. 37; 7 D. L. R. 530.—*CAN.*

**m.** ———.]—The judge neglected to tell the jury that any admissions or confessions made by one of accused, not in the presence of the other, was only evidence against the one making

**Sect. 7.—Determination of appeals against conviction: Sub-sect. 11, D., E. & F. Sect. 8: Sub-sect. 1, A.]**

four reports of the result of the analysis, three of which were labelled, as to two, with the girl's name, & as to another with the applt.'s name, the fourth being unlabelled & unidentified. One of them, labelled with the girl's name & showing the presence of the typical microscopical appearance of the *gonococcus*, was admitted in evidence. In his summing up the judge by mistake referred to the unlabelled report only, which stated that "if the specimen is from the urethra the organisms seen are doubtless *gonococci*," & he did not refer to any other report:—*Held*: a mistake had been made, but that as the report given in evidence was substantially to the same effect as that which was referred to in the summing up, no injustice had resulted, & the appeal would be dismissed.—*R. v. MULLASHEY* (1919), 83 J. P. 188; 14 Cr. App. Rep. 44, C. C. A.

**6140. As to onus of proof.]**—On indictments for receiving with guilty knowledge the *onus* never rests on deft.—*R. v. SANDERS* (1919), 14 Cr. App. Rep. 11, C. C. A.

*v. THOMAS*, No. 6015, *ante*.

**E. Irregularity in Procedure at Trial.**

**6142. Improper arraignment—Coinage offence.]**—*R. v. RUSSELL*, No. 6093, *ante*.

**6143. Witness called by prosecution—After close of defence.]**—Proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1), applied despite an irregularity in procedure at the trial.

such confession or admission, all the evidence being before the ct.:—*Held*: it would not be useful to send the case back to have this question re-stated, as all that could be said upon it had been said by counsel, & all the evidence bearing upon it had been brought to the attention of the ct.; & from that evidence it was plain that, in the circumstances, it was not serious error on the judge's part, & in any case it was manifest that there had been no substantial wrong or miscarriage under Criminal Code, s. 1019, by reason of such warning not being given.—*R. v. DAVIS* (1914), 26 W. L. R. 912.—**CAN.**

**n. Misdirection upon evidence—Refusal to redirect.]**—Where a judge errs in his statement of the evidence to the jury & refuse to correct it, although exception is taken by counsel for accused, it cannot be said that no substantial wrong was done, & consequently the conviction will be set aside & a new trial ordered.—*R. v. KLEPARCZUK*, [1918] 1 W. W. R. 695; 13 Alta L. R. 212; 29 Can. Crim. Cas. 336; 39 D. L. R. 171.—**CAN.**

**PART XIV. SECT. 7, SUB-SECT. 11.—E.**

**o. Reply wrongly allowed to Crown.]**—At the trial of accused who was not defended by counsel, & who called no evidence, & did not give evidence himself, but made a statement to the jury from the dock, immediately before prisoner made his statement the Crown prosecutor requested, & was permitted, to address the jury. Prisoner was found guilty, & sentenced to a term of imprisonment. The learned judge stated a case, by which he raised the question whether he was right in allowing the Crown prosecutor to address the jury:—*Held*: he was not right in so doing, but there had been no substantial miscarriage of justice, & the conviction should be affirmed.—*R. v. MEHEAN* (1919), 12 Q. S. R. 119.—**AUS.**

**p. Personation of juror.]**—On the

empanelling of a jury the associate called the name of B. W., whose name was on the jury panel, & a jurymen named L. W., whose name was also on the panel, answered, entered the jury-box, was sworn, & acted on the jury. Accused was convicted:—*Held*: the conviction must stand, there being no miscarriage of justice.—*MORGAN v. R.* (1920), 22 W. A. L. R. 45.—**AUS.**

**q. —.]**—B. found guilty of feloniously administering poison with intent to murder, moved in arrest of judgment on the ground that one of the jurors who had tried the case had not been returned as such. The general panel of jurors contained the names of J. L. & M. L. The special panel for the term of the ct., at which prisoner was tried, contained the name of J. L. The sheriff served J. L.'s summons on M. L., & returned J. L. as the party summoned. M. L. appeared in ct., answered to the name of J. L., & was sworn as a juror without challenge when B. was tried. On a reserved case:—*Held*: the point should not have been reserved, but assuming the point could be reserved, *R. S. C.*, c. 174, s. 246, clearly covered the irregularity complained of.—*BRISEBOIS v. R.* (1888), 15 S. C. R. 421.—**CAN.**

**r. Challenging the jury.]**—When a panel had been gone through & a full jury had not been obtained the Crown on the second calling over the panel was permitted, against the objection of prisoner, to direct eleven of the jurymen on the panel to stand aside a second time, & the judge was not asked to reserve, & neither reserved nor refused to reserve the objection. After conviction & judgment a writ of error was issued:—*Held*: all

*v. R.* (1890), 18 S. C. R. 407.—**CAN.**

**s. Separation of jurors—Conversation with strangers.]**—Even in a criminal case the separation of the jurors & their conversation with

The calling of witnesses after the close of the defence was in the discretion of the judge at the trial, & that discretion must be exercised with a due regard to the interests of deft. If it were shown that the prosecution had done something unfair—had set what has been called a trap—which resulted in an injustice to prisoner, the ct. reserved to itself full power to deal with the matter (*LORD ALVERSTONE, C.J.*).—*R. v. FOSTER* (1911), 6 Cr. App. Rep. 196, C. C. A.

**6144. Cross-examination to letter of defendant—Letter not produced.]**—Cross-examination to a letter written by deft. but not produced is improper. Proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1), applied.—*R. v. BANKS* (1916), as reported in, 85 L. J. K. B. 1657; 80 J. P. 432; 12 Cr. App. Rep. 74, C. C. A.

**6145. Omission to translate evidence—To foreign defendant.]**—*R. v. LEE KUN*, No. 6107, *ante*.

**6146. Information of previous convictions—Obtained by questions of judge.]**—An interrogation of deft. by the judge tending to suggest that the latter has information to deft.'s discredit or that deft. has been guilty of an offence, other than that then being tried, if deft. has not let in such evidence, is an infringement of Criminal Evidence Act, 1898 (c. 36), s. 1 (f). Proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1), not applied.—*R. v. RATCLIFFE* (1919), 89 L. J. K. B. 135; 122 L. T. 384; 84 J. P. 15; 26 Cox, C. C. 554; 14 Cr. App. Rep. 95, C. C. A.

*Annotation:—Refd. R. v. Redd*, [1923] 1 K. B. 104.

**6147. — Inadvertently given to jury.]**—*R. v. WILLIAMS & WOODLEY*, No. 6122, *ante*.

strangers will not necessarily destroy the verdict. *Qu.*: whether misconduct of the jurors, when there is no other irregularity, would in capital cases be a sufficient ground for directing a *venire de novo*.—*R. v. KENNEDY* (1856), 3 N. S. R. (2 Thom.) 203.—**CAN.**

**t. —.]**—Prisoner was convicted on a charge of rape. The jury included eight jurors who were members of a jury empanelled on the previous day to try prisoner, but which had, after hearing the evidence of five Crown witnesses, been discharged on the ground that the jurors had not been kept together overnight:—*Held*: the trial judge was under no duty to exclude from the convicting jury the jurors who were members of the jury which had been discharged, & the mere presence of the jurors in question on the convicting jury did not constitute a substantial wrong or miscarriage under Criminal Code, s. 1019.—*R. v. LUPARELLO* (1915), 30 W. L. R. 777; 8 W. W. R. 89; 25 Man. L. R. 233.—**CAN.**

**a. Absence of juror during trial.]**—On the trial of deft. on an indictment, charging him with the forgery of two promissory notes, deft. having been found guilty, a reserved case was applied for, because one of the jurors was absent from the ct. room at a time when a witness gave evidence of having seen deft. at a previous trial write a number of names on a sheet of paper:—*Held*: the points mentioned were within Code, s. 746 (f), & there having been no substantial wrong or miscarriage which would be ground for a new trial, the appeal should not be allowed.—*R. v. McLEAN* (1906), 39 N. S. R. 147.—**CAN.**

**b. No record of evidence kept—Military court.]**—Resp., a South African Mounted Rifleman, & as such under Act 13 (1912), s. 12 (1), a member of the permanent defence force of the Union, was tried before his commanding officer & convicted of an offence against Police Regs. in failing to make a certain entry in the occur-

**6148. Case summed up by counsel for prosecution—Defendant not represented by counsel.]—***R. v. THOMAS*, No. 6015, *ante*.

*F. Other Cases.*

**6149. Ambiguous verdict.]—**When the words of a verdict are not clear or are confused, but the intention of the jury is plain, the ct. will give effect to it, under the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1). Under that proviso it may decline to consider a point of law not taken at the trial.—*R. v. RAWLINGS* (1909), 3 Cr. App. Rep. 5, C. C. A.

**6150. Technical objection—Charge of obtaining credit by fraud—Proof of obtaining property by fraud.]—**Where it appeared doubtful whether the evidence supported a conviction for obtaining credit by fraud other than false pretences, the ct. dismissed the appeal, acting under Criminal

that the evidence showed that applt. had obtained property by fraud or larceny.—*R. v. ARMITAGE* (1909), 74 J. P. 48; 3 Cr. App. Rep. 80, C. C. A.

**6151. — Charge of false pretence—Proof of fraud not a false pretence.]—**If on an indictment for obtaining money by false pretences, fraud is proved against applt., even though it is not strictly a false pretence in law, the ct. will apply the proviso to Criminal Appeal Act, 1907 (c. 23), s. 4 (1).—*R. v. BUCKLAND* (1910), 4 Cr. App. Rep. 28, C. C. A.

**6152. — Proof of consent of Attorney-General.]—**The ct. will not give effect to a purely technical point which might have been taken at the trial. A conviction for an offence under Trading with the Enemy Act, 1914 (c. 87), s. 1 (4), shall not be quashed merely because formal proof of the consent of the A.-G. to the prosecution has not been given at the trial.—*R. v. METZ* (1915), 84 L. J. K. B. 1462; 113 L. T. 464; 79 J. P. 384; 50 Col. Jo. 457; 25 Cox, C. C. 67; 11 Cr. App. 164, C. C. A.

## 8.—DETERMINATION OF APPEALS AGAINST SENTENCE.

### SUB-SECT. 1.—ALTERATION OF SENTENCE.

#### *A. In General.*

**6154. Trial judge proceeding on wrong principles—Agreement with sentence not the test—Rule when prisoner has pleaded guilty.]—**Where a

prisoner has been tried, the Ct. of Criminal Appeal will not interfere with the sentence imposed unless the judge has gone wrong in principle, although members of the ct. may be of opinion that they would not have inflicted so severe a sentence. But where prisoner has pleaded guilty, the Ct. of Criminal Appeal are in as good, or in nearly as good, a position to consider what is the proper sentence on reviewing the sentence, as the ct. of trial is on its imposition, & therefore in such cases the Ct. of Criminal Appeal will reduce a sentence which is in their opinion too severe.—*R. v. NUTTALL* (1908), 73 J. P. 30; 25 T. L. R. 76; 53 Sol. Jo. 64; 1 Cr. App. Rep. 180, C. C. A.

*Annotation:—Reid. R. v. Haden* (1909), 2 Cr. App. Rep. 148.

**6155. — — —.]—**The ct. will not interfere with a sentence unless it is apparent that the judge at the trial has proceeded upon wrong principles, or given undue weight to some of the facts proved in evidence. It is not possible to allow appeals because individual members of the ct. might have inflicted a different sentence, more or less severe (LORD ALVERSTONE, C.J.).—*R. v. SIDLOW* (1908), 72 J. P. 391; 24 T. L. R. 751; 1 Cr. App. Rep. 28, C. C. A.

**6156. — — —.]—**If the principle on which the ct. of trial passes sentence is right, this ct. will not inquire whether the sentence is one which they themselves would have thought well to pass (CHANNELL, J.).—*R. v. MAURICE* (1908), 1 Cr. App. Rep. 176, C. C. A.

**6157. — — —.]—***R. v. HILLIER* (1909), 2 Cr. App. Rep. 142, C. C. A.

**6158. — — —.]—***R. v. SHERSHIEWSKY* (1912), 28 T. L. R. 364; 76 J. P. 172, C. C. A.

**6159. — — —.]—**An isolated incorrect passage in a summing up is not sufficient ground for quashing a conviction if the ct. is satisfied that the jury appreciate the proper question for them.

It is not the policy of this ct. to interfere (with a sentence) if its members are of opinion that they would have given a less sentence, but

slaughter & sentenced to ten years' penal servitude. It appeared that applt. gave the deceased a "clout" under the left ear, kicked him when he was falling from the blow, & kicked him again on the side of the head when he was lying on the ground; but the cause of the death of the deceased, whose body was in a diseased condition, was the fall following upon the "clout." Applt. when he gave the "clout" was very drunk, in an excited condition from a fight he had just had with

rence book. Resp. at the time of the offence was employed on police duty. No record of the evidence was kept but the commanding officer in failing to keep such record, acted in strict accordance with the Defence Code. Upon a summons to review the proceedings under Cape Provincial Division, s. 190:—*Held*: assuming the commanding officer sat as an inferior ct. of justice to try resp., there had been no such irregularity in the proceedings as would justify an interference with the conviction & sentence.—UNION GOVERNMENT & FISHER *v.* WEST, [1918] App. D. 556. **S. AF.**

### PART XIV. SECT. 7, SUB-SECT. 11.—*F.*

**o. Perverse verdict—Whether view of trial judge conclusive.]—***R. v. BREWSTER* (No. 2) (1896), 2 Terr. L. R. 377.—**CAN.**

**J.—VOL. XIV.**

### PART XIV. SECT. 8, SUB-SECT. 1.—*A.*

**d. Principles on which the court acts.]—**A Ct. of Criminal Appeal should not interfere with a sentence because ct. might have inflicted a different sentence, more or less severe, nor unless the ct. sees that the sentence is manifestly excessive or inadequate.—*SKINNER v. R.* (1913), 16 C. L. R. 336.—**AUS.**

**e. — — —.]—***R. v. MALCOLM*, [1919] V. L. R. 596.—**AUS.**

**f. — — —.]—**Deft. was convicted at the police ct. on a charge under Police Act, 1892, s. 66 (3), that "he did on Oct. 2, 1920, pretend to tell the fortune of J.," & was sentenced to three months' imprisonment with hard labour. On appeal it was contended on deft.'s behalf that the sentence was excessive:—*Held*: there was no ground for interfering with the sen-

tence. A Ct. of Criminal Appeal will be reluctant to interfere with sentences which do not seem to it to be wrong in principle though they may appear heavy to individual judges.—*ISHERWOOD v. O'BRIEN* (1920), 23 W. A. L. R. 10.—**AUS.**

**g. — — —.]—***Semle*: on an application for leave to appeal against a conviction & sentence, where, for convenience, the merits of the whole matter are argued, the ct. will not interfere with the sentence if the application for leave to appeal is refused.—*R. v. NICHOLLS*, [1922] St. R. Qd. 71.—**AUS.**

**h. — — —.]—**The ct., on an application on behalf of a convict under Criminal Code, s. 1055A, for revision of sentence passed, largely reduced the sentence passed on a charge of incest, on consideration of the peculiar conditions in the case.—*R. v. ADAMS*,

**N N**

*Sect. 8.—Determination of appeals against sentence :  
Sub-sect. 1, A., B., C. & D.]*

another man, & in pain from a wound in the eye. The deceased man was only thirty-six years of age. On an appeal against this sentence:—*Held*: the Ct. of Criminal Appeal was not there to correct sentences on minor differences of opinion in the standard of punishment. They had to consider whether a wrong standard or principle had been applied in the particular case under consideration. In this case they thought the judge who had tried the case had allowed two circumstances to weigh with him too much—(1) the fact that applt. did not give the deceased man a chance of "putting up his hands," & (2) that it made no difference to the offence whether the body of the deceased man was in a diseased condition. But such a condition might make the consequences of an assault more serious than could be anticipated. The sentence would be reduced from one of ten to one of three years' penal servitude.—*R. v. O'CONNELL* (1909), 73 J. P. 118; 2 Cr. App. Rep. 11, C. C. A.

**6161.** —[—]—For the purposes of sentence there may be a distinction between an actual receiver of stolen goods & one who, knowing them to be stolen, merely gets rid of them to screen the thief. It is not the function of this ct. to gauge nicely the terms imposed by the judges at the trial (LORD ALVERSTONE, C.J.).—*R. v. MAXWELL* (1909), 2 Cr. App. Rep. 28, C. C. A.

**6162.** —[—]—*R. v. WILSON*, No. 5610, *ante*.

**6163.** —[—]—In this case we have experienced considerable difficulty. The Recorder imposed a long term of imprisonment upon prisoner, believing that a short sentence would do no good; & while it is true that only three previous convictions were proved against applt., on the other hand, he

about himself.

We only interfere with sentences, as a general rule, when it appears that the sentence has proceeded upon some wrong principle (LORD ALVERSTONE, C.J.).—*R. v. ROSS* (1909), 3 Cr. App. Rep. 198, C. C. A.

**6164.** —[—]—*R. v. KERVORKIAN* (1911), 7 Cr. App. Rep. 96, C. C. A.

*Annotation*:—*Reid. R. v. Caroubi* (1912), 7 Cr. App. Rep. 153.

**6165.** —[—]—*R. v. WILLIAMS* (OTHERWISE EMBLETON) (1916), 12 Cr. App. Rep. 11, C. C. A.

**6166.** —[—]—Or sentence manifestly excessive.—*R. v. SHERSHEWSKY*, No. 6158, *ante*.

**6167.** —[—]—We are loth to interfere with a sentence unless we come to the conclusion that it is one which no judge ought to have passed (LORD READING, C.J.).—*R. v. PRIDAY* (1914), 10 Cr. App. Rep. 34, C. C. A.

**6168.** —[—]—*R. v. WOLFF*, No. 6159, *ante*.

**6169.** —[—]—*R. v. WILDE & JUKES* (*alias* WEST) (1914), 11 Cr. App. Rep. 34, C. C. A.

*B. Substitution, Variation and Correction of Sentences.*

**6170. Whether fresh sentence can be substituted—Plea of guilty.**—*R. v. DAVIDSON*, No. 5548, *ante*.

**6171.** —[—]—*R. v. ETTRIDGE*, No. 5549, *ante*.

**6172. Variation of sentence—Sentence reduced on one of several prisoners.**—If the ct. reduces a

sentence passed on one of several prisoners jointly indicted, it will, in the absence of any reason for discrimination, reduce it in the case of the others.—*R. v. BOXALL, HAMMERSLEY & MARSTON* (1909), 2 Cr. App. Rep. 175, C. C. A.

**6173.** —[—]—*R. v. BRENNER* (1915), 11 Cr. App. Rep. 203, C. C. A.

**6174.** —[—]—Sentence reduced in view of mitigation of that of another deft.—*R. v. HICKSON* (1921), 16 Cr. App. Rep. 47, C. C. A.

**6175.** —[—]—Sentence based on misleading evidence.—Applt. was convicted of attempted larceny & sentenced to two years' detention under the Borstal system. Applt. & his mother, who were desirous that he should be sent to Borstal, had misled the ct. as to his age. Prisoner was over 21 years of age, & therefore ineligible for punishment under the Borstal system.

The sentence must be varied to one of four months' imprisonment with hard labour (*per* CUR.).—*R. v. BURKE* (1913), 9 Cr. App. Rep. 222, C. C. A.

**6176.** —[—]—To carry out intention of trial judge.—In order that the intentions of the trial judge should be carried out the ct. will reduce a sentence.—*R. v. ROUSE* (1914), 10 Cr. App. Rep. 179, C. C. A.

**6177.** —[—]—When sentence has been passed under a misunderstanding of relevant facts, the Ct. of Criminal Appeal will give effect to what it believes would have been the judgment of the trial judge if he had been cognisant of the true facts.—*R. v. PLATT* (1915), 11 Cr. App. Rep. 172, C. C. A.

**6178.** —[—]—When one of several convictions quashed.—When one of two or more convictions is quashed, sentence may be reduced.—*R. v.*

**6179. Correction of sentence—Mistake as to prisoner's antecedents.**—W., aged sixteen, was convicted of stealing a lady's bag from her person. It appeared that he had been sentenced to fourteen days' imprisonment for embezzlement six months previously. W. was now sentenced to two years' imprisonment with hard labour, & he was recommended for treatment under the Borstal system. Before sentencing him, the judge said, "They say that they cannot do anything with you at home." It appeared that this remark had been made with reference to another person, D., & that the judge, in sentencing W., was under the impression that a bad character given to D. applied to W. The ct. reduced the sentence to six months' imprisonment with hard labour, to date from the conviction.—*R. v. WHITEMAN* (1909), 73 J. P. 102; 2 Cr. App. Rep. 10, C. C. A.

**6180.** —[—]—When the police reports, after conviction, of a prisoner's antecedents were found on appeal to be incorrect & the sentence passed was evidently increased by reason of the misleading statements made, the sentence of three years' penal servitude was reduced to one of fifteen months' imprisonment with hard labour.—*R. v. ELLEY* (1921), 85 J. P. 144; 15 Cr. App. Rep. 143, C. C. A.

**6181.** —[—]—Misapprehension of effect of sentence—Modified Borstal.—The ct. will correct a sentence passed under a misapprehension of its

[1921] 3 W. W. R. 854; 65 D. L. R. 211; 36 Can. Cr. Cas. 180; 17 Alta. L. R. 52.—CAN.

*k. No reduction of lawful sentence—Unless circumstances peculiar.*—In pursuance of a common purpose between K., the driver of a motor-car, & himself, C., an employé of a motor garage, took a tin of petrol from his

employer's store & without removing it from the employer's premises placed it in another portion of those premises. The employer becoming aware of the removal took back the tin of petrol & substituted for it a tin of petrol & water, the contents of which in accordance with an arrangement between C. & himself, K. poured into the

car:—*Held*: the ct. will not alter a lawful sentence imposed by a magistrate unless there are peculiar circumstances in the case. A sentence of imprisonment without the option of a fine, passed by a magistrate on first offenders confirmed.—*R. v. CARELSE & KAY*, [1920] C. P. D. 471.—S. AF.

effects.—*R. v. SMITH* (1913), 9 Cr. App. Rep. 117, C. C. A.

*Annotation*.—*Folld. R. v. Lee* (1913), 9 Cr. App. Rep. 144.

**6182. — Mistake in record.**—The ct. will correct a sentence due to a mistake in the record.—*R. v. MALOY* (1914), 10 Cr. App. Rep. 52, C. C. A.

**6183. —**—Where, though the prosecution has abandoned a count in the indictment, a general verdict has been returned, the ct. may amend the record of the verdict.—*R. v. PROCTOR, R. v. WHITEFIELD, R. v. MORRISON* (1923), 17 Cr. App. Rep. 124, C. C. A.

**6184. — Clerical error in indictment.**—A clerical error in an indictment may be a ground for reducing sentence.—*R. v. JAMES* (1922), 17 Cr. App. Rep. 10, C. C. A.

**6185. — Imposed by mistake.**—Where hard labour has been, by mistake, inflicted in respect of a common law offence for which it cannot be imposed, the sentence will be reduced.—*R. v. CARNEY* (1914), 10 Cr. App. Rep. 79, C. C. A.

**6186. —**—The ct. will rectify a sentence inadvertently passed.—*R. v. NEARY* (1914), 10 Cr. App. Rep. 209, C. C. A.

**6187. — Misapprehension of plea by prisoner.**—The ct. will correct a sentence inflicted under a misapprehension of deft.'s plea.—*R. v. HIRST* (1914), 10 Cr. App. Rep. 282, C. C. A.

#### *C. On Account of Facts not before Trial Judge.*

**6188. Good character of prisoner.**—The ct. will take into consideration the fact that applt. did not put his good character in issue at the trial.—*R. v. FRANCIS* (1908), 1 Cr. App. Rep. 259, C. C. A.

**6189. —**—*R. v. BRUCE* (1913), 9 Cr. App. Rep. 168, C. C. A.

**6190. —**—The ct. may consider evidence of character not given at the trial.—*R. v. MURCH* (1913), 9 Cr. App. Rep. 214, C. C. A.

**6191. —**—Sentence mitigated in view of favourable facts not known to the judge at the trial.—*R. v. YARDLEY* (1918), 13 Cr. App. Rep. 131, C. C. A.

**6192. —**—Mitigation of sentence in view of meritorious conduct not known to the ct. of trial.—*R. v. MARROWS* (1918), 13 Cr. App. Rep. 207, C. C. A.

**6193. Bad character of prosecutrix.**—*R. v. DICKINSON*, No. 5557, *ante*.

**6194. Owing to plea of guilty.**—If, owing to a plea of guilty, the judge at the trial has not all the facts before him, the Ct. of Criminal Appeal may interfere.—*R. v. SNEASBY* (1909), 2 Cr. App. Rep. 178, C. C. A.

**6195. —**—In view of facts not disclosed to the judge at the trial on a plea of guilty a sentence

may be reduced.—*R. v. ADAMS* (1916), 12 Cr. App. Rep. 139, C. C. A.

**6196. Period of honesty by prisoner.**—The ct. may mitigate sentence on evidence of a period of honest work, not before the ct. of trial.—*R. v. KENDRICK* (1911), 6 Cr. App. Rep. 117, C. C. A.

**6197. Established by witnesses on appeal.**—*R. v. LANE* (1911), 6 Cr. App. Rep. 136, C. C. A.

**6198. —**—*R. v. HOLDER* (1911), 7 Cr. App. Rep. 59; 75 J. P. Jo. 569, C. C. A.

**6199. —**—*R. v. SANDERS* (1913), 9 Cr. App. Rep. 179, C. C. A.

**6200. Information as to crime volunteered by prisoner.**—*R. v. PORTER* (1913), 9 Cr. App. Rep. 213; 77 J. P. Jo. 557, C. C. A.

**6201. Lengthy detention before trial.**—Mitigation of sentence in view of lengthy detention before trial not known to trial judge.—*R. v. MCCULLOCH* (1914), 11 Cr. App. Rep. 51, C. C. A.

**6202. Prisoner's state of health.**—A sentence may be reduced in view of prisoner's state of health which was not before the judge at the trial.—*R. v. RYLE* (1915), 11 Cr. App. Rep. 312, C. C. A.

**6203. —**—Applt. had been sentenced to five years' penal servitude for performing an operation to procure abortion, resulting in the death of the woman. He had pleaded "not guilty" to the original indictment for murder, but had afterwards pleaded "guilty" to the charge of manslaughter. He was eighty-one years of age, infirm & shaky, & had from a time before the trial been in the infirmary in a neurasthenic condition & was said to be, if anything, worse since his admission:—*Held*: the ct. was in a better position to gauge applt.'s condition than the judge at the trial, & without interfering with his discretion the sentence would be reduced to one of two years' imprisonment.—*R. v. FERROA* (1919), 14 Cr. App. Rep. 39; 83 J. P. Jo. 267, C. C. A.

#### *D. Other Cases*

**6204. Pending charges—Consideration of—Consent of prisoner.**—Pending charges against applt.s. will not be taken into consideration by Ct. of Criminal Appeal in passing sentence unless they consent.—*R. v. WERNER & COOKES* (1909), 3 Cr. App. Rep. 93, C. C. A.

**6205. —**—In considering the severity of a sentence, the ct. may take into account the fact that an untried indictment is pending against applt., & may inquire whether he confesses it.—*R. v. SMITH* (1911), 6 Cr. App. Rep. 201, C. C. A.

**6206. Remanet sentences—Cannot be considered.**—The ct. has no jurisdiction over remanet sentences.—*R. v. WILLIAMS* (1909), 3 Cr. App. Rep. 2, C. C. A.

#### **PART XIV. SECT. 8, SUB-SECT. 1.—B.**

**6185 i. Correction of sentence—Imposed by mistake.**—*W. & L.* were charged on information with robbery. The evidence showed that they had committed the offence in company. They were found guilty & sentenced to imprisonment & to a whipping & flogging respectively.

Prisoner's counsel took no objection to the sentence. The sect. under which they were charged did not authorise whipping or flogging, although the sect. dealing with robbery in company does so. The error was not discovered until the sittings had been closed. When the judge discovered the error, he re-opened the ct., respited the sentences & stated a case:—*Held*: the sentences must be amended by striking out so much as directed the whipping & flogging.—*R. v. WISHER* (1896), 7 Q. L. J. 52.—*AUS.*

**l. — No inquiry into prisoner's antecedents—Left to executive to determine.**—When passing sentence on a prisoner who had been convicted of using certain materials for the purpose of forging a £5 bank-note, judge said he was passing the maximum sentence of 14 years' penal servitude on prisoner, leaving it to the executive to determine when his history was known, the length he would have to serve. One of the Crown witnesses said that prisoner admitted to him that he had produced spurious money in other countries. Beyond this nothing was known against prisoner who had only been in Australia a few months:—*Held*: infliction of the maximum penalty was contrary to the principles which have always guided judges in determining sentences.—*R. v. SELLING* (1913), 13 S. R. N. S. W. 628; 30 N. S. W. W. N. 189.—*AUS.*

**m. — Sentence erroneous in law.]**

—A prisoner convicted under 46 Vict. No. 17, s. 98, was sentenced to two years' imprisonment. The lowest sentence that could be legally passed was three years' penal servitude:—*Held*: the defect was not amendable under 46 Vict. No. 17, s. 427, & judgment must be reversed.—*HUME v. R.* (1888), 9 N. S. W. L. R. 168.—*AUS.*

**n. —**—Deft. was convicted under the Speedy Trials Act, Criminal Code, Part 18, of fraudulently abstracting electricity to the value of some \$13.40 from the St. J. Co., & was sentenced to two years' imprisonment & to pay a fine of \$1,000, one-half of which was ordered to be paid to the St. J. Co. On appeal:—*Held*: the sentence was erroneous in law, & the case was remitted to the ct. below with directions to impose a sentence of six months' imprisonment & a fine of \$500.00.—*R. v. SPERDAKES* (1911), 40 N. B. R. 428; 9 E. L. R. 433.—*CAN.*

*Sect. 8.—Determination of appeals against sentence: Sub-sect. 1, D.; sub-sect. 2. Sects. 9 & 10.]*

**6207. Mitigation by Home Secretary—Ground for not interfering with sentence—Habitual criminal.]—***R. v. MORTON* (1909), 2 Cr. App. Rep. 145, C. C. A.

**6208. ———.]—**The ct. will not interfere with a sentence, mitigation of which would more properly be effected by the royal prerogative.—*R. v. STEANE* (1918), 13 Cr. App. Rep. 55, C. C. A.

**6209. Irregularity at trial not affecting sentence.]—**It is not a ground for granting leave to appeal against sentence that, after conviction, information has been given to the ct. of alleged previous convictions of prisoner without strict proof thereof, where there is no reason to believe that the term has been increased in view of such information.—*R. v. PEARSON* (1910), 5 Cr. App. Rep. 188, C. C. A.

#### SUB-SECT. 2.—FRIVOLOUS APPEALS AND INCREASE OF SENTENCE.

**6210. Frivolous appeals—Sentence unaltered.]—***R. v. HOOPER, R. v. THOMAS* (1908), 1 Cr. App. Rep. 109; 72 J. P. Jo. 400, C. C. A.

**6211. ———.]—***R. v. ROTHWELL (alias MILLER)* (1922), 16 Cr. App. Rep. 104, C. C. A.

**6212. ———Sentence increased.]—**In this case S., who was convicted of shooting a fellow passenger in the train with the intent to murder him, applied for leave to appeal against his sentence of twelve years' penal servitude. Leave was granted that the question of the sufficiency of the sentence might be considered, & the case being that of a most deliberate attempt to murder, the ct. increased the sentence from one of twelve to one of fifteen years' penal servitude.—*R. v. SIMPSON* (1910), 75 J. P. 56; 5 Cr. App. Rep. 217, C. C. A.

**6213. ———.]—***R. v. COTTON* (1921), 15 Cr. App. Rep. 142, C. C. A.

**6214. ———.]—**In the case of frivolous appeals against sentence the ct. will exercise its power of increasing sentence.—*R. v. PICKERING* (1921), 15 Cr. App. Rep. 175, C. C. A.

**6215. ———.]—***R. v. MASSEY* (1921), 16 Cr. App. Rep. 85, C. C. A.

#### SECT. 9.—POWER TO VARY VERDICT.

**6216. Murder—To manslaughter.]—***R. v. LETENOCK* (1917), 12 Cr. App. Rep. 221, C. C. A.

**6217. ———.]—***R. v. WARD* (1922), 17 Cr. App. Rep. 65, C. C. A.

**6218. ———To special verdict of insanity—Criminal Appeal Act, 1907 (c. 23), s. 5 (4).]—***R. v. COELHO* (1914), 30 T. L. R. 535; 18 Cr. App. Rep. 210, C. C. A.

**6219. ———.]—**Applt. was convicted of murder & sentenced to death. He appealed against the conviction. The Ct. of Criminal Appeal, being of opinion that the evidence showed that at the time of committing the act charged against him he was insane:—*Held*: the proper course for the ct. to pursue was that provided by

sect. 5 (4) of the above Act, namely, to quash the sentence passed at the trial, & to order applt. to be kept in custody as a criminal lunatic.—*R. v. GILBERT* (1914), 84 L. J. K. B. 1424; 112 L. T. 479; 24 Cox, C. C. 586; 11 Cr. App. Rep. 23, C. C. A.

**6220. Wounding with intent to do grievous bodily harm—To unlawful wounding.]—***R. v. PARKS* (1914), 10 Cr. App. Rep. 50, C. C. A.

**6221. Unlawful wounding—To assault occasioning bodily harm.]—***R. v. CAMERON* (1914), 10 Cr. App. Rep. 198, C. C. A.

**6222. Carnal knowledge—To indecent assault.]—***R. v. PITTS* (1912), 8 Cr. App. Rep. 126, C. C. A.  
*Annotation:—Mentd. R. v. Dossi* (1918), 87 L. J. K. B. 1024.

**6223. Riot—To assault.]—***R. v. WONG CHEY, ETC.* (1910), 6 Cr. App. Rep. 59, C. C. A.

**6224. Larceny from the person—To simple larceny.]—***R. v. TAYLOR*, [1911] 1 K. B. 674; 80 L. J. K. B. 311; 75 J. P. 126; 27 T. L. R. 108; 6 Cr. App. Rep. 12, C. C. A.

**6225. Obtaining by false pretences—To attempting to obtain.]—***R. v. DARGUE* (1911), 6 Cr. App. Rep. 261, C. C. A.

**6226. ———.]—***R. v. MARSTON* (1918), 13 Cr. App. Rep. 203, C. C. A.

**6227. Larceny by a trick—Not to obtaining by false pretences.]—**On an indictment for larceny by a trick, if the facts proved establish only an obtaining by false pretences, the ct. will not substitute the latter verdict unless it is satisfied in accordance with Criminal Appeal Act, 1907 (c. 23), s. 5 (2), that the jury "must," on a proper direction, have so found.—*R. v. COLLINS* (1922), 128 L. T. 31; 87 J. P. 60; 67 Sol. Jo. 367; 27 Cox, C. C. 322; 17 Cr. App. Rep. 42, C. C. A.

**6228. Larceny—To receiving stolen property.]—**Four persons were charged in two counts of an indictment with larceny of lead piping at common law & receiving it well knowing it to have been stolen. The evidence showed that the first prisoner stripped the lead piping from a house, & the second & third prisoners carried it away to the fourth prisoner. The first prisoner was acquitted upon the ground that he was not guilty of larceny at common law, but only under Larceny Act, 1861 (c. 96), s. 31, for which offence he was not indicted. The jury found the second & third prisoners guilty of larceny & the fourth of receiving:—*Held*: the jury upon the evidence would, if their attention had been called to the particular point, have convicted the three prisoners of receiving, & therefore under Criminal Appeal Act, 1907 (c. 23), s. 4 (1), 5 (1), the appeal would be dismissed, prisoners being properly convicted of receiving.—*R. v. COOPER, SHEA & STOCKS* (1908), 24 T. L. R. 867; 1 Cr. App. Rep. 88; 72 J. P. Jo. 365, C. C. A.

**6229. Receiving stolen property—To larceny.]—**If on an indictment for larceny & receiving the jury return only a verdict of the latter, without sufficient evidence to constitute that offence, the ct. will, on a review of the whole facts, substitute a verdict of the former charge.—*R. v. SMITH* (1923), 17 Cr. App. Rep. 133, C. C. A.

#### PART XIV. SECT. 9.

**o. Assault on constable in execution of duty—To assault at common law.]—**A constable in uniform on his way from his beat to his home at 11.20 p.m. saw five young men standing at the corner of a street & said to them, "Are you not away to bed yet, boys?" As he was walking away one of them threw a bottle at him which struck his head & inflicted a serious wound:—

*Held*: the constable when assaulted was not "in the execution of his duty" within Prevention of Crimes Act, 1871, s. 12, & consequently that the assailant was not guilty of the statutory offence created by that sect. & the case was not one appropriate for the exercise of the power conferred by Summary Jurisdiction Act, 1908, s. 75, & find accused guilty of an assault at common law.—*MONK v. STRATHERN*,

[1921] S. C. (J.) 4.—**SCOT.**

**p. Principal offence—To abetment of offence.]—**It is not a universal rule that in no case can an appellate ct. convict an accused of abetment, when he was charged only with the principal offence. But it is discretionary with the appellate ct. to allow such fresh charge being tried on appeal.—*INDAR CHAND v. R.* (1915), 1 L. R. 42 Calc. 1094.—**IND.**



**6230. General verdict of housebreaking, larceny & receiving—To receiving only.]—R. v. GEORGE, No. 5817, ante.**

**6231. Obtaining credit & goods by false pretences—To obtaining credit only.]—R. v. NORMAN, [1915] 1 K. B. 341; 84 L. J. K. B. 440; 112 L. T. 784; 79 J. P. 221; 31 T. L. R. 173; 24 Cox, C. C. 681; 11 Cr. App. Rep. 58, C. C. A.**

*Annotations:—*Consd. R. v. Smith (1915), 11 Cr. App. Rep. 81. *Refd.* R. v. Pickering (1921), 15 Cr. App. Rep. 175.

**6232. Obtaining goods & credit by false pretences & obtaining credit by fraud—To obtaining credit by fraud only.]—R. v. JOHNSTON, No. 6081, ante.**

#### SECT. 10.—POWER TO ORDER VENIRE DE NOVO.

**6233. When awarded—Mistrial.]—R. v. DICKMAN, No. 5776, ante.**

#### PART XIV. SECT. 10.

**q. Whether power to order new trial—Felonv.]—**The ct. has power, under Criminal Statute, No. 233, to grant new trials in cases of felony; & order may be made at the time of quashing first conviction.—*R. v. WHELAN* (1868), 5 W. W. & A.D. 7.—**AUS.**

**6239 i. —.]—**The ct. has no power to order a new trial in a criminal case reserved under 14 & 15 Vict. c. 13.—*R. v. BABY* (1855), 12 U. C. R. 346.—**CAN.**

**6239 ii. —.]—***R. v. HEALEY* (1856), 3 N. S. R. (2 Thom.) 331.—**CAN.**

**6239 iii. —.]—**Defts. having been convicted on an indictment for nuisance which had been removed into the Queen's Bench by *certiorari*, moved for a new trial, which was refused:—*Held*: no appeal would lie to a ct. from the judgment refusing the new trial, & it could make no difference that the indictment had been removed by *certiorari*, & tried on the civil side.—*R. v. LONDON CITY* (1888), 15 A. R. 414.—**CAN.**

**r. —.]—***Supreme Court, Newfoundland.]—*The Supreme Ct. of Newfoundland possesses all the powers of the Ct. of Q. B. in England, & can therefore legally order a new trial in a criminal case.—*R. v. ST. JOHN* (1861), 4 Nfld. L. R. 598.—**NFLD.**

**s. —.]—***When awarded.]—*Where after conviction for a capital offence, the proceedings were discovered to have been illegal, there having been no associate judge sitting in ct. during the trial, on motion on behalf of the Crown, the indictment & conviction, with prisoner, were brought up on *certiorari* & *habeas corpus*, & an order made setting aside all such proceedings, & remanding prisoner to custody, with a view to a new trial.—*R. v. SULLIVAN* (1857), 15 U. C. R. 198.—**CAN.**

**t. —.]—**On a trial for felony the jury cannot be allowed to separate during the progress of the trial, & where such separation takes place it is a mistrial, & the ct. may direct that the party convicted be tried again.—*R. v. DERRICK* (1879), 2 L. N. 214; 23 L. C. J. 239.—**CAN.**

**u. —.]—**The grounds on which new trial should be granted by the ct. under sect. 689 must be those which a ct. of civil jurisdiction would consider sufficient.—*SLEATOR v. R.* (1914), 16 W. A. L. R. 113.—**AUS.**

**v. —.]—***R. v. CHUBBS* (1864), 14 C. P. 32.—**CAN.**

**w. —.]—**Withholding from the ct. confessions made before the coroner, for fear that they would prejudice prisoner, would render application for a new trial irregular.—*R. v.*

*FINKLE* (1865), 15 C. P. 453.—**CAN.**

**d. —.]—***R. v. SEDDONS* (1866), 16 C. P. 389.—**CAN.**

**e. —.]—***R. v. SLAVIN* (1866), 17 C. P. 205.—**CAN.**

**f. —.]—**Where points of law were reserved under 14 & 15 Vict. c. 3, & prisoner, besides relying upon them, moved for a new trial, the ct. refused to grant it, though the evidence was slight.—*R. v. HAMBLBY* (1859), 16 U. C. R. 617.—**CAN.**

**g. —.]—**The ct. will not in criminal cases grant a new trial, unless the verdict is clearly wrong, even though the evidence on which the prisoner is convicted would equally justify his acquittal, for the jury are to judge of the preponderance of the evidence & their finding will not be disturbed.—*R. v. McELROY* (1864), 15 C. P. 116.—**CAN.**

**h. —.]—**One of the prisoner's counsel while addressing the jury at the close of the case, was suddenly seized with a fit, & incapacitated from proceeding further. No adjournment was applied for, but the other, who was the senior counsel, continued the address to the jury on prisoner's behalf, without raising any objection that he was placed at a disadvantage by reason of his colleague's disability. It did not appear that prisoner had been prejudiced by the absence of the counsel alluded to:—*Held*: no ground for a new trial.—*R. v. FICK* (1866), 16 C. P. 379.—**CAN.**

**k. —.]—**Where, on the trial of prisoners indicted for breaking & entering a bank, the jury disagreed, & there was no time left for a second trial during the then sittings of the ct.:—*Held*: a trial could be obtained by the issue of a commission by the Govt., & the ct. could not order a new trial of the cause, nor discharge prisoners on their own recognisances.—*R. v. WATSON* (1876), 11 N. S. R. (2 R. & C.) 1.—**CAN.**

**l. —.]—**In a criminal case reserved the Ct. of Q. B. deferred pronouncing judgment, on the verdict against prisoner, being in doubt as to the legality of the admission of certain evidence, & ordered a new trial.—*R. v. LALIBERTE* (1878), 1 S. C. R. 117.—**CAN.**

**m. —.]—**Case stated at instance of Crown after trial & acquittal of accused on a charge of theft:—*Held*: there was possession under Criminal Code, s. 989, as steer in question was in accused's herd, a small compact one, in charge of his son.—*R. v. DUBOIS* (1909), 12 W. L. R. 560.—**CAN.**

**n. —.]—**Where judge, at trial, rules that evidence tendered for defence which is material, & is

**6234. —.]—**Unqualified juror.]—*R. v. WAKEFIELD*, No. 6100, ante.

**6235. —.]—**Plea of guilty improperly entered.]—*R. v. BAKER*, No. 6094, ante.

**6236. —.]—***R. v. INGLESON*, No. 6096, ante.

**6237. —.]—***R. v. GOLATHAN*, No. 6097, ante.

**6238. —.]—**Joint trial of persons separately indicted.]—*CRANE v. PUBLIC PROSECUTOR*, No. 6090, ante.

**6239. Whether power to order new trial.]—***R. v. DYSON*, No. 6007, ante.

**6240. —.]—***R. v. DIBBLE (alias CORCORAN)*, No. 5877, ante.

**6241. —.]—**Fresh evidence, not strong enough to quash a conviction, might induce the ct., if it had the power, to grant a new trial.—*R. v. COLCLOUGH* (1909), 2 Cr. App. Rep. 84; 73 J. P. Jo. 147, C. C. A.

such that, if the jury believe it, they will not be justified in convicting accused, is properly admissible, but counsel for Crown tells jury that that evidence is not admissible & should not have been allowed, & jury find a verdict of "guilty," a new trial should be granted, because the jury may have been led, by the statement of counsel, to believe that they should pay no attention to that evidence in considering their verdict.—*R. v. WEBB* (1914), 27 W. L. R. 313.—**CAN.**

**o. —.]—**Where an accused is found guilty on all of several inconsistent counts & is clearly guilty of one & is to be punished on one only, a new trial should not be ordered, but he should be given the minimum sentence prescribed for the offences charged in the several counts.—*R. v. KELLY* (1916), 35 W. L. R. 46; 11 W. W. R. 46.—**CAN.**

**p. —.]—**Under Criminal Code the Crown has the same privilege as an accused person of securing a new trial if the Ct. of Appeal is of opinion that a mistake has been made & that in consequence thereof a substantial wrong has been done in the method by which the final result of the trial was arrived at.—*R. v. NICKLE*, [1920] 3 W. W. R. 1016; 16 Alta. L. R. L. 1; 34 Can. Crim. Cas. 15.—**CAN.**

**aa. —.]—***R. v. SALES* (1908), 27 N. Z. L. R. 715.—**N.Z.**

**bb. —.]—***After acquittal.]—**Qu.*: whether it is proper to grant a new trial, where an individual or a corpn. has been once acquitted on an indictment, even in cases of misdemeanour.—*R. v. GRAND TRUNK RY. CO.* (1857), 15 U. C. R. 121.—**CAN.**

**cc. —.]—**Whether or not the ct. should order a new trial after an acquittal depends on whether or not there was evidence upon which the judge could have reasonably convicted if he had not been led to acquit by his mistaken view of the law. If on perusal of the evidence the ct. is of opinion that there was such evidence it should order a new trial; otherwise the acquittal should stand.—*R. v. SHAYCHOOK*, [1923] 2 W. W. R. 108; 39 Can. Crim. Cas. 386.—**CAN.**

**dd. —.]—***Jury not unanimous.]—*Upon motion for new trial:—*Held*: affidavits made by some of the jurors that the jury were not unanimous, but believed that the verdict of the majority was sufficient, could not be received as ground for new trial.—*R. v. FELLOWES* (1859), 19 U. C. R. 48.—**CAN.**

**ee. —.]—***Joint trial of persons separately indicted.]—*Motion on behalf of defts. M. & F., tried together & convicted of burglary & theft, for a new trial, made by consent of the trial judge under Code, s. 1021. It was



# **SECT. 11.—THE COURT IN RELATION TO THE HOME SECRETARY.**

**6242. Powers of Home Secretary—Unaffected by Criminal Appeal Act, 1907 (c. 23).—**The Home Secretary's powers are untouched by the above Act.—*R. v. FAIRBROTHER* (1908), 1 Cr. App. Rep. 233, C. C. A.

**6243. Decision of Home Secretary—Not subject of appeal to Court of Criminal Appeal.**—*R. v. LORD*, No. 5543, *ante*.

**6244. ———.**—*R. v. KEATING*, No. 5547, *ante*.

**6245. ———.**—*R. v. TWYNHAM*, No. 5544, *ante*.

**6246. Reference by Home Secretary to Court of Criminal Appeal—Criminal Appeal Act, 1907 (c. 23), s. 19 (a)—Case dealt with as an ordinary appeal.**—*R. v. DICKMAN*, No. 5776, *ante*.

**6247. ———.**—This case was referred to the ct. by the Home Secretary under the provisions of sect. 19 (a) of Criminal Appeal Act, 1907 (c. 23); it does not seem to be a case in which this ct. can possibly interfere. Cases of this kind are referred to us as if they were appeals, & cannot be treated upon considerations different from those which are applicable in the case of appeals (*LORD ALVERSTONE, C.J.*).—*R. v. ALLEN & WINTER* (1910), 5 Cr. App. Rep. 225, C. C. A.

**6248. ———. Petition against sentence only.**—Prisoners who have petitioned the Home Secretary against their sentence, & whose petitions are referred to the Ct. of Criminal Appeal under sect. 19 of Criminal Appeal Act, 1907 (c. 23), must be deemed to be applts. in respect of their sentence only.—*R. v. SMITH, R. v. WILSON*, [1909] 2 K. B. 756; 79 L. J. K. B. 4; 101 L. T. 126; 73 J. P. 407; 22 Cox, C. C. 151; 2 Cr. App. Rep. 271, C. C. A.

*Annotations:—Mentd. R. v. Rabjohns* (1913), 109 L. T. 414; *R. v. Collins* (1923), 17 Cr. App. Rep. 105.

**6249. ———. Conviction as incorrigible rogue.**—*R. v. JOHNSON*, No. 5535, *ante*.

**6250. Reference to Home Secretary by court—When no appeal entered—Against sentence.**—The ct. will call the attention of the Home Secretary to a sentence not appealed against which it thinks too severe.—*R. v. WHALEY* (1914), 10 Cr. App. Rep. 22, C. C. A.

**6251. ———. For release of prisoner—Detained on account of ill-health.**—The chairman sent applt. to prison in the interests of his health. He received a medical report that applt.'s health had much improved since he came to the prison, but that he was not yet fit to be released, as, if he were, he might make another attempt on his life. We will alter the imprisonment to the first division & report to the Home Secretary, that he should be released as soon as the doctor reports that it is safe to do so (*BRAY, J.*).—*R. v. SAUNDERS* (1913), 9 Cr. App. Rep. 119, C. C. A.

## **SECT. 12.—PROCEDURE ON REVERSAL OF DECISION BY HOUSE OF LORDS.**

**6252. General rule.**—On an indictment for incest under Punishment of Incest Act, 1908

urged on behalf of defts. that if either of them were granted a new trial because of a conviction against the weight of evidence, both must be, as they were tried together:—*Held*: the rule above referred to on behalf of defts., applied to cases of conspiracy only, & the case of each deft. must be considered on its merits. Upon the merits, the ct. came to the conclusion that deft., F., was entitled to new

trial.—*R. v. MURRAY & FAIRBAIRN* (1912), 23 O. W. R. 492; 4 O. W. N. 368; 27 O. L. R. 382; 20 Can. Crim. Cas. 197; 8 D. L. R. 208.—*CAN.*

## **PART XIV. SECT. 13.**

**b. Whether conclusive—Conflict between note & judge's recollection.**—Where there is a conflict between the evidence as taken down in shorthand

(c. 45), evidence is admissible to prove the existence of a guilty passion between accused & of carnal intercourse before the Act was passed.

Order of Ct. of Criminal Appeal quashing the conviction reversed.

Upon an appln. subsequently made to Ct. of Criminal Appeal:—*Held*: the proper procedure in applying the above decision of the House of Lords was by appln. to Ct. of Criminal Appeal to amend its record by expunging the order setting aside the verdict, & to make an order for the arrest of the accused persons.—*R. v. BALL*, [1911] A. C. 72; 104 L. T. 48; 75 J. P. 184; 27 T. L. R. 162; 55 Sol. Jo. 190; 22 Cox, C. C. 370; 6 Cr. App. Rep. 49; *sub nom.* PUBLIC PROSECUTIONS DIRECTOR *v. BALL* (No. 2), 80 L. J. K. B. 693, C. C. A.

**6253. ———.**—*R. v. LEACH* (1912), 7 Cr. App. Rep. 172, C. C. A.

**6254. ———.**—*R. v. THOMPSON* (1918), 13 Cr. App. Rep. 97, C. C. A.

## **SECT. 13.—USE OF SHORTHAND NOTES OF TRIAL.**

**6255. Effect of absence or insufficiency—Criminal Appeal Act, 1907 (c. 23), s. 16 (1).**—*R. v. RUTTER*, No. 6084, *ante*.

**6256. ———.**—Application was made for leave to appeal against conviction upon the ground that no sufficient shorthand note of the proceedings at the trial was forthcoming, contrary to Criminal Appeal Act, 1907 (c. 23), s. 16 (1):—*Held*: that Act is directory only, & the absence or insufficiency of a shorthand note of the trial does not make the trial improper, or confer an absolute ground for appealing, although, where there is ground for questioning the legality or propriety of a conviction or sentence the absence or insufficiency of a shorthand note may become material.—*R. v. ELLIOTT* (1909), 100 L. T. 977; 25 T. L. R. 572; 2 Cr. App. Rep. 171; 73 J. P. Jo. 252, C. C. A.

**6257. Whether conclusive—Discrepancy between judge's note & shorthand note.**—*R. v. BEAUCHAMP*, No. 6027, *ante*.

**6258. ———. As to evidence given at the trial.**—Where it is uncertain whether certain evidence has been given before the jury, the ct. will be guided by the shorthand notes, especially when combined with the judge's own notes, unless there are grave reasons for departing from this practice.—*R. v. RIMES* (1912), 28 T. L. R. 409; 7 Cr. App. Rep. 240; 76 J. P. Jo. 220, C. C. A.

**6259. What should be included—Judge's summing up.**—The shorthand notes of the proceedings at the trial of a prisoner which are required to be taken by Criminal Appeal Act, 1907 (c. 23), s. 16, should include a note of the summing up.—*R. v. BENNETT* (1909), 25 T. L. R. 528; 2 Cr. App. Rep. 152; 73 J. P. Jo. 252, C. C. A.

**6260. ———. Statements & incidents of trial.**—*R. v. AUSTIN & DAVIES*, No. 6108, *ante*.

**6261. ———.**—It must be understood by shorthand writers that their duty is to take in shorthand everything that occurs at the trial, so that if an appeal is brought this ct. may be able

by the official reporter & the positive recollection of the trial judge, the ct. will accept as final the report of the judge as to what actually took place.—*R. v. TUCKER* (1915), 15 S. R. N. S. W. 504; 32 N. S. W. N. 169.—*AUS.*

**6257 i. ———. Discrepancy between judge's note & shorthand note.**—The ct. is bound to accept the statement of the trial judge as to the facts, even

to form as good an opinion as is possible when reading the transcript. An abbreviated note is not sufficient. Everything that occurs at the trial must be taken in the form of question & answer, which should be numbered to admit of easy reference (LORD TREVEETHIN, C.J.).—*R. v. MONKMAN* (1922), 66 Sol. Jo. 317; 16 Cr. App. Rep. 115; 57 L. Jo. 94, C. C. A.

**6262. What may be included—Note of counsel's speeches—When required by judge—Criminal Appeal Rules.**—By an additional rule to the Criminal Appeal Rules, dated Mar. 27, 1908, power is given to a trial judge to order shorthand notes to be taken of the speeches of counsel (DARLING, J.).—*R. v. BLISS HILL* (1918), 82 J. P. 194; *sub nom. R. v. BROADHURST, MEANLEY & HILL*, 13 Cr. App. Rep. 125, C. C. A.

**6263.** ———.—*R. v. SULLIVAN*, [1923] 1 K. B. 47; 91 L. J. K. B. 927; 126 L. T. 643; 86 J. P. 167; 27 Cox, C. C. 187; 16 Cr. App. Rep. 121, C. C. A.

**6264. Should be taken on plea of guilty.**—*R. v. DIXON & ROCKLIFFE* (1920), 15 Cr. App. Rep. 96, C. C. A.

**6265. Form of note—Numbered questions & answers.**—*R. v. ALLEN* (1908), 1 Cr. App. Rep. 18; 72 J. P. Jo. 281, C. C. A.

**6266.** ———.—In the shorthand notes of the trial questions & answers must be numbered.—*R. v. GREY* (1909), 2 Cr. App. Rep. 37, C. C. A.

**6267.** ———.—*R. v. MONKMAN*, No. 6261, *ante*.

**6268. Grant of free copy to appellant—Criminal Appeal Rules, 1908, r. 39 (c).**—In a proper case the ct. will grant *appet.* a transcript of the shorthand note of the proceedings at the trial, free of charge, under Criminal Appeal Rule 39c.—*R. v. DAVIS* (1914), 11 Cr. App. Rep. 52, C. C. A.

**6269.** ———.—**Not after dismissal of appeal.**—The Ct. of Criminal Appeal has no power under Criminal Appeal Rules, 1908 r. 39 (c), to order a transcript of the shorthand notes taken at the trial to be furnished to a person whose appeal has been dismissed & who has served his sentence.—*Ex p. WEIR* (1912), 108 L. T. 350; 77 J. P. 56; 23 Cox, C. C. 326, C. C. A.

**6270. Transcript to be preserved—By official shorthand writer.**—The official shorthand writer is bound to keep the transcript of the trial (LORD ALVERSTONE, C.J.).—*R. v. HARRIS (alias DESMOND)* (1912), 8 Cr. App. Rep. 30, C. C. A.

#### SECT. 14.—“CRIMINAL CAUSE OR MATTER.”

**6271. Extraditable offence—Extradition Act, 1870 (c. 52).**—The Q. B. Div. having refused an application for a writ of *habeas corpus* made on behalf of a person who had been committed to prison under Extradition Act, 1870 (c. 52), s. 10, as a fugitive criminal accused of an extradition crime:—*Held*: the decision of the Q. B. Div. was given in a “criminal cause or matter” within Jud. Act, 1873 (c. 66), s. 47, & therefore no appeal would lie to the Ct. of Appeal.—*Ex p. WOODHALL* (1888), 20 Q. B. D. 832; 57 L. J. M. C. 71; 59 L. T. 841; 52 J. P. 581; 36 W. R. 655; 4 T. L. R. 515, C. C. A.

*Annotations*.—*Folld. R. v. Brixton Prison, Ex p. Savarkar*,

where not borne out by the stenographer's notes of the evidence, which in this case the judge declared to be incorrect.—*R. v. ANGELO* (1914), 26 W. L. R. 108.—*CAN.*

*o. Stenographic notes not available.*—Where upon a motion for leave

to appeal from a refusal of a trial judge to reserve certain questions arising out of a trial for theft, it appeared that the ct. stenographer who took the evidence had left Canada, taking his notes with him, & the judge's notes were not complete, the ct. entertaining little doubt as to the

[1910] 2 K. B. 1056. *Appld. R. v. Garrett, Ex p. Sharf*, [1917] 2 K. B. 99. *Refd. R. v. Barnardo* (1889), 23 Q. B. D. 305; *Cox v. Hakes* (1890), 15 App. Cas. 506; *Ex p. Schofield*, [1891] 2 Q. B. 428. *Mentd. R. v. Young* (1891), 61 L. J. M. C. 42; *Payne v. Wright* (1892), 61 L. J. Q. B. 398; *Ex p. Pulbrook*, [1892] 1 Q. B. 86; *Seaman v. Burley*, [1896] 2 Q. B. 344; *R. v. Wiltshire J.J.*, *Ex p. Jay*, [1912] 1 K. B. 566; *Scott v. Scott*, [1912] P. 241; *R. v. Manchester Local Profitteering Committee, Ex p. L. & Y. Ry.* (1920), 89 L. J. K. B. 1089; *Re Clifford & O'Sullivan*, [1921] 2 A. C. 570; *Provincial Cinematograph Theatres v. Newcastle-upon-Tyne Profitteering Committee* (1921), 125 L. T. 651.

**6272.** ———.—**Fugitive Offenders Act, 1881 (c. 69).**—*Appct.*, having been committed, under an Indian warrant which charged him with certain offences, for return to India under above Act for trial there, obtained from the K. B. Div. a rule calling upon the governor of the prison to show cause why a writ of *habeas corpus* should not issue. The K. B. Div. having discharged the rule, *appct.* appealed:—*Held*: no appeal lay to the Ct. of Appeal, the decision of the K. B. Div. having been given in a “criminal cause or matter” within Jud. Act, 1873 (c. 66), s. 47.—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. SAVARKAR*, [1910] 2 K. B. 1056; 80 L. J. K. B. 57; 103 L. T. 473; 26 T. L. R. 561; 54 Sol. Jo. 635, C. A.

*Annotations*.—*Refd. Ex p. Le Gros* (1914), 30 T. L. R. 249. *Mentd. R. v. Garrett, Ex p. Sharf*, [1917] 2 K. B. 99; *Home Secretary v. O'Brien* (1923), 39 T. L. R. 638.

**6273.** ———.—On an application to the Ct. of Appeal for a rule *nisi* for a *habeas corpus* on behalf of one who had been committed on the charge of an extraditable offence, it appeared that the Div. Ct. had refused the application. It was admitted that no appeal would lie from the Div. Ct., & in the alternative the application was made to the Lord Chief Justice individually as a judge of the K. B. Div.:—*Held*: as the Lord Chief Justice was sitting as a member of the Ct. of Appeal & not as a judge of the K. B. Div. the ct. could not deal with the application.—*Ex p. LE GROS* (1914), 30 T. L. R. 249; 78 J. P. Jo. 63, C. A.

**6274. Abatement of nuisance—Public Health Act, 1875 (c. 55), s. 96.**—*R. v. WHITCHURCH*, No. 10, *ante*.

**6275.** ———.—The Q. B. Div. refused to grant an order *nisi* for a *mandamus* to compel a stipendiary magistrate who had made an order under above sect. for the abatement of a nuisance, to state a case for the opinion of the ct.:—*Held*: the decision of the Q. B. Div. was given in a “criminal cause or matter” within Jud. Act, 1873 (c. 66), s. 47, & therefore the Ct. of Appeal had no jurisdiction to entertain the application for a *mandamus*.—*Ex p. SCHOFIELD*, [1891] 2 Q. B. 428; 60 L. J. M. C. 157; 56 J. P. 4; 39 W. R. 580; 7 T. L. R. 615; *sub nom. ROOK v. SCHOFIELD*, 64 L. T. 780; 17 Cox, C. C. 303, C. A.

*Annotations*.—*Consd. R. v. Young* (1891), 61 L. J. M. C. 42; *Payne v. Wright* (1892), 61 L. J. M. C. 114; *Ex p. Pulbrook*, [1892] 1 Q. B. 86; *R. v. Garrett, Ex p. Sharf*, [1917] 2 K. B. 99. *Refd. Seaman v. Burley*, [1896] 2 Q. B. 344; *R. v. D'Eyncourt* (1901), 85 L. T. 501. *Mentd. R. v. Tyler & International Commercial Co.*, [1891] 2 Q. B. 588; *Rayson v. South London Tram. Co.* (1893), 42 W. R. 21; *R. v. Davey, Ex p. Bishop* (1899), 63 J. P. 515; *R. v. Manchester Local Profitteering Committee, Ex p. L. & Y. Ry.* (1920), 89 L. J. K. B. 1089; *Toronto Ry. v. Toronto City*, [1920] A. C. 446.

**6276. Corrupt practices at election—Certificate to witness.**—The decision of a Div. Ct. discharging a rule for a *mandamus* to the comrs. appointed to inquire into corrupt practices at a parliamentary

guilt of accused made an order that the Crown file with the registrar of a properly authenticated transcript of the notes within one month, if not so filed an order to go quashing the conviction.—*R. v. JENNINGS & HAMILTON* (1916), 34 W. L. R. 1058; 10 W. W. R. 1049.—*CAN.*

**Sect. 14.—“Criminal cause or matter.”]**

election to grant their certificate under Corrupt Practices Prevention Act, 1863 (c. 29), which certificate if given would be a protection to the witness against criminal proceedings for bribery, does not relate to a “criminal cause or matter” within Jud. Act, 1873 (c. 66), s. 47, & the Ct. of Appeal is not therefore, deprived of jurisdiction to hear an appeal against such decision.—*R. v. HOLL* (1881), 7 Q. B. D. 575; 50 L. J. Q. B. 763, C. A.

*Annotations* :—**Apld.** *Ex p. Walker* (1889), 22 Q. B. D. 384. **Refd.** *Preece v. Harding, Re Hereford Municipal Pctn.* (1889), 6 T. L. R. 65.

**6277. Default in forwarding list of members of company to registrar—Companies Act, 1862 (c. 89), s. 26.]**—An application to a magistrate for a summons against a co. to recover penalties for default in forwarding a list of its members to the registrar of joint-stock cos. as required by above sect., is a criminal proceeding, & therefore, the judgment of the Q. B. Div. on an application for a *mandamus* directing the magistrate to hear the summons is a judgment in a “criminal cause or matter” within Jud. Act, 1873 (c. 66), s. 47, & no appeal lies therefrom to the Ct. of Appeal.—*R. v. TYLER & INTERNATIONAL COMMERCIAL CO.*, [1891] 2 Q. B. 588; 61 L. J. M. C. 38; 65 L. T. 662; 56 J. P. 118; 7 T. L. R. 720, C. A.

*Annotations* :—**Consd.** *R. v. Garrett, Ex p. Sharf*, [1917] 2 K. B. 99. **Refd.** *R. v. Young* (1891), 61 L. J. M. C. 42. **Mentd.** *Rayson v. South London Tram. Co.* (1893), 69 L. T. 491; *Southport Corpn. v. Birkdale U. D. C.* (1897), 76 L. T. 319; *Park v. Royalties Syndicate*, [1912] 1 K. B. 330; *Monsell v. L. & N. W. Ry.*, [1917] 2 K. B. 836; *Griffiths v. Studebakers* (1923), 87 J. P. 199.

**6278. Possession of false measures—Weights & Measures Act, 1878 (c. 49).]**—The decision of the Q. B. Div. discharging a rule *nisi* for a *mandamus* to compel justices to hear a summons under sect. 25 of above Act against a person for being in possession for use of false or unjust measures is a decision of the High Ct. in a “criminal cause or matter” within Jud. Act, 1873 (c. 66), s. 47, in respect of which no appeal lies to the Ct. of Appeal.—*R. v. YOUNG, ETC., LONDON COUNTY JJ.* (1891), 61 L. J. M. C. 42; 66 L. T. 16; 8 T. L. R. 178; 36 Sol. Jo. 138; 17 Cox, C. C. 425, C. A.

*Annotation* :—**Refd.** *R. v. Brixton Prison, Ex p. Savarkar*, [1910] 2 K. B. 1056.

**6279. Contravention of Building Act—Metropolitan Building Act, 1855 (c. 122).]**—No appeal lies to the Ct. of Appeal from a decision of the Q. B. Div. on a case stated by a magistrate upon a summons taken out under sect. 46 of above Act, for a contravention of the provisions of sect. 19 of that Act; for the decision of the Q. B. Div. is a decision in a “criminal cause or matter” within Jud. Act, 1873 (c. 66), s. 47.—*PAYNE v. WRIGHT*, [1892] 1 Q. B. 104; 61 L. J. M. C. 114; 66 L. T. 148; 56 J. P. 564; 8 T. L. R. 288; 36 Sol. Jo. 230; 17 Cox, C. C. 460, C. A.

*Annotations* :—**Consd.** *Seaman v. Burley*, [1896] 2 Q. B. 344. **Refd.** *R. v. Manchester Local Profiteering Committee, Ex p. L. & Y. Ry.* (1920), 89 L. J. K. B. 1089; *Wilson v. L. & Y. Ry.* (1920), 36 T. L. R. 412.

**6280. — London Building Act, 1894 (Amendment) Act, 1898 (c. cxxxvii).]**—A magistrate convicted a person of having erected a building beyond the general line of buildings in a street in London, & made an order for the demolition thereof under London Building Act, 1894 (c. cxxiii) & above Act, & refused to state a case for the opinion of the High Ct. The K. B. Div. refused to grant a rule *nisi* for a *mandamus* to the magistrate to state a case; but a rule *nisi* was granted by the Ct. of Appeal :—**Held** : this was a “criminal cause or matter” within Jud. Act,

1873 (c. 66), s. 47, & the Ct. of Appeal had no jurisdiction to entertain the application for a *mandamus*.—*R. v. D'EYNCOURT* (1901), 85 L. T. 501; 18 T. L. R. 53; 20 Cox, C. C. 68, C. A.

**6281. Criminal libel—Law of Libel Amendment Act, 1888 (c. 64).]**—An appeal does not lie from an order made by a judge at chambers under sect. 8 of above Act allowing a criminal prosecution to be commenced against the proprietor, publisher, or person responsible for the publication of a newspaper, for a libel published therein.—*Ex p. PULBROOK*, [1892] 1 Q. B. 86; 61 L. J. M. C. 91; 66 L. T. 159; 56 J. P. 293; 40 W. R. 175; 36 Sol. Jo. 79; 17 Cox, C. C. 464.

*Annotations* :—**Distd.** *R. v. Manchester Local Profiteering Committee, Ex p. L. & Y. Ry.* (1920), 89 L. J. K. B. 1089. **Apld.** *Provincial Cinematograph Theatres v. Newcastle-upon-Tyne Profiteering Committee* (1921), 125 L. T. 651.

**6282. — Taxation of costs.**—By Libel Act, 1843 (c. 96), s. 8, on judgment for deft. in an information for libel he is entitled to recover from prosecutor his costs, to be taxed by the officer of the ct. before which the information is tried. The master of the Crown office having taxed deft. his costs according to the usual practice under a sidebar rule :—**Held** : by Jud. Act, 1873 (c. 66), s. 47, the general right of appeal given by sect. 19 from any judgment of the High Ct. is excepted in any criminal cause or matter; the costs were the consequence of the judgment, & were within the exception; & the Ct. of Appeal had no jurisdiction.—*R. v. STEEL* (1876), 2 Q. B. D. 37; 46 L. J. M. C. 1; 35 L. T. 534; 41 J. P. 245; 25 W. R. 34, C. A.

*Annotations* :—**Foldd.** *R. v. Fletcher* (1876), 2 Q. B. D. 43. **Apprvd. & Apld.** *Blake v. Beech* (1877), 36 L. T. 723. **Consd.** *R. v. Foote* (1883), 10 Q. B. D. 378. **Apld.** *R. v. Rudge* (1886), 53 L. T. 851; *Ex p. Woodhall* (1888), 20 Q. B. D. 832. **Consd.** *Ex p. Schofield*, [1891] 2 Q. B. 428. **Refd.** *R. v. Central Criminal Court JJ.* (1886), 56 L. J. M. C. 25; *Ex p. Pulbrook*, [1892] 1 Q. B. 86. **Mentd.** *Seaman v. Burley*, [1896] 2 Q. B. 344; *Scott v. Scott*, [1912] P. 241.

**6283. Profiteering — Profiteering Act, 1919 (c. 66).]**—Complainant & three friends were supplied in a restaurant with a meal consisting of sausages, bread, cakes, & tea ordered separately. Complainant made a complaint concerning the prices charged to the Local Profiteering Committee, who proceeded to investigate the complaint under sect. 1, sub-sect. 1 (b), of the above Act. The proprietors of the restaurant obtained a rule *nisi* for a prohibition against the committee investigating the matter on the ground that the articles supplied did not come within Board of Trade Order, dated Sept. 11, 1919, Sched. II., made under the Act, & that the articles described as six small cakes were not separately complained of. This rule was discharged by a Div. Ct. & the railway co. appealed, when a preliminary objection was taken that no appeal lay, on the ground that the order of the Div. Ct. was made in a criminal cause or matter within Jud. Act, 1873, s. 47 :—**Held** : the order of the Div. Ct. was not in a criminal cause or matter.—*R. v. MANCHESTER LOCAL PROFITEERING COMMITTEE, Ex p. LANCA-SHIRE & YORKSHIRE RY. CO.* (1920), 89 L. J. K. B. 1089; 123 L. T. 98; 84 J. P. 177; *sub nom.* *WILSON v. LANCA-SHIRE & YORKSHIRE RY. CO.*, 36 T. L. R. 412; 64 Sol. Jo. 358; 18 L. G. R. 333, C. A.

*Annotation* :—**Distd.** *R. v. Newcastle-upon-Tyne Profiteering Committee, Ex p. Provincial Cinematograph Theatres* (1920), 89 L. J. K. B. 1088.

**6284. — — —**—Where a complaint has been made to a profiteering committee that an overcharge has been made, & the committee have found that the charge made was excessive & have directed a prosecution to be instituted under above

Act, & a rule *nisi* for *certiorari* on the ground that the committee was not properly constituted, & that the proceedings were without jurisdiction, has been discharged:—*Held*: an appeal would not lie, as the direction to institute a prosecution was the first step in a "criminal cause or matter" within Jud. Act, 1873 (c. 66), s. 47.—*PROVINCIAL CINEMATOGRAPH THEATRES, LTD. v. NEWCASTLE-UPON-TYNE PROFITEERING COMMITTEE* (1921), 90 L. J. K. B. 1064; 125 L. T. 651; 85 J. P. 211; 37 T. L. R. 799; 65 Sol. Jo. 661; 19 L. G. R. 505; 27 Cox, C. C. 63, H. L.  
*Annotation*:—*Reid. Re Clifford & O'Sullivan*, [1921] 2 A. C. 570.

**6285. Decision of High Court—Refusal of *certiorari*—To quash conviction by justices.**—Where the Q. B. Div. discharges a rule for *certiorari* to bring up a conviction of justices to be quashed, there is no appeal to the Ct. of Appeal under Jud. Act, 1873 (c. 66).—*R. v. FLETCHER* (1876), 2 Q. B. D. 43; 46 L. J. M. C. 4; 35 L. T. 538; 41 J. P. 310; 25 W. R. 149; 13 Cox, C. C. 358, C. A.  
*Annotations*:—*Apld. Blake v. Beech* (1877), 2 Ex. D. 335. *Consd. R. v. Garrett, Ex p. Sharf*, [1917] 2 K. B. 99. *Reid. Ex p. Schofield*, [1891] 2 Q. B. 428; *R. v. Marlborough Street Police Magistrate, Ex p. Samuel* (1919), 63 Sol. Jo. 300; *Re Clifford & O'Sullivan*, [1921] 2 A. C. 570. *Mentd. Yates v. R.* (1885), 52 L. T. 305; *Ex p. Woodhall* (1888), 20 Q. B. D. 832; *R. v. Young* (1891), 61 L. J. M. C. 42; *Seaman v. Burley*, [1896] 2 Q. B. 344; *R. v. Brixton Prison, Ex p. Savarkar*, [1910] 2 K. B. 1056; *Scott v. Scott*, [1912] P. 241; *R. v. Manchester Local Profiteering Committee, Ex p. L. & Y. Ry.* (1920), 89 L. J. K. B. 1089.

**6286. ——— To remove indictment to Central Criminal Court.**—The decision of the Q. B. Div. on an application for a writ of *certiorari* under Central Criminal Ct. Act, 1856 (c. 16), s. 3, to remove an indictment into the Central Criminal Ct. for trial is a "judgment of the High Ct. in a criminal cause or matter" within Jud. Act, 1873 (c. 66), s. 47, & the Ct. of Appeal has no jurisdiction to entertain an appeal from such decision.—*R. v. RUDGE* (1886), 16 Q. B. D. 459; 55 L. J. M. C. 112; 53 L. T. 851; 50 J. P. 755; 34 W. R. 207; 2 T. L. R. 243, C. A.

*Annotation*:—*Reid. Burnett v. Berry* (1896), 60 J. P. 550.

**6287. ——— Refusal of prohibition—To magistrate.**—A judgment of the K. B. Div. refusing to issue to a magistrate a writ of prohibition against proceeding with the hearing of a criminal charge is a judgment in a "criminal cause or matter" within Jud. Act, 1873 (c. 66), s. 47, & therefore by that sect. is not subject to appeal.—*R. v. GARRETT, Ex p. SHARF*, [1917] 2 K. B. 99; 86 L. J. K. B. 894; 116 L. T. 398; 81 J. P. 145; 33 T. L. R. 305; 25 Cox, C. C. 627, C. A.

*Annotation*:—*Reid. Re Clifford & O'Sullivan*, [1921] 2 A. C. 570.

**6288. Conviction for keeping common gaming-house.**—A judgment of the Ct. of Appeal from inferior cts., against the validity of a conviction, under Betting Act, 1853 (c. 119), s. 3, for keeping a common gaming-house, on a case stated under Summary Jurisdiction Act, 1857 (c. 43), is a judgment of the High Ct. in a criminal matter from which, by Jud. Act, 1873 (c. 66), s. 47, there is no appeal.—*BLAKE v. BEECH* (1877), 2 Ex. D. 335; 36 L. T. 723, C. A.

*Annotation*:—*Reid. Seaman v. Burley*, [1896] 2 Q. B. 344.

**6289. Enforcement of poor rate by warrant of distress.**—A judgment upon a special case stated by justices on an application to enforce payment of a poor rate by warrant of distress is a judgment in a criminal cause or matter within Jud. Act, 1873 (c. 66), s. 47, inasmuch as the proceedings before the justices may end in imprisonment of the person in default, & therefore an appeal will not lie to the Ct. of Appeal from the judgment of the Q. B. Div. on such a case.—*SEAMAN v. BURLEY*,

[1896] 2 Q. B. 344; 65 L. J. M. C. 208; 75 L. T. 91; 60 J. P. 772; 45 W. R. 1; 12 T. L. R. 599; 40 Sol. Jo. 684; 18 Cox, C. C. 403, C. A.

*Annotations*:—*Distd. Southwark & Vauxhall Water Co. v. Hampton U. C.* [1899] 1 Q. B. 273; *Scott v. Scott*, [1912] P. 241. *Apld. R. v. Manchester Local Profiteering Committee, Ex p. L. & Y. Ry.* (1920), 89 L. J. K. B. 1089. *Reid. R. v. Newcastle-upon-Tyne Profiteering Committee, Ex p. Provincial Cinematograph Theatres* (1920), 89 L. J. K. B. 1098.

**6290. Bailiff retaining excessive charges—Distress Costs Act, 1817 (c. 93).**—The Ct. of Appeal has no jurisdiction to hear an appeal from a decision of a div. ct. upon a case stated by justices as to a complaint under sect. 2 of above Act against a certificated bailiff for unlawfully retaining certain charges exceeding those allowed by statute when employed to make a distress for rent for a sum not exceeding £20; the proceeding before justices being a "criminal cause or matter" within Jud. Act, 1873 (c. 66), s. 47.—*ROBSON v. BIGGAR*, [1908] 1 K. B. 672; 77 L. J. K. B. 203; 97 L. T. 859; 24 T. L. R. 125; 52 Sol. Jo. 76, C. A.

*Annotations*:—*Apld. R. v. Daly, Ex p. Newson* (1911), 104 L. T. 892. *Reid. R. v. Manchester Local Profiteering Committee, Ex p. L. & Y. Ry.* (1920), 89 L. J. K. B. 1089.

**6291. Penalty for supplying inferior gas.**—By a local Act it was provided that, "if it shall at any time be proved to the satisfaction of any two justices, after hearing the parties, that the illuminating power of the gas supplied by the corpn. in the said township did not, when so tested as aforesaid, equal the illuminating power by this Act prescribed," the corpn. should forfeit such sum not exceeding £20 as such justices should determine, to be paid to the local board. Upon an information & complaint by the local board under the above provisions, the justices convicted the corpn. & imposed a penalty of £10 & stated a case for the opinion of the High Ct.:—*Held*: the judgment of the High Ct. upon the case was a judgment in a "criminal cause or matter," within Jud. Act, 1873 (c. 66), s. 47, from which no appeal would lie to the Ct. of Appeal.—*SOUTHPORT CORPN. v. BIRKDALE URBAN DISTRICT COUNCIL* (1897), 76 L. T. 319; 18 Cox, C. C. 537, C. A.

**6292. Application for bail.**—A prisoner applied for bail to a div. ct. of the Q. B. Div. but was refused; he then appealed to the Ct. of Appeal:—*Held*: the decision of the Div. Ct. was a judgment of the High Ct. in a criminal matter, & therefore the Ct. of Appeal had no jurisdiction to entertain the appeal.—*R. v. FOOTE* (1883), 10 Q. B. D. 378; 52 L. J. Q. B. 528; 48 L. T. 394; 48 J. P. 36; 31 W. R. 490; 15 Cox, C. C. 240, C. A.

*Annotations*:—*Folld. R. v. Rudge* (1886), 2 T. L. R. 243; *Re Woodall* (1888), 57 L. J. M. C. 71. *Reid. R. v. Central Criminal Court JJ.* (1886), 18 Q. B. D. 314; *R. v. Phillips* (1922), 128 L. T. 113. *Mentd. Re Frost* (1888), 4 T. L. R. 757.

**6293. Order for restitution of property.**—An order of the Q. B. Div. discharging a rule *nisi* for a *certiorari* to bring up an order for restitution of property made under Larceny Act, 1861 (c. 96), is a judgment in a "criminal cause or matter" within Jud. Act, 1873 (c. 66), s. 47, & no appeal lies to the Ct. of Appeal.—*R. v. CENTRAL CRIMINAL COURT JJ.* (1886), 18 Q. B. D. 314; 56 L. J. M. C. 25; 56 L. T. 352; 51 J. P. 229; 16 Cox, C. C. 196; *sub nom. R. v. CENTRAL CRIMINAL COURT JJ., FOISARD'S CASE*, 35 W. R. 243, C. A.

*Annotation*:—*Consd. Re Woodall* (1888), 57 L. J. M. C. 71.

**6294. Order to enforce payment of rate—Public Health Act, 1875 (c. 55), s. 256.**—An application to a ct. of summary jurisdiction for an order to enforce payment of a general district rate under the above sect. is not a criminal cause or matter, & therefore an appeal lies to the Ct. of Appeal

**Sect. 14.—“Criminal cause or matter.” Part XV.]**

from the judgment of a Div. Ct. upon a case stated on such an application.—**SOUTHWARK & VAUXHALL WATER CO. v. HAMPTON URBAN COUNCIL**, [1899] 1 Q. B. 273; 68 L. J. Q. B. 207; 80 L. T. 1; 63 J. P. 100; 47 W. R. 177; 15 T. L. R. 95; 43 Sol. Jo. 124, C. A.; *affd.* on other grounds, *sub nom.* **HAMPTON URBAN COUNCIL v. SOUTHWARK & VAUXHALL WATER CO.**, [1900] A. C. 3, H. L.

*Annotations*:—**Mentd.** *R. v. Shuttleworth*, *Ex p.* Tickle (1908), 72 J. P. 329; *Atkins v. Hutton* (1910), 103 L. T. 514.

**6295. Order to pay costs of abandoned appeal to quarter sessions.**—Where notice of appeal to quarter sessions against a summary conviction for wilful damage & trespass having been given, but the appeal not being prosecuted, the sessions made an order for payment of costs against the party, who had given the notice under Quarter Sessions Act, 1819 (c. 45), s. 6, & an application for a *certiorari* to bring up the order so made had been refused by a div. ct.:—**Held**: the order for costs being one made in a “criminal cause or matter,” no appeal lay to the Ct. of Appeal against the decision of the Div. Ct.—*R. v. WILTSHIRE JJ.*, *Ex p.* JAY, [1912] 1 K. B. 566; 81 L. J. K. B. 518; 106 L. T. 364; 76 J. P. 169; 28 T. L. R. 255; 56 Sol. Jo. 343; 10 L. G. R. 353; 22 Cox, C. C. 737, C. A.

*Annotations*:—**Apld.** *R. v. Marlborough Street Police Magistrate*, *Ex p.* Samuel (1919), 63 Sol. Jo. 300. **Mentd.** *R. v. Garrett*, *Ex p.* Sharf, [1917] 2 K. B. 99; *Re Clifford & O’Sullivan*, [1921] 2 A. C. 570.

**6296. Order to pay costs of motion to commit for contempt of court—Nullity suit.**—Upon a motion

by resp. to commit for contempt of ct. petitioner & her solr. for publishing copies of the transcript, in contravention of the order directing that the cause should be heard *in camera*, the judge found that petitioner & her solr. were guilty of a contempt of ct. & ordered them to pay the costs of the motion:—**Held**: the order to pay costs was not a judgment in a “criminal cause or matter” within Jud. Act, 1873 (c. 66), s. 47, so that no appeal would lie from it.—**SCOTT v. SCOTT**, [1913] A. C. 417; 82 L. J. P. 74; 109 L. T. 1; 29 T. L. R. 520; 57 Sol. Jo. 498, H. L.

*Annotations*:—**Consd.** *R. v. Manchester Local Profitteering Committee*, *Ex p.* L. & Y. Ry. (1920), 89 L. J. K. B. 1089. **Mentd.** *Cleland v. Cleland*, *Cleland v. Cleland & McLeod* (1913), 109 L. T. 744; *Moosbrugger v. Moosbrugger*, *Moosbrugger v. Moosbrugger & Martin* (1913), 29 T. L. R. 658; *Ex p.* Norman (1915), 85 L. J. K. B. 203; *Norman v. Mathews* (1916), 85 L. J. K. B. 857; *R. v. Lewes Prison*, *Ex p.* Doyle, [1917] 2 K. B. 254; *Re Stevenson*, [1918-19] B. & C. R. 106.

**6297. Breach of regulations—For management of Royal park.**—The decision of the Div. Ct. refusing an *ex p.* motion to grant a rule *nisi* for a writ of *certiorari* to quash a conviction by magistrates for the breach of regulations made for the management of a Royal park is a decision in a “criminal cause or matter.” & is therefore final.—*R. v. MARLBOROUGH STREET POLICE MAGISTRATE*, *Ex p.* SAMUEL (No. 1) (1919), 63 Sol. Jo. 300, C. A.

**6298. Breach of bye-law.**—**MELLOR v. DENHAM**, No. 8, *ante*.

**Penal actions.**—See Part I., Sect. 1, *ante*.

**Appeal against attachment & committal for contempt of court.**—See CONTEMPT OF COURT, ATTACHMENT & COMMITTAL, Vol. XVI., pp. 80-82.

## Part XV.—Appeal to House of Lords and Judicial Committee of the Privy Council.

**6299. Grant of legal aid—To appellant—By Court of Criminal Appeal.**—Ct. of Criminal Appeal, sitting as a single judge, has power to grant applt. legal aid under Criminal Appeal Act, 1907 (c. 23), s. 10, on an appeal from a decision of Ct. of Criminal Appeal to the House of Lords, where the A.-G. has granted his certificate under sect. 1 (6) of that Act.—*R. v. LEACH* (No. 2) (1912), 76 J. P. 246; 56 Sol. Jo. 311, C. C. A.

**6300. Condition precedent—Preliminary hearing by Court of Criminal Appeal necessary.**—*R. v. FLESTAD* (1913), 30 T. L. R. 143; 9 Cr. App. Rep. 227; 77 J. P. Jo. 580, C. C. A.

**6301. Case must raise points of law of exceptional importance.**—(1) Applt. who was charged with acts of gross indecency with boys, set up the defence that he was not the man & adduced evidence to prove an alibi. It was proved that the man who committed the offence made an appointment to meet the boys three days later at the time & place where the offence was committed & that applt. met the boys at the appointed time & place & gave them money. The prosecu-

tion tendered evidence that on this occasion, when he was arrested, applt. was carrying powder puffs & that he had indecent photographs of boys in his rooms:—**Held**: in the special circumstances of the case the evidence was admissible on the issue of identity.

(2) The case raised no point of law of exceptional importance, & it was to be regretted that it should have been thought desirable in the public interest that an appeal should be brought to the House of Lords (LORD SUMNER).—**THOMPSON v. R.**, [1918] A. C. 221; *sub nom.* **THOMPSON v. PUBLIC PROSECUTIONS DIRECTOR**, 87 L. J. K. B. 478; 118 L. T. 418; 82 J. P. 145; 34 T. L. R. 204; 62 Sol. Jo. 266; 26 Cox, C. C. 189; 13 Cr. App. Rep. 61, H. L.; *affg.* S. C. *sub nom.* *R. v. THOMPSON*, [1917] 2 K. B. 630, C. C. A.

*Annotations*:—*As to* (1) **Refd.** *R. v. Twiss*, [1918] 2 K. B. 853; *R. v. Armstrong*, [1922] 2 K. B. 555; *R. v. Manning* (1923), 17 Cr. App. Rep. 85. *As to* (2) **Refd.** *It. v. Armstrong*, [1922] 2 K. B. 555.

**Leave to appeal to Privy Council.**—See DEPENDENCIES.

END OF VOL. XIV.

(Vol. XV., CONCLUDING CRIMINAL LAW AND PROCEDURE, COMMENCES AT PAGE 601.)









